



# CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## Dissenting thoughts of the Republic of Latvia Constitutional Court justice Anita Ušacka in case No. 2002-20-0103

**On the compliance of Article 11 (the Fifth Part) of the Law "On State Secrets" and the Cabinet of Ministers June 25, 1997 Regulations "List of Objects of State Secrets" (Chapter XIV, Item 3) with Article 92 of the Republic of Latvia Satversme (Constitution).**

I am afraid I cannot agree with several arguments and conclusions of the Judgment, voiced by the majority.

Article 92 of the Satversme determines that "everyone has the right to defend their rights and lawful interests in a fair court". A fair court in the understanding of the Satversme incorporates different aspects, inter alia also the right to appeal against the adopted decision and the right to be heard. In conformity with Article 11 of the challenged Law "On State Secrets" the person may use alternative procedures to defend his/her rights at a court of general jurisdiction: the decision of the Director of the Constitutional Defense Bureau may be appealed to the Prosecutor General, whose decision is final and shall not be appealed. Thus even the challenged norm includes the right to appeal.

However, the challenged norm denies the right of a person to such an aspect of a fair court as the right to be heard. This right follows from the principle of natural justice. I shall try to prove that it is necessary to observe the above important principle on the basis of comparative laws. I have already before expressed my opinion on this issue in the Article "The Principle of Natural Justice and the Administrative Process", which is published in the 1998 Latvian University Scientific Collected Articles.

The administrative process of the British legal system is based on the *principle of natural justice*, the elements of which have been incorporated into administrative process both in the states with other Anglo-Saxon systems of common law and Roman-German systems of civil law, as well as in the states with different legal systems (traditions). *The principle of natural justice*, the beginnings of which can be found in the British court judgments, reached many centuries ago, includes the requirements, which are necessary for the procedure of fair adjudging of administrative matters and which – in accordance with Anglo-Saxon laws - shall be taken into consideration when taking decisions in administrative matters. This principle is usually formulated in two sentences: 1) *no-one shall be the judge in his/her own case* and 2) *both parties shall be heard*. The Romans expressed the above in the following two sentences: 1) *nemo iudex in causa sua* and 2) *audi alteram partem*. Recently this principle was expressed just in two English words– *impartiality and fairness*. Very often the foreign administrative law literature, which is being published in English, calls the principle of natural justice *the rule against bias and freedom from bias or fair hearing rule and right to be heard*.

Enumeration of the rights following from this principle is very extensive. It incorporates all the guarantees of the court process like: all evidence shall be accessible to all persons, involved in the matter; the possibility of summoning witnesses and equal possibility to put questions to them; the obligation to hear every party in the presence of the other party; the right to representation; the possibility to express one's viewpoint on all issues, facts, laws etc. The body of guarantees shall not be reviewed abstractly, isolating them from specific norms of legislature; its contents shall be expressed only by analyzing the particular cases.

The French administrative laws are based on another fundamental principle – the rule of law. Lawfulness is understood not only as the conformity with the law (*loi*) but more comprehensively – as the conformity with the rights. Other main principles – fundamental rights of the individuals,

proportionality, the right to appeal at the court against an administrative act, prohibition of the retroactive force, protection of the environment etc. follow from the rule of law. These principles may be compared with the British *principle of natural justice*, however, the French administrative law abjures from restricted procedural norms and is open to new, derived main principles in case the necessity for it arises.

The French administrative law determines that before taking the decision both parties shall be heard. This requirement shall be observed, e.g., in cases when disciplinary fines are imposed. In France the right to defense (*droit de la defense*) is scrupulously observed. Nobody, regardless of the fact whether the person is an official or not, shall be fined, if he has not been given the right to defend himself/herself from the charge against him/her. In France as well as in Great Britain the *conception of natural justice* is applied in courts without the particular constitutional basis, it is different in the USA where this principle has been determined in Constitution and is called the Article on *due process*.

Historically in France existed the principle that only those requirements of the administrative process shall be observed, which are determined in normative acts. The State Council could abrogate administrative acts if the procedural requirements, determined by normative acts, were not observed. In 1944 the State Council of France took a historical decision in one of matters, by which the French administrative law actually adopted the conception, which was similar to the conception of British natural justice. The essence of the matter was as follows: the state institution annulled the license allowing the person to sell newspapers in the news-stall in one of the central boulevards of Paris. The State Council stated that one of the general legal principles forbids applying sanctions against a person, without allowing it to defend himself/herself, and – even though no normative act envisaged the principle, the State Council repealed the decision of the institution to annul the permit.

Issues on human rights and administrative law often get covered as the administrative institutions have to observe the rights, which are guaranteed to an individual by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention determines that the states, which have ratified this important international instrument, shall ensure realization of the rights, mentioned in the Convention, as concerns everyone under the jurisdiction of the state.

The first part of Article 6 of the Convention envisages that in the determination of his civil rights and obligations or of any charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal, established by law. In short the above right is called the right to fair adjudication of the case. In English the title of this Article is "*Right to a fair trial*" and in literature it is often called also "*The right to a fair hearing*".

Initially the European Human Rights Commission and the European Court of Human Rights in their decisions attributed the right to a fair trial to criminal matters. Later it was acknowledged that the first part of Article 6 of the Convention under certain circumstances may be applied also in civil cases. In 1971 in the case *Ringeisen v. Austria* the Court declared that the right to a fair trial refers not only to the court process, but also to administrative process, which takes place outside of the courts, if it connected with determination of civil rights and duties. In the above case the Court took the decision that Article 6 (the first part) of the European Convention of Human Rights may be applied not only as concerns the matters of the individuals but also in cases between the state and the individual, and that there was no necessity to speak of differences between private and public rights. Thus the notion "public rights and duties" is interpreted by the European Human Rights Commission and the European Court of Human Rights in an extensive way. It means that the first part of Article 6 of the European Human Rights Convention may be applied also in the administrative process. To my opinion it is also the proof to the fact that the requirements of *the principle of natural justice* and the right to a fair trial of a case there is much in common.

The principle of justice follows also from Article 1 of the Satversme and the Constitutional Court in its judgments has interpreted it as follows: the decisions taken by the institutions of state power shall create the belief that they have been taken by observing the principle of justice [*see the Constitutional Court March 24, 2000 Judgment in case No. 04-07(99)*] as well as that when evaluating restrictions to the human rights, the principle of justice has to be observed (*see January 21, 2002 Judgment in case No.2001-09-01*). Besides, I hold that the above principle incorporates the requirement not to take the decision on any person if the person has been denied the right to be heard. The submitter of the application in his constitutional claim has pointed out that neither the Director of the Constitutional Defense Bureau nor the Procurator General has heard his explanations.

One may agree with the viewpoint expressed in the Judgment that "conferring of the status of secrecy to the clearance materials does not forbid designing such a procedure, which establishes that in certain cases the court may become acquainted with clearance materials. In the same way the fact that the materials are recognized as secret does not forbid acquainting the person with that part of materials, which does not contain state secret so as to realize the person's right to be heard out".

However, the refusal to hear the person shall not be motivated by the argument that the valid normative acts do not determine the procedure of issuing special permits connected with state secret. Therefore in the Judgment – as concerns the right of the person to be heard – it is reasonably pointed out that "the principle of justice determines that the person to be cleared shall enjoy the right of expressing his/her viewpoint and being heard before the refusal to issue the special permit is issued", and that the procedure, which denies the person the right to be heard "disproportionately limits the rights of the person to be cleared, creates doubt of the impartiality of the decisions and is not needed in a democratic society". In the same way it is stated that "the law-based state has the possibility of elaborating a well-considered mechanism to take into consideration the interests of every particular person to be cleared, at the same time taking into consideration also the interests of state security, when reaching the decision on issuing the special permit".

Even though it is concluded in the Judgment that the challenged norm "does not exclude the possibility for competent institutions to implement the above principle", the practice proves that in the legal systems of transitional provisions, which at the moment exists in Latvia, the principle, which establishes the right to hearing, but is not fixed in legislature, is not observed. The particular case proves it. In its turn the fact may create the possibilities for not observing the human rights by the state, inter alia – also to serve as the basis for discrimination.

By taking the above into consideration I hold that Article 11 (the Fifth part) of the Law "On State Secrets" and the words "verification materials" of Item 3, Chapter XIV of the Cabinet of Ministers June 25, 1997 Regulations No. 226 "List of Objects of State Secrets" do not comply with the right to a fair court, guaranteed in Article 92 of the Republic of Latvia Satversme.

Riga, April 29, 2003.

The Constitutional Court justice

A.Ušacka