



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## SEPARATE OPINION

of the Justice of the Constitutional Court

Artūrs Kučs

in Riga on 23 December 2022

in Case No. 2021-41-01

**“On Compliance of Para 3 of Section 55 of the Law “On Judicial Power”  
with the First Part of Article 101 and the First Sentence of Article 106 of the  
*Satversme* of the Republic of Latvia”**

1. On 15 December 2022, the Constitutional Court delivered its judgement in case No. 2021-41-01 “On Compliance of Para 3 of Section 55 of the Law “On Judicial Power” with the First Part of Article 101 and the First Sentence of Article 106 of the *Satversme* of the Republic of Latvia” (hereafter – the Judgement), by which it recognised Para 3 of Section 55 of the law “On Judicial Power” as being incompatible with the first part of Article 101 and the first sentence of Article 106 of the *Satversme* of the Republic of Latvia and void as of 1 January 2024. In my arguing I shall use the abbreviations used in the Judgement.

2. I consent that the contested provision is incompatible with the first part of Article 101 and the first sentence of Article 106 of the *Satversme*. Namely, I subscribe to the conclusions made by the Constitutional Court that the legitimate

aim of the prohibition, included in the contested provision, can be achieved, in equal quality, by alternative measures.

However, I do not uphold the choice to use the methodology of a restriction on fundamental rights for reviewing the constitutionality of the contested norm. I believe that this review had to be done by using the methodology of absolute prohibition, embedded in the Constitutional Court's judicature. I stated my arguments regarding the significance of this methodology and its applicability in cases where the contested provision envisages absolute prohibition already in my separate opinion of 28 June 2021 in Case No. 2020-50-01 "On Compliance of Para 4 of Section 4 of the Law "On the Career Course of Service of Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Prisons Administration" with Article 101 and Article 106 of the *Satversme* of the Republic of Latvia" (hereafter – Case No. 2020-50-01). Namely, I pointed out that in the case of applying the methodology of absolute prohibition, meticulous assessment of prohibition of this nature is demanded from the legislator; however, that does not restrict in any way the legislator's discretion to decide on regulation with respect to persons in civil service. The considerations and arguments expressed in the separate opinion referred to above are applicable also to the Judgement.

3. In the Constitutional Court's judicature, a restriction that does not allow for exceptions or is not flexible enough to take into account the individual circumstances of each situation, is designated by the concept of "absolute prohibition". The methodology of absolute prohibition is used to review the constitutionality of a restriction on fundamental rights of this nature (*see, for example, Judgement by the Constitutional Court of 24 November 2017 in Case No. 2017-07-01 and Judgement of 5 December 2019 in Case No. 2019-01-01*). It is based on the methodology for reviewing the constitutionality of a restriction on fundamental rights; however, following the criterion of necessity in the element of proportionality (whether no other measures exist that would be as effective and the choice of which would restrict a person's fundamental rights to a lesser extent),

the Court mainly examines the legislator's actions in determining the absolute prohibition and the substantiation of the need for such prohibition rather than considers the existence of more lenient measures on its merits (*see: Kučs A., Šņepste I. Absolūti civiltiesību ierobežojumi Satversmes tiesas judikatūrā. Jurista Vārds, 2021. gada 7. decembris, Nr. 49 (1211), 53. lp.*). To establish, whether the prohibition, included in a legal provision, is absolute, it must be examined, firstly, whether it applies to all persons belonging to a certain group; i.e., whether it does not envisage individual assessment of each particular case; thus, does not envisage exceptions, and, secondly, whether it has been established for a fixed term or for lifetime (*see Judgement by the Constitutional Court of 5 December 2019 in Case No. 2019-01-01, Para 19.2.*).

In the present case, the prohibition, included in the contested provision, to become a candidate for a judge's office pertains to all persons who have been held criminally liable and the criminal case against whom had been terminated for non-exonerating reason. It does not allow for exceptions. Moreover, this prohibition has been set for lifetime. Hence, taking into account the Constitutional Court's judicature, referred to above, the Court had to conclude that the prohibition, included in the contested provision, was absolute.

The Applicant also pointed to such nature of the said prohibition (*see Case Materials, Vol. 1, p. 13*). Likewise, several persons summoned in the case also have noted this. For example, the Ombudsman, in this respect upholding the Applicant's view, has pointed out that the contested provision comprises the so-called absolute prohibition (*see Case Materials, Vol. 1, p. 77*). Likewise, the Latvian Association of Administrative Judges has expressed the opinion that the restriction on fundamental rights, included in the contested provision, is of absolute nature (*see Case Materials, Vol. 5, p. 116*). Also, lecturer at the Criminal Law Department of the Faculty of Law, the University of Latvia *Mg. iur.* Evija Vīnkalna has underscored in her opinion provided to the Constitutional Court that the contested provision comprises absolute prohibition to become a candidate for a judge's office to persons, against whom criminal

proceedings have been terminated for non-exonerating reasons (*see Case Materials, Vol. 5, p. 18*).

The absolute nature of the prohibition has not been analysed in the Judgement. However, the fact that such a restriction has a particularly far-reaching effect upon a person's fundamental rights has been noted both by the Constitutional Court itself and also by the European Court of Human Rights, in several of its judgements (*see, for example, Judgement by the European Court of Human Rights of 22 April 2013 in Case "Animal Defenders International v. The United Kingdom", Application No. 48876/08*).

4. I would like to indicate as the most significant shortcoming of the Judgement that it creates the basis for legal uncertainty with respect to the methodology to be applied in cases of absolute prohibition. The Judgement does not provide an answer to the question why, in the present case, the methodology of absolute prohibition should not be applied. I believe that such analysis had to be included, similarly as in the judgement in Case No. 2020-50-01. The Constitutional Court noted therein that, in view of the special role and status of the civil service, as well as the legislator's broad discretion in this area, the methodology for reviewing the constitutionality of absolute prohibition was not applicable to the legality review of these special requirements (*see Judgment by the Constitutional Court of 11 June 2021 in Case No. 2020-50-01, Para 13*).

I already noted in my separate opinion in Case No. 2020-50-01 that the Constitutional Court's findings on non-application of the methodology of absolute prohibition should be interpreted narrowly and should be applied only to the situation and legal regulation, reviewed in the particular case. It is not clear from the Constitutional Court's findings, included in the Judgement, how extensively the Constitutional Court is going to apply exceptions to the use of this methodology. Namely, is this methodology not applicable only in cases related to particular officials in the civil service or in all cases where the fundamental rights of a person who is performing civil service have been restricted, or the Constitutional Court is abandoning this methodology in general and it is not

applicable in any case when, as to its nature, a restriction on fundamental rights is absolute prohibition.

5. The Constitutional Court has recognised that legal certainty is an essential element in the principle of a state governed by the rule of law. Uniform case law ensures compliance with the principle of legality, legal certainty and promotes public trust in courts (*see Judgement by the Constitutional Court of 15 March 2018 in Case No. 2017-16-01, Para 16.1.3.*).

The methodology for reviewing the constitutionality of the contested provision and its consistent application are also essential. This ensures legal certainty in the administration of justice. Knowing the methodologies, developed by the Constitutional Court, that it uses to conduct the constitutionality review of contested provisions, a person may reasonably foresee what exactly could be reviewed and, accordingly, what should be focused on, in elaborating one's reasoning.

The uniformity of case law is important because inconsistency in its selection may impact the course of an application within the Constitutional Court. Namely, certain requirements have been set for an application that a person submits to the Constitutional Court. Pursuant to Para 4 of Section 18 (1) of the Constitutional Court Law, one of these is providing the legal substantiation. The legal substantiation of the application is understood as the legal reasoning used to substantiate the alleged incompatibility of the contested provision with the superior legal provision, indicated in the application. Pursuant to Para 3 of Section 20 (5) of the Constitutional Court Law, a panel has the right to refuse initiation of a case if the application is incompatible with requirements set out in Section 18 of this law. Initiation of a case may be refused also in the case of shortcomings in the legal substantiation of the application, due to the reason that the person has erroneously chosen to develop one's reasoning in accordance with one or another methodology for reviewing the constitutionality of the contested provisions.

I am of the opinion that the Judgement has created legal uncertainty in the matter of the Constitutional Court's judicature in cases of absolute prohibition, as

well as regarding how, in each particular case, the legal substantiation of the application will be assessed and, accordingly, what the further course of this application within the Constitutional Court will be like.

Justice of the Constitutional Court

Artūrs Kučs