



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

ON BEHALF OF THE REPUBLIC OF LATVIA

Riga, 22 February 2010

Case No. 2009-45-01

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma and Viktors Skudra,

having regard to applications submitted by Jānis Kuzins,

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia, Article 16 1st indent, Article 17 (1) 11th indent, Article 19.² and Article 28.¹ of the Constitutional Court Law,

on 26 January 2010 in writing examined the case

“On compliance of Section 33 of the Law “On Pre-election Campaign before the Local Government Elections ” with Article 100 of the Satversme of the Republic of Latvia”

The Facts

1. On 31 January 2009, the Law adopted on 15 January 2009 “Amendments to the Law “On Pre-election Campaign before the Local Government Elections”” came into force, wherewith the Law “On Pre-election Campaign before the Local Government Elections” was supplemented by Section 33 (hereinafter – Contested Norm) that provides the following:

“On the local government election day, as well as one day prior to the elections, advertising on radio, television, public places, publications and institutions mentioned in the first part of Section 20 of the Law shall be prohibited.”

The following institutions are mentioned in the first part of Section 20 of the Law: “State and local government institutions, capital companies, more than 50 percent of shares of which are owned by the State or a local government”.

2. The applicant Jānis Kuzins (hereinafter - Applicant) was a deputy candidate at the local government elections of 6 June 2009, however he was not elected. The Applicant holds that the Contested Norm has prohibited, in a non-proportional way, performing pre-election campaigns on 5 and 6 June 2009. According to the Applicant, the Contested Norm does not comply with the fundamental right to freedom of speech enshrined in Article 100 of the Satversme of the Republic of Latvia (hereinafter – Satversme).

By referring to conclusions made in the Judgment of 5 June 2003 by the Constitutional Court in the case No. 2003-02-0106 regarding freedom of speech, it is emphasized in the application that the Contested Norm does restrict the above mentioned right.

The Applicant does not deny that the above mentioned fundamental right can be restricted, that the restriction of this fundamental right, as established in the Contested Norm, has been established by law, and that it has a legitimate objective – lawful elections. However, according to the Applicant, the restriction of the fundamental right is non-proportional with the above mentioned objective due to several considerations.

First, this restriction of the fundamental right does not reach the legitimate objective. Based on the Judgment of 2006 by the Administrative Case Department of the Senate of the Supreme Court of the Republic of Latvia (hereinafter – Senate) in the case No. SA-5/2006, each voter is a reasonable human being, and he or she cannot be influenced by “positive campaigns” even if legal norms are violated. Consequently, the free choice of a voter cannot be influenced even by such a pre-election campaign that is prohibited by the Contested Norm.

Second, restriction of the rights of a person is greater than the benefit gained by the society. The Contested Norm prohibits deputy candidates to carry out lawful pre-election campaigns; however the State cannot effectively guarantee observance of the restriction established in the Contested Norm. The sanctions do not deter persons from dishonest and unlawful pre-election campaigns. Consequently, honest deputy candidates enjoy considerably worse situation if compared to dishonest ones.

Third, no restrictions of pre-election campaigns are provided for the period of preliminary voting. Consequently, this causes a situation when a part of voters make their choice based on pre-election campaigns, whilst the other part is not influenced by them. Since all voters have equal rights during elections and each of them has one vote, it is not admissible if a different regulation is established for the election day and the day prior to the elections, if compared to other days when electorate has the right to vote.

It is also indicated in the application that, when interpreting the fundamental rights established in Article 100 of the Satversme in conjunction with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) and the practice of application thereof at the European Court of Human Rights (hereinafter – ECHR), one should take into account the conclusions made by the ECHR that restrictions of pre-election campaigns could contradict Article 10 of the Convention (*see: Judgment by the ECHR in the case TV Vest As & Rogaland Pensjonistparti v. Norway, application no. 21132/05, Judgment of 11 December 2008*).

3. The institution that adopted the Contested Norm – the **Saeima (Parliament)** does not agree with the opinion of the Applicant and asks to recognize the Contested Norm as compliant with Article 100 of the Satversme.

By referring to the case-law of the ECHR, the Saeima holds that political advertisements, including pre-election campaigns, is an element of the right to freedom of speech that is protected by Article 100 of the Satversme [*see: Judgment by the ECHR in the case Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2), Application no. 32772/02, Judgment of 30 June 2009 (GC)*]. These fundamental rights,

however, are not absolute and they can be restricted [*see: Judgment of 6 June 1999 by the Constitutional Court in the case No. 04-02(99), Para 1 of the Concluding Part*].

The Saeima indicates that the Contested Norm has been adopted with a view to reach the legitimate objective – to protect the democratic regime of the State, namely, ensure free elections. Free elections include two aspects: formation of a free will of voters and the possibility of the electors to express their will by voting. By means of the Contested Norm, the legislator has ensured voters the possibility to assess, on the election day and one day prior to it, the information provided by political forces before the elections and to freely make their choice in local government elections.

It is emphasized in the reply that restriction of pre-election campaigns on the election days is a tradition of many European states, Latvia included. However, introduction of such regulatory framework regarding the day prior to the election day was supported by the Council of Europe Committee of Ministers [*see, e.g.: Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of pre-election campaigns, adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies: <https://wcd.coe.int/ViewDoc.jsp?id=1207243>*].

The Saeima maintains that the legitimate objective established in the restriction of the fundamental right provided in the Contested Norm cannot be reached otherwise than by means of the procedure established in the Contested Norm. The benefit given to the society by this restriction is greater than the restriction established for the political parties and association of political parties and persons unrelated thereto. The selected measure is as lenient as possible since the total period of pre-election campaigns constitutes 120 days, whilst the Contested Norm prohibits carrying out such campaigns only for two days. Moreover, it is prohibited to distribute election advertisements only on the radio, television, public places, publications, and State and local government institutions. The Law does not prohibit the candidates and their representatives to electioneer individually, to meet with the voters, to organize election meetings, as well as to use other measures, like, internet resources.

The Saeima indicates that in the above mentioned judgment referred to by the Applicant the ECHR established an infringement of the Convention in a situation that

differed substantially from the regulatory framework established in the Contested Norm. Namely, in Norway, all kinds of political advertisements in the respective mass media were completely prohibited (*see: Judgment by the ECHR in the case TV Vest As & Rogaland Pensjonistparti v. Norway, application no. 21132/05, Judgment of 11 December 2008, Para 61*).

It is indicated in the reply that the possibility of the electors to vote during three days prior to the election day, as established in Section 26 (1) of the Election Law on City Council and Amalgamated Municipality Council, is an exception that is not used often. This regulatory framework does not provide that elections would take place for four days. Only five percent of all persons having the right to vote took advantage of this possibility before the Contested Norm was adopted.

4. The following persons were recognized as summoned persons of the Case – the Chairman of the Central Election Commission [*Centrālā vēlēšanu komisija*], the Cabinet of Ministers, the National Radio and Television Council [*Nacionālā radio un televīzijas padome*], the Ombudsman of the Republic of Latvia and the Latvian Association of Local and Regional Governments [*Latvijas Pašvaldību savienība*].

4.1. The Chairman of the Central Election Commission holds that the Contested Norm complies with Article 100 of the Satversme and agrees with the argumentation of the Saeima.

The Central Election Commission (hereinafter – the CEC) does not have any information at its disposal saying that the Contested Norm could not reach its objective. On June 2009 after election of local governments, the CEC examined four complaints that contained the following argument substantiating cancellation of election results – violations of restriction of pre-election campaigns (presence of election advertising materials on the election day and one day prior to it); however, according to its jurisdiction, the CEC did not assess the violations on their merit.

Activity of voters before the general European Parliament and local government election day of 6 June 2009 was 9.85 percent. Taking into account the procedure for counting votes established by law, which, among the rest things, is aimed at ensuring closed election, it cannot be established whether the choice of voters who voted before

the election day would differ considerably from the choice of voters who voted on the general election day.

4.2. The Cabinet of Ministers holds that the Contested Norm complies with Article 100 of the Satversme. However, the Contested Norm does include a restriction of the fundamental rights established in the above mentioned Article of the Satversme, it has a legitimate objective and the restriction included therein is proportional with the objective thereof.

The Cabinet of Ministers interprets Article 100 of the Satversme in conjunction with Article 10 of the Satversme and indicates that political debates is one of the main issues related with the right to freedom of speech (*see: Judgment of the ECHR in the case Lingens v. Austria, application Nr. 9815/82, Judgment of 8 July 1986*). The Cabinet of Ministers agrees with the viewpoint that the Contested Norm restricts the right to freedom of speech; however this restriction of rights has been established by a law adopted according to proper proceedings and the restriction has a legitimate objective, which is to protect the democratic regime of the State by ensuring free elections.

When assessing whether the restriction included in the Contested Norm is necessary in a democratic society, the Cabinet of Ministers emphasize that it is only one of the elements of a detailed balance and counterbalance system that altogether forms the election system of the Republic of Latvia. In the context of the case under review, the right to freedom of speech established in Article 100 of the Satversme should be regarded in conjunction with the right to free elections that is protected by Article 6 of the Satversme and Article 3 of the Protocol No. 1 of the Convention.

The Cabinet of Ministers indicates that the principle of free elections protects voters from pressure or unpermitted influence and ensures expressing free will of voters. By means of the Contested Norm, the legislator has ensured voters the possibility, on the election day and one day prior to it, to assess information provided by different political forces during pre-election campaigns and to make a free choice at local government elections without the influence of deputy candidates or third parties. The Contested Norm reduces the influence of pre-election campaign materials on voters irrespective the possibilities and amount of expenses of each party spent on the

campaign. The Contested Norm ensures a substantial benefit for the society, namely, the possibility to assess propositions of political parties and to make an impartial choice.

According to the Cabinet of Ministers, the restriction of fundamental rights established in the Contested Norm is proportional with the legitimate objective.

The Cabinet of Ministers agrees with the opinion of the Applicant, namely, that the State cannot effectively guarantee observance of the Contested Norm. The legislator has established liability for infringement of the Contested Norm and has listed the institutions that have the authority to control observation of the restriction included in the Contested Norm.

4.3. The National Radio and Television Council (hereinafter – Council), according to Section 41 of the Radio and Television Law, represents interests of the society in mass media. The Council holds that the Contested Norm does not contradict Article 100 of the Satversme.

The Council emphasizes that during the pre-election period, distribution of pre-election campaign materials are permitted for 118 days. All political parties have equal rights regarding distribution of pre-election campaign information, and the prohibition established in the Contested Norm equally applies to all of them.

According to the council, it is important not to influence the will and choice of a voter during the last days before the elections by means of “intrusive” advertisements. The prohibition included in the Contested Norm aims at ensuring free elections.

When replying to the question set by the Constitutional Court, namely, whether the Contested Norm reaches the legitimate objective, the Council informs that after the local government elections of 6 June 2009 four administrative violation reports regarding infringements of the norm under consideration were drawn up. The Council holds that the legitimate objective of the norm has been reached and elections are not subject to such a great pressure of pre-election campaigns as in the case of that of “positive campaign” before the 9th Saeima elections in 2006.

4.4. The Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) holds that the Contested Norm does not contradict Article 100 of the

Satversme. However the Contested Norm provides for a restriction of the right to freedom of speech, this restriction does comply with the requirements of Article 116 of the Satversme. The restriction has been established with a view to reach a legitimate objective, i.e. to ensure free elections. The above mentioned restriction is indispensable and proportional with its legitimate objective.

The Ombudsman emphasizes that free elections is a central and mandatory element of a democratic State regime. By referring to the recommended practice of the Council of Europe's Venice Commission in the electoral matters, the Ombudsman emphasizes that the right of voters to free formation of the elector's opinion is a substantial aspect of free elections [*see: Code of Good Practice in Electoral Matters. Explanatory Report, Para 26, [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp)].*

By referring to the opinion expressed by the Senate, the Ombudsman indicates that formation of a free will of voters is a complex process that depends on internal factors (opinions and confidence of an elector) and external factors (political orientation pre-election campaigns, as well as content of political programmes, political activities during the previous years, etc.).

The Ombudsman maintains that the period of prohibition to carry out pre-election campaigns established in the Contested Norm is proportional to reach the expected result. It is not necessary to apply the particular restriction to the entire period when preliminary voting is permitted. The possibility to vote in advance, i.e. within three days before the general election day, shall be assessed as the possibility to vote in an extraordinary case. This possibility is used by a rather small number of electors.

4.5. The Latvian Association of Local and Regional Governments holds that both, the Applicant and the Saeima present important arguments. However, meeting with the inhabitants and practice of the Latvian Association of Local and Regional Governments show that in general the society is rather unaware of activities of local governments and political parties; therefore they lack information to make a well-considered choice. It is necessary to broaden the possibilities of the electors to receive information on “programmes, guidelines and other similar information on

political parties”. The regulation that was effective before adoption of the Contested Norm did ensure higher awareness of the electors.

The Constitutional Court holds:

5. Section 2 (3) of the Law “On Pre-election Campaign before the Local Government Elections” provides that “a period of pre-election campaign shall be the period of time from the 120th day before the elections until the election day”.

The first part of Section 20 of the same law provides that “it is prohibited to place and distribute materials of pre-election campaign in publicly available places in State and local government institutions, capital companies, in which more than 50 per cent of capital shares (stocks) belong to the State or a local government”. According to the Transitional Provisions of the law, the term “capital company” in this Law shall also mean an undertaking and company.

The Contested Norm provides for a prohibition to place and distribute materials of pre-election campaign on the election day and one day prior to it regarding the following:

- 1) institutions mentioned in the first part of Section 30 of the Law in which it is prohibited to place materials of pre-election campaigns during the entire pre-election period, as established in the above quoted norm;
- 2) distribution of pre-election campaign materials in radio and television, public places and publications, where such pre-election campaigns are permitted during the rest of pre-election period.

Even if the above mentioned Law would not contain the Contested Norm, Section 20 of the Law would prohibit, on the election day and one day prior to it, to place pre-election campaign materials in State and local government institutions, as well as capital societies, more than 50 percent of shares of which are owned by the State or a local government. The Applicant does not contest Section 20 of the Law “On Pre-election Campaign before the Local Government Elections”.

The Application does not include any legal justification proving that the prohibition to place pre-election campaign materials in the institutions listed in Section

20 of the above mentioned law would not comply with Article 100 of the Satversme. It neither justifies that Article 100 of the Satversme would require permitting distributing pre-election campaign materials on the election day and one day prior to it.

Neither the reply nor opinions of persons deal with the question whether the prohibition established in Section 20 of the Law “On Pre-election Campaign before the Local Government Elections” as such complies with Article 100 of the Satversme.

Consequently, in the frameworks of the case under review, the Constitutional Court will assess whether the Contested Norm complies with Article 100 of the Satversme insofar as it prohibits placing of pre-election campaign materials in radio, television, public places and publications on the election day and one day prior to it.

6. By referring to conclusions made in the case-law of the Constitutional Court, participants of the case and the summoned persons agree that the Contested Norm does restrict the fundamental rights of the Applicant enshrined in Article 100 of the Satversme. Article 100 of the Satversme provides: “Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited.”

The Constitutional Court has already concluded that the content of this Satversme Article is close to Article 19 of the UNO December 16, 1966 International Covenant on Civil and Political Rights and Article 10 of the Convention (*see: Judgment of 5 June 2003 by the Constitutional Court in the case No. 2003-02-0106, Para 1 of the Concluding Part*), and it has emphasized that freedom of expression is enshrined in the fundamental law of any state and it belongs to civic and political rights (*see: Judgment of 29 October 2003 in the case No. 2003-05-01, Para 21*).

It has been concluded in the case-law of the Constitutional Court that the freedom of speech covers a broad field and includes two aspects – private one and public one. The public aspect of the freedom of speech applies to the right of every person to receive information and to express his or her opinion in any way – orally, in writing, visually, by means of artistic means of expression etc. These ways of information distribution and expression of opinions also include mass media – radio and press.

Freedom of expression in its public aspect includes also freedom of press (*see: Judgment of 5 June 2003 by the Constitutional Court in the case No. 2003-02-0106, Para 1 of the Concluding Part and Judgment of 29 October 2003 in the case No. 2003-05-01, Para 21*).

However, it follows from the case-law of the ECHR that the right to freedom of speech applies to political debates in general (*see, e.g.: Judgment of ECHR in the case Lingens v. Austria, application Nr. 9815/82, Judgment of 8 July 1986*), as well as political advertisement, including pre-election campaigns [*see, e.g.: Judgment of the ECHR in the case Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2), Application no. 32772/02, Judgment of 30 June 2009 (GC)*] and pre-election campaigns in regional elections (*see: Judgment by the ECHR in the case TV Vest As & Rogaland Pensjonistparti v. Norway, application no. 21132/05, Judgment of 11 December 2008*).

Consequently, the Constitutional Court agrees with the opinion expressed by the persons involved in the case, namely, that the Contested Norm does restrict the right of a person to freedom of speech established in Article 100 of the Satversme.

7. In the case under review, there is no dispute that, based on Article 116 of the Satversme, the right to freedom of speech can be restricted. The respective restrictions should: 1) be established by law; 2) have a legitimate objective; 3) be proportional with this objective [*see: Judgment of 6 July 1999 by the Constitutional Court in the case No. 04-02(99), Para 1 of the Concluding Part, Judgment of 5 June 2003 in the case No. 2003-02-0106, Para 1 of the Concluding Part, and Judgment of 29 October 2003 in the case No. 2003-05-01, Para 22*].

8. The Contested Norm is included in the Law “On Pre-election Campaign before the Local Government Elections”. The case under review does not contain any materials that would raise doubt whether the Contested Norm would have been adopted and proclaimed or not according to proper procedure. Consequently, the respective restriction of the fundamental rights has been established by law.

9. Participants of the case and the summoned persons agree that the restriction established in the Contested Norm has a legitimate objective, namely, ensuring of free elections.

Article 116 of the Satversme provide that the right to freedom of speech can be restricted in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals. However, Article 10 (2) of the Convention provides for restrictions of freedom of speech that are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

“The Satversme has determined restrictions to freedom of expression in a general way; the Convention in its turn presents more specific criteria. Therefore as concerns admissible restrictions of freedom of expression in its wider sense, the norms of the Satversme shall be interpreted in the understanding of Article 10 of the Convention” (*see: Judgment of 29 October 2003 by the Constitutional Court in the case No. 2003-05-01, Para 22*).

The Constitutional Court agrees with the opinions expressed by the Saeima, the Cabinet of Ministers, and the Ombudsman that the Contested Norm has been adopted with a view to reach the legitimate objective mentioned in Article 116 of the Satversme, which is to protect a democratic State regime. The Ombudsman reasonably indicates that free elections are a central and mandatory element of a democratic State regime.

However, it follows from the above-mentioned conclusions of the Constitutional Court that the objective of the restriction of the fundamental right to freedom of speech shall be recognized as legitimate only if it complies not only with the objectives mentioned in Article 116 of the Satversme but also those mentioned in Article 10 of the Convention, for ensuring of which freedom of speech can be permitted.

The duty of the legislator to ensure free elections is an element of both, a democratic State regime and particular suffrage enshrined in the Satversme. The Constitutional Court agrees with the opinion of the Cabinet of Ministers that the right to freedom of speech enshrined in Article 100 of the Satversme should be interpreted in conjunction with other rights to free elections protected by Article 6 of the Satversme and Article 3 of the Protocol No. 1 of the Convention.

The Constitutional Court has already concluded in its case-law that the norms on Saeima elections included in the Satversme should be interpreted taking into consideration international liabilities that Latvia has undertaken in accordance with Article 25 of the Covenant and Article 3 of the Protocol No. 1 of the Convention (*see, e.g.: Judgment of 30 August 2000 by the Constitutional Court in the case No. 2000-03-01, Para 2 and 3 of the Concluding Part*). Article 3 of the Protocol No. 1 of the Convention provides the following: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

The Constitutional Court has already indicated that there are five universally recognized election principles in the democratic states of the world. Elections have to be general, equal, free, secret and direct (*see: Judgment of 23 September 2002 by the Constitutional Court in the case No. 2002-08-01, the Concluding Part*).

The Senate has also recognized the following: “[..] although free elections are not directly mentioned in the Satversme, there is no doubt that this is one of the fundamental principles of election system and an indispensable part of democracy. As it has already been mentioned, the source of the state power is the will of the people; therefore expression of such a will should be free. It is important that the scope of this principle applies not only to the moment of elections, but also to free formation of the will of electors during the entire pre-election period. First, this principle requires for the State to ensure such conditions that would facilitate formation of different opinions and ensure the possibility to express these opinions in different ways and to make them known to electors. Second, the principle requires protecting voters from a forbidden influencing of his or her will by the State or private persons” (*Judgment of 3*

November 2006 by the Administrative Case Department of the Senate of the Supreme Court in the case No. SA-5/2006, Para 10.2).

However, it is indicated in legal literature sources that “[...] the preconditions for elections to be free pertains to the essence of representation of the Latvian people, namely, only a freely elected Saeima shall enjoy the right to implement the scope of competence provided in the Satversme” (*Pleps J. Senāts un Satversme: vēlēšanu lieta. Jurista Vārds, 19 December 2006, Nr. 50*).

When mentioning the principle of free elections, participants of the case refer to documents related only to parliament elections. Consequently, it is necessary to make sure that in local government electoral matters, the fundamental rights established for persons include the element of free elections.

The second Paragraph of Section 101 of the Satversme determines that “Local governments shall be elected by Latvian citizens and citizens of the European Union who permanently reside in Latvia. The Constitutional Court has concluded that this sentence shall be interpreted by taking into consideration the international liabilities undertaken by Latvia by confirming the Charter of European Local Governments (hereinafter – the Charter) and acceding to the Covenant” (*see: Judgment of 15 June 2006 by the Constitutional Court in the case No. 2005-13-0106, Para 13*). Article 3 of the Charter provides that this right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage.

Even though in Section 101 it is *expressis verbis* envisaged that the local governments shall be elected by full-fledged citizens; however, when interpreting this norm as read together with the Charter, it can be concluded that the legislator has the duty of passing such norms, which would determine the elections of the local governments to be held on the basis of equal, direct and universal elections by secret ballot; namely – analogous to the principles of the Saeima elections (*see: Judgment of 15 June 2006 by the Constitutional Court in the case No. 2005-13-0106, Para 13.1*).

The common Europe’s constitutional legal heritage in electoral matters has been summarized in a document “Code of Good Practice in Electoral Matters” and the explanatory report, this being ordered by the Council of Europe. These documents

apply to parliament, as well as regional and local government elections. It is indicated therein that the right of electors to freely form their opinion is an important aspect of free elections [*see: Code of Good Practice in Electoral Matters. Explanatory Report, para 26, [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp)*].

When interpreting the first sentence of Article 101 (2) of the Satversme in conjunction with international liabilities of Latvia, as well as taking into account the common constitutional legal heritage of the European States, it can be concluded that this norm of the Satversme provides fundamental rights of persons mentioned therein to elect local government in elections that comply with the five criteria of elections, namely, general, equal, free, closed and direct elections.

Consequently, the restriction of rights provided in the Contested Norm has been established with a view to protect the right to elect local government in free elections, as provided for in Article 101 of the Satversme. Under Article 116 of the Satversme and Article 10 of the Convention, such aim shall be regarded as legitimate; therefore the right to freedom of speech can be restricted to reach the above mentioned objective.

10. In order to assess whether the restriction of freedom included in the Contested Norm is necessary in a democratic society and whether it can be used as a measure to reach the legitimate objective, it is necessary to investigate whether the restriction is necessary and proportional (*see: Judgment of 5 June 2003 by the Constitutional Court in the case No. 2003-02-0106, Para 4 of the Concluding Part and Judgment of 29 October 2003 in the case No. 2003-05-01, Para 34*).

10.1. By referring to the judgment of 2006 by the Senate in the case No. SA-5/2006, the Applicant holds that the Contested Norm is not necessary in a democratic society because the free will of electors cannot, in fact, be influenced by pre-election campaigns that are prohibited by the Contested Norm.

The Applicant refers to this document without having regard to its context. The particular conclusions made by the Senate apply to the assessment whether the violations made during elections were that grave to infringe the principle of free elections. The Senate concludes among the rest things: “[.] it has been recognized in

the legal doctrine that the principle of free elections shall not be regarded as violated if any of organizations involved in political combat have committed violations whilst these violations have been discussed in public during the pre-election period. Consequently, the voters are aware of the violations before they make their choice” (*Judgment of 3 November 2006 by the Administrative Case Department of the Senate of the Supreme court in the case No. SA-5/2006, Para 10.2*). However, the Contested Norm is aimed at facilitating the possibility for voters to freely weigh the information at their disposal.

Free suffrage comprises two different aspects: free formation of the elector’s opinion, and free expression of this opinion [*see: Code of Good Practice in Electoral Matters. Explanatory Report, Para 26, [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp)*]. By means of the Contested Norm, the legislator has ensured the electors the possibility to assess, on the election day and one day prior to it, the information expressed by different political forces in their pre-election campaigns and to make a free choice.

The principle of free suffrage also protects electors from pressure or unpermitted influence when expressing their will. The Contested Norm is aimed at reducing the influence of pre-election campaign materials on voters irrespective the possibilities and amount of expenses of each party spent on the campaign at the election day provided that parties spend more than 70 percent of their expenses for political advertisement (*see: case materials, Vol. 2. pp. 8*).

The necessity to establish a regulatory framework aimed at reducing of such pressure was publicly discussed at the pre-election period of Saeima elections of 2006, and also after the election of the Saeima. The Contested Norm shall be regarded in the context of a set of amendments that the Saeima has made to laws regulating elections of the Saeima, the European Parliament and local governments. It is indicated in the annotation to the draft law “Amendments to the Law “On Pre-election Campaign before the Local Government Elections”” that “it pertains to the common set of draft laws with amendments to the Law on Financing of Political Organizations (Parties) and amendments to the Law “On Pre-election Campaign before the Saeima Elections and Elections of the European Parliament”” (*case materials, Vol. 2, pp. 119*).

It follows from the minutes of the meeting of the Saeima State Administration and Local Government Committee that elaboration of the Contested Norm was time-consuming and it took place along with several other draft laws (*see: case materials, Vol. 1, pp. 61 – 200*). The above mentioned Committee has stated the necessity to discuss such regulation by also examining experience of other states already on August 2008 (*see: Minutes of the meeting of 27 August 2008 by the Saeima State Administration and Local Government Committee, case materials, 1. pp. 61*). This was also the Corruption Prevention and Combating Bureau that states the necessity of the regulation included in the Contested Norm (*see: case materials, Vol. 1, pp. 83*).

The Contested Norm ensures a substantial benefit for the society – the possibility to assess propositions of political parties and to make an objective choice. It is necessary in a democratic society. Restrictions established for pre-election campaigns on the election day and during a certain period prior to it are also established on other European States, like, Check Republic, Lithuania, France, and Hungary.

Namely, Section 49 of the Law on Election of the President of the Republic of Lithuania, Section 56 of the Seimas (Lithuanian Parliament) Election Law and Section 53 of the Local Government Election Law prohibits election campaigns 30 hours prior to the elections and on the election day (*see: <http://www.vrk.lt/lt/teisine-informacija/teises-aktai.html>*). The Check Republic Parliament Election Law provides for restrictions of pre-election campaigns 48 hours prior to the beginning of the elections and on the election day (*see: Electoral database of the Venice Commission, <http://www.venice.coe.int>, <http://www.psp.cz/docs/texts/1995-247.html>*), in France, a paid political advertisements in press and mass media is prohibited three months prior to the elections (*see: <http://www.loc.gov/law/help/campaign-finance/france.php>*).

Experience of the European States in this field has been summarized in the Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns. Section 5 of this Recommendation “Day of reflection” provides that member states may consider the merits of including a provision on their regulatory frameworks to prohibit the dissemination of partisan electoral messages on the day preceding voting or to provide

for their correction [see: *Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of pre-election campaigns, adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies: <https://wcd.coe.int/ViewDoc.jsp?id=1207243>].*

A similar recommendation is established in Recommendation R(99)15 of the Committee of Ministers of Member States with the same title, Chapter III, Section 1 [see: *Recommendation No. R(99) 15 of the Committee of Ministers to member states on measures concerning media coverage of pre-election campaigns, <https://wcd.coe.int/ViewDoc.jsp?id=419411>]. It is mentioned in the explanatory memorandum to the above mentioned recommendations that the aim of such day of reflection is to prohibit the dissemination of partisan electoral messages on this day, since it is considered that voters should have time to 'digest' all the information received during the campaign and thus take a decision on their vote without pressures [see: *Explanatory Memorandum to Recommendation No. R (99) 15 of the Committee of Ministers to member states on measures concerning media coverage of pre-election campaigns, [https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(99\)15](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(99)15)].**

Such restrictions were regarded as constitutional also by constitutional courts of other states. For instance, the Hungarian Constitutional Court has concluded that "the silent pre-election period" that lasts for 86 hours before the elections, provided that the pre-election period constitutes 84 days, shall be regarded as proportional restriction of the right to freedom of speech (see: *Summary on the Judgment of the Hungarian Constitutional Court in the case No. 6.2007, www.codices.coe.int*).

10.2. The arguments of the Applicant that the Contested Norm would prohibit the deputy candidates to lawfully carry out pre-election campaigns; however, the State cannot effectively ensure observance of the restriction set forth in the Contested Norm.

The legislator has provided for liability for the breach of the Contested Norm and has listed the institutions that have the right to control observance of the restriction established in the Contested Norm based on their jurisdiction.

For example, the first part of Section 204.² "Liability for Violation of Pre-election Campaign Provisions" (wording of 3 September 2009) of the Administrative Violations Code provides that in the case of violations of the provisions regarding pre-

election campaigns), warning shall be issued or a fine shall be imposed at the amount up to 150 lats for natural persons and up to 800 lats for legal persons.

In the frameworks of their jurisdictions, the respective State and local government institutions control observance of the Contested Norm, these institutions being, for instance, the Corruption Prevention and Combating Bureau and the Local Government Police.

Observance of the Contested Norm on radio and television is first of all controlled by the Council. The Council informs that after the elections of 6 June 2009 it has drawn up four administrative violations reports regarding violation of this norm. The Council holds that the legitimate objective of the norm has been reached and the voters are subject to a lower pressure by pre-election campaigns if compared to “positivism campaigns” carried out before the elections of the 9th Saeima in 2006.

It was concluded also in the research made by the “Centre for Public Policy “Providus”” that, at the elections of Local Governments and the European Parliament of 6 June 2009, parties have mainly observed the advertising prohibition. Based on the data of monitoring of 5 June 2009 commissioned by the above mentioned Centre, no advertisement were established in national radio organizations; however, there was one advertisement in national press and two advertisement in regional press. There were 15 cases when ordered environment advertisements were established. One of these advertisements referred to the political party where the Applicant pertains (*see: case materials, Vol. 2, pp. 19 – 20*). It was indicated in the above mentioned research that mass media reported on several tens of violations of the prohibition established in the Contested Norm, the advertisements being mainly environmental ones (*see: case materials, Vol. 2, pp. 31*).

However, taking into consideration the total amount of environmental advertisements used during the pre-election period, there is no reason to conclude, based on these separate violation cases, that the Contested Norm would not reach its objective.

10.3. Restrictions of pre-election campaigns are not established for the entire period of preliminary voting. The first part of Section 26 of the Election Law on City Council and Amalgamated Municipality Council provides for the possibility of

electors to vote during three days prior to the election day. This regulation does not provide that elections would take place for four days. However, the number of voters who take advantage of this possibility gradually increases. For instance, at the local government elections of 2001, the total number of voters who voted during the three days prior to the general election day constituted 6 percent (*see: Central Election Commission, Local government elections 2010, http://www.cvk.lv/cgi-bin/wdbcgiw/cvk/IEPR_AKTIV.vietas?nr=0100*); however, these were 9.85 percent of people having the right to vote who took advantage of this possibility at the European Parliament and local government elections of 6 June 2009 (*see: <http://www.velesanas2009.cvk.lv/activities.html>*).

Taking into account the procedure for counting votes established by law, which, among the rest things, is aimed at ensuring closed election, it cannot be established whether the choice of voters who voted before the election day would differ considerably from the choice of voters who voted on the general election day.

The Constitutional Court shares the opinion of the Saeima, that of the Cabinet of Ministers and that of the Ombudsman that the possibility to vote before the general election day, this period constituting three days prior to the election day, shall be assessed as a possibility to vote in an exceptional case.

It should be taken into account that activity of electors in each of the three above mentioned days is different. Namely, on the second and the third day before the general election day, this possibility is used by a comparatively low number of voters. At the local government elections of 2001, only 0.8 percent of people voted on the third day prior to the general election day, and 2.78 percent of people in total on the third and the second day prior to the general day of elections (*see: Central Election Commission, Local government elections 2001, http://www.cvk.lv/cgi-bin/wdbcgiw/cvk/IEPR_AKTIV.vietas?nr=0100*). At the local government elections of 2005, 1.2 percent of people voted on the third day prior to the general election day, and 3.17 percent of people in total on the third and the second day before the general election day (*see: Central Election Commission, City Council, Amalgamated municipality and Parish Council elections of 12 March 2005. Electors' activity,*

<http://www.pv2005.cvk.lv/akt/>). This was 1.45 percent who voted on the third day prior to the general election day of 2009 European Parliament and local government elections, and 3.42 percent of people in total who voted on the third and the second day prior to the general election day (*see: Central Election Commission, European Parliament and local government elections of 6 June 2009, Electors' activity* <http://www.velesanas2009.cvk.lv/activities.html>).

Consequently, on the third and the second day prior to the general election day, namely, on the days when carrying out of pre-election campaigns is not prohibited, this is a comparatively small number of electors who vote. Moreover, it is not possible to make precise prognosis regarding the fact whether persons would take advantage of this possibility at all. Likewise, it is not possible predict the day on which the electors would vote. Therefore these persons cannot be subject to such a great and purposeful pre-election campaign pressure aimed at determination of the elector to vote based on his or her emotions, if compared to persons who vote on the general election day.

10.4. In the Application, attention is drawn to the judgment of the ECHR, wherein non-compliance of restrictions regarding pre-election campaigns with the rights established in Article 10 of the Convention was established (*see: Judgment of the ECHR in the case TV Vest As & Rogaland Pensjonistparti v. Norway, application no. 21132/05, Judgment of 11 December 2008*) and was concluded that the Contested Norm restricts the right to freedom of speech in a non-proportional manner.

In the above mentioned judgment, the ECHR has, among the rest, recognized several substantial consideration of Norway as substantial, these considerations served as the ground for providing for the restrictions. Namely, prohibition of political advertisements on the television was aimed at restriction of expenses for pre-election campaigns with a view to reduce dependence of the participants from donors and to ensure high quality of political debates. Its aim was to protect integrity of democratic process, to achieve a fair framework for political and public debates, and to prevent the situation when political forces with greater support would have the advantage to use the most influential and accessible mass media.

According to the ECHR, these substantial reasons could not justify complete prohibition of political advertisement in television. However, it should be taken into

consideration that in the above mentioned case the ECHR established infringement of the Convention in a situation that was considerably different from the situation established in the Contested Norm. Namely, in Norway, political advertisement in the particular mass media was totally prohibited. The ECHR emphasized in the judgment that the prohibition was permanent and absolute; moreover it applied only to television, provided that any political advertisement in other mass media was permitted (*see: Judgment of the ECHR in the case TV Vest As & Rogaland Pensjonistparti v. Norway, application no. 21132/05, Judgment of 11 December 2008, Para 63*).

The Contested Norm does not provide for an absolute prohibition of pre-election campaigns in mass media. It prohibits distribution of pre-election campaign materials only two days prior to the election day. This restriction equally refers to all persons involved in elections. In the case under review, there are not materials testifying that the objective of the Contested Norm could be reached by other measures that would be more lenient.

Already on the 20-s of the previous century, the legislator has tried to establish, based on the urgent problems of that period, measures that would ensure serious and well-considered choice of electors. For instance, Section 43 of the Saeima Election Law of 1922 provided the following: "Selling alcoholic drinks on the election day shall be prohibited." This norm was also preserved in the Law "On Elections of the 5th Saeima".

When dealing with the regulatory framework regarding pre-election campaigns on radio and television, the legislator has tried to preserve electors from influential informative pressure on the election day and one day prior to it. For instance, Section 14 of the Law "On Pre-election Campaigns on Radio and Television Before the Local Government Elections" (wording of 31 March 1994) initially provided that "one day prior to the election day, as well as on the election day, it shall be prohibited to include, into the Latvian Radio and Latvian Television broadcasts results of any public opinion surveys regarding popularity of political organizations, associations of political organization and electors' organizations".

The regulatory framework included in the Contested Norm regarding restriction of pre-election campaigns on the election day continues the tradition established in Latvia. For instance, already in the Supreme Council's decision of 30 March 1993 "Regarding Equal Possibilities for Pre-election Campaigns on Radio and Television", the right to use, free of charge, transmission time during the time period up to the last day prior to the first election day was established. Section 5 of the Law "On Pre-election Campaigns on Radio and Television before Local Government Elections" (wording of 31 March 1994) provided that the right to use, free of charge, transmission time on Latvian Radio and Latvian Television shall be established during the time from 25th day up to the last day before the elections.

Consequently, the legislator, when adopting the contested regulation, continued the tradition established already in the 20-s and tried to find a measure permitting to ensure, in accordance with the realities of the particular time, a free and well-considered choice of electors.

As it has already been mentioned, the norm facilitates implementation of the principle of free elections. Similar restrictions are also established in other European states.

The restriction of the fundamental rights established in the Contested Norm is necessary in a democratic society and proportional with the benefit that the society gains from it.

The Constitutional Court

based on Article 30 – 32 of the Constitutional court Law,

h o l d s :

Section 33 of the Law "On Pre-election Campaign before the Local Government Elections" with Article 100 of the Satversme of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgment shall come into force on the date of publishing it.

Presiding Judge

G. Kūtris