



LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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DISSENTING THOUGHTS

of the Constitutional Court Justice JURIS JELĀGINS
in case No. 2005-13-0106

”On the Compliance of Section 5 (Items 5 and 6) of the Saeima (Parliament) Election Law and Section 9 (Items 5 and 6 of the first Paragraph) of the City Dome, District Council and Rural District Council Election Law with Sections 1, 9, 91 and 101 of the Republic of Latvia Satversme (Constitution) as well as with Sections 25 and 26 of the International Covenant on Civil and Political Rights”.

In accordance with the Court Judgment the impugned norms comply with Sections 1, 9, 91 and 101 of the Republic of Latvia Satversme (Constitution) as well as with Sections 25 and 26 of the International Covenant on Civil and Political Rights. As refers to the submitter of the constitutional claim Juris Bojārs, the Court in its turn declared that the impugned norms were unconfomable with the norms of higher legal force.

I hold that if the Court declares a legal norm as unconfomable with the Satversme with regard to a certain person, it shall be declared as being unconfomable with the Satversme also with regard to everybody. The legal norm includes in it a general provision, i.e., it shall be attributed also to persons, who are in an analogous situation with the person, regarding whom it has been declared that the legal norm is at variance with the human rights, fixed in the Satversme.

Is the impugned norm – as regards the submitter of the constitutional claim Juris Bojārs – at variance with the Satversme?

As is well known, several months ago – on March 16, 2006 – the Grand Chamber of the European Court of Human Rights (hereinafter – ECHR) reached the Judgment in case ”Ždanoka v. Latvia”, in which it declared that the election rights of the claimant, which are guaranteed in the First Protocol, Section 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), had not been violated.

Even though the legitimacy of the restriction of election rights of the State Security Committee employees was not assessed, many ECHR statements,

which were incorporated in the Judgment, might be used, when assessing also the claim of the submitter of the constitutional complaint.

First of all it is important to note that the Grand Chamber, when assessing restrictions to the election rights, reached a different Judgment than the ECHR First Department June 17, 2004 Judgment, which was initially declared in the so-called "Ždanoka's Case".

The Grand Chamber pointed out that election rights on their nature differ from other fundamental rights of persons, therefore in these cases greater freedom of action of the state shall be justified in determination of restrictions. When assessing restrictions to the election rights one should not be automatically guided by the same criteria, which shall be applied with regard to interference, which is permitted by Sections 8-11 of the Convention. Thus the standards, which shall be applied to determine observance of Protocol 1, Section 3, have to be regarded as less strict than the principles, which are applied in accordance with Sections 8 –11 of the Convention (*sk. Ždanoka v. Latvia [GC], para. 115a*).

A similar viewpoint has been previously expressed by ECHR justice Egils Levits in his dissenting thoughts on the First Department Judgment in case "Ždanoka v. Latvia". He noted that election rights and human rights have different functions. The aim of the election rights is to ensure democratic participation of the people in state administration and legitimise state institutions, while human rights tend to protect individual freedoms from interference of the state. Thus in the state constitutional systems the election rights, taking into consideration their different legal nature, are never regarded as human rights (fundamental, essential), but more as political rights, which belong to the institutional sector of the constitutional system. Therefore, the legal importance of the above rights, as well as their interpretation and practical application, is based on different principles than those, which shall be applied with regard to human rights [*sk. ECT Pirmā departamenta spriedums lietā "Tatjana Ždanoka pret Latviju"; see ECHR First Department Judgment in case "Tatjana Ždanoka v. Latvia"// Latvijas Vēstnesis, Nr. 11 (3059) 15.07.2004.J.*].

It especially refers to the so-called passive election rights – the right to be elected in the Parliament.

Because of the above reason when assessing the election rights the ECHR Grand Chamber used the test, which was different from the test of ECHR First Department.

By using the classical test the ECHR First Department recognized that the rights of the submitter (i.e. Tatjana Ždanoka) had been disproportionately restricted, as she was not any more able to endanger democracy in Latvia.

In its turn at the basis of the ECHR Grand Chamber Judgment was the conclusion that in the sector of election rights the state –for the reason of self-protection of the democracy - a greater freedom of action shall be allowed, because "it cannot be excluded that a person or a group of persons shall refer to the rights, entrenched in the Convention or its Protocols, so that they have "rights" to activities, which in practice mean actions, the intention of which is destruction of rights or freedoms, determined in the Convention; any such destructive activity may put an end to democracy". Therefore ECHR holds that "no-one shall be allowed to weaken or destroy ideals and values of a democratic society on the basis of the provisions of the Convention". (*Ždanoka v. Latvia [GC], para 99*)

Thus, when reviewing observation of Section 3, Protocol 1 of the Convention, ECHR concentrated its attention mainly on two criteria: whether there was arbitration or lack of proportionality and whether the restriction has hindered free expression of the viewpoint of the person. (*see Ždanoka v. Latvia [GC], para 115c*)

ECHR recognizes that the necessity of restricting concrete election rights in the light of political evolution of the state can be best of all assessed by the national court and the legislator.

Especially important in "Ždanoka's case" is the conclusion of the Grand Chamber that the aim of the restrictions to run for elections is not the intention to punish those, who were against the integrity of the democratic processes, but rather to exclude from participation in the work of legislature those individuals, who had taken an active role in a party, which was linked to the attempted violent overthrow of the newly established democratic regime.

Thus, the main objective of the restrictions determined to the Election Law is to protect the Parliament from persons, who have discredited themselves by activities in the organizations, which were supporting the Soviet totalitarian system.

Simultaneously ECHR points out that the restrictions to the election rights may not be eternal and they shall be periodically reviewed and advance towards their abrogation.

For the restricting measure to be in compliance with Section 3, Protocol 1 of the Convention, it might be enough with a lesser degree of individualization as opposed to situations with regard to potential violation of Sections 8-11 of the Convention.

It means that even in this case to pass the test of the Satversme conformity the degree of individualization shall be such.

As is known, ECHR Grand Chamber, when assessing the potential violation of the election rights of the submitter, concluded that the restrictions do not violate the standards, envisaged in the Convention.

Such a conclusion, inter alia, has been substantiated by the statement that the submitter had not disassociated from the anti-democratic activities of the LCP (Latvian Communist Party).

To the viewpoint of the Court party activities may be attributed to its members, especially to those, who occupy leading positions of the party, if these members do not disassociate themselves from the above activities. Otherwise there is reason to think that their activities are directed to destructive action as regards respecting of the democratic values.

Already in the Constitutional Court August 30, 2000 Judgment in case No. 2000-03-01 it was concluded that formal belonging to SSC (State Security Committee), LCP and other organizations may not serve as the reason for refusing to register a person as a candidate and elect in the Saeima.

The Constitutional Court has confirmed the above again by declaring restrictions to the Election Law as unconformable with the Satversme as regards J. Bojārs, as it has been established that "he by his activities has proved that he supported the idea of Latvia being an independent and democratic republic" (*Satversmes tiesas 2006. gada 15. jūnija spriedums lietā Nr. 2005-13-0106 20.2 punkts; the Constitutional Court June 15, 2006 Judgment in case No. 2005-13-0106, Item 20.2*).

In order to apply analogous, less offending restrictions also with regard to other persons, the legislator should determine additional provisions, which would give the possibility to reach an individualization degree conformable with the Satversme. Determination of such provisions could in future serve

for this category of persons as an intermediate stage "on the road" to abrogation of restrictions to election rights.

Riga, June 22, 2006

The Constitutional Court justice

Juris Jelāgins