



CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

DISSENTING OPINIONS

**of the Constitutional Court justices Aivars Endziņš, Juris
Jelāgins and Anita Ušacka**

in case No.2000 – 03 – 01

”On Compliance of Article 5 (Items 5 and 6) of the Saeima Election Law and Article 9 (Items 5 and 6) of the City Dome, Region Dome and Rural Council Election Law with Articles 89 and 101 of the Satversme (Constitution), Article 14 of the Convention for the Protection of Human Rights and Article 25 of the International Covenant on Civil and Political Rights”.

1. In compliance with Article 1 of the Satversme (Constitution)¹, Latvia is an independent, democratic republic. When delivering a report on the Draft of the Satversme in its first reading, the rapporteur Mārgeris Skujenieks stressed that ”this basic thesis determines the contents and spirit of the law and is the leading principle of the activity of the Constituent Assembly” (Verbatim Report of the Constituent Assembly of Latvia, booklet 14, page

¹ Abbreviations, given in the text of the Judgement, are also used in the dissenting opinions of the justices.

1304, 1921). In any of its activities, also when specifying constitutional norms in laws, the Saeima has to observe Article 1 of the Satversme and shall act in compliance with the principles of a democratic state.

When clarifying the notion of Article 1 of the Satversme, one should take into consideration fundamental values of the State of Latvia, which have ensured the possibility of establishing the state and its vital capacity even under extremely critical conditions. November 18, 1918 Act of Proclamation of the Republic of Latvia states, that "... all the citizens, without any national distinctions are asked to help, as the rights of all the ethnicities will be guaranteed in Latvia. It will be a democratic and just state, without any suppression and injustice..." On May 4, 1990 the Republic of Latvia Supreme Council, when adopting the Declaration "On the Accession of the Republic of Latvia to International Instruments Relating to Human Rights", referred to the above conclusion of the act. Thus, the very first steps, both at the time of establishing the state of Latvia and the renewal of its independence, were unequivocally directed to establishment of a really democratic state system, where human rights and tolerance to diversity of opinion are respected.

As can be ascertained from the Resolution by the Supreme Council of the Republic of Latvia "On the Results of March 3, 1991 Opinion Poll of the Residents of the Republic of Latvia", out of 1 902 802 inhabitants, included in the opinion poll lists, 1 666 128 persons (87,56%) took part in it. They had to give an answer to the question "Are you for a democratic and independent state of Latvia"? 1 227 562 (73,68% of those taking part) voted for the answer "yes", thus confirming that the absolute majority of the

inhabitants of the Republic of Latvia supported establishment of the state system in which democracy and national independence are mutually and inseparably connected.

When adopting Chapter 8 of the Satversme, the Saeima consequently and consistently developed the idea of the democratic state, which had been enclosed in the foundation of formation and renewal of the State of Latvia. When interpreting the norms, incorporated in Chapter 8 of the Satversme, contradistinction of the above norms to basic democratic values included in Article 1 of the Satversme is not admissible.

2. It is reasonably stated in the Judgment that "the aim of the legislator has not been to oppose norms of human rights, included in the Satversme to the international ones. In cases when there is doubt about the contents of the norms of human rights incorporated in the Satversme, they should be interpreted in compliance with the practice of application of international norms of human rights." Experience of the European Court of Human Rights "should be used in interpreting the respective norms of the Satversme". However, the above experience has been imperfectly used in the Judgment. Besides, in some cases it is not connected with the context of the respective case of the European Court of Human Rights.

The common trend of practice of the European Court of Human Rights, in conformity with which democracy means pluralism, tolerance and difference of opinion (see the Judgment of the European Court of Human Rights in Dudgeon case /1981/), has not been taken into consideration. Democratic society cannot exist

without pluralism, tolerance and difference of opinion. It means that proportionality of the legitimate aim shall be determined to every "formality", "circumstance", "restriction" or "punishment", which is applied in a case (see the Judgment of the European Court of Human Rights in Handyside case /1976/). Besides only restrictions needed in a democratic society shall be regarded as proportional. And the adjective "needed" in this case is not a synonym to the word "binding". Neither has it the flexible variation possibilities of such words as "admissible", "reasonable" or "preferable". The word rather means "an urgent social need" (see the Judgment of the European Court of the Human Rights in Barthold case /1985/).

The necessity of the particular restrictions, mentioned in the Judgment of the Constitutional Court, has not been adaptably evaluated with regard to the democratic society. Besides the component "socially needed" has not been evaluated at all.

In a democratic society only restrictions, which comply with the principles of a law – based state, may be regarded as socially needed. They are to be estimated taking into consideration the particular historical and political system. However, imperfections in the development of democracy, pointed out by the Saeima representative at the Court session, cannot serve as the basis to deviate from the principles of a law – based state. New democracies, also Latvia, may not regard the present stage of development of democracy in the state as an absolute criterion. They should orient themselves to the standards of democracy of the developed Western states. Groundless restrictions of the human rights do not strengthen democracy but weaken it. No state should orient itself to the existing

situation as self-sufficient, but take into consideration the experience of member states of the European Council.

As concerns Items 6 of the disputable Articles, the fact that they refer only to the activity of persons during the period from January 13, 1991 to September 1991 has not been disclosed in the Judgment. Persons, who have been active in the organisations, mentioned in Items 6 of the disputable Articles after that time, in accordance with the procedure anticipated by law, should be criminally liable. If in compliance with the court decision their activity is considered to be criminal, the above persons in compliance with Article 5 (Items 2 or 3) of the Saeima Election Law or Article 9 (Items 1 or 3) of the Local Dome Election law lose the passive election rights.

3. Well grounded is the viewpoint expressed in the Judgment that the important right, determined in Article 101 of the Satversme and in the manner prescribed by law endowing every citizen with the right to participate in the activity of the state and local governments, is not absolute. However, by using the provision "in the manner prescribed by law", the right of the Saeima to determine the criterion of law for implementation of the right incorporated in Article 101 of the Satversme is also not absolute. The Saeima experiences the right to free choice only as far as Article 1 of the Satversme and other constitutional norms do not limit it.

The fact, that, when adopting Article 101 of the Satversme in the third reading, the Saeima has replaced the criterion "full rights" with the condition "in the manner prescribed by law", does not indicate that when interpreting Article 101 of the Satversme one

should not take into account Article 1 of the Satversme and other constitutional norms, first of all Articles 2, 9, 89 and 91. Thus the manner of implementation of rights incorporated in Article 101 of the Satversme, which is determined by law should be in compliance with the principles of a democratic state, resulting from Article 1 of the Satversme, international liabilities undertaken by Latvia and Article 91 of the Satversme, determining that "human rights shall be implemented without any discrimination".

4. Well grounded is also the opinion expressed in the Judgment that– as to the disputable norms of the Saeima Election Law– Article 101 of the Satversme shall be interpreted together with Article 9 of the Satversme. However, it is not sufficient to interpret the notion of the Article only as an authorisation for the Saeima to specify the contents of the notion "a full – fledged citizen", used in the Saeima Election Law. As can be seen from the debate at the Constituent Assembly session, the proposal to include limitations in the text of Satversme was not connected with the concern about the possibility of the full – fledged scope of voters being too wide. Quite to the contrary, the Constituent Assembly has stressed the importance of the right, determined in Article 9, in functioning of the democratic system. The Assembly even considered the necessity of determining the notion "full – fledged" in the Satversme.

The decision that the notion shall be determined in the Satversme was adopted with an insignificant majority of votes. At that time it was connected with the conviction about the understanding of the then elected representatives on values of the democratic state and the notion and objective of Article 9 of the Satversme. On October 11, 1921 at the session of the Constituent

Assembly the deputy Arveds Bergs remarked that "every full – fledged Latvian citizen has the right to elections. It is the principle, which could have only a few restrictions. And to incorporate other restrictions on the basis of the above is not allowed. It would not be in compliance with the spirit of the Constitution and no Saeima would want to violate the spirit of the Constitution" (Verbatim reports of the Constituent Assembly of Latvia, Riga, 1921, booklet 17, page 1576).

The objective of Article 9 of the Satversme is to ensure as much as possible the right to elections to all the citizens of Latvia. The notion of the word "full – fledged" of the Article permits only "some restrictions", which are in conformity with the "spirit of the Constitution". An analogous conclusion – reference to the viewpoint of the Saeima representative – has been expressed also in the Judgment. He pointed out that restrictions of the right to vote are exceptions from the principle and should be interpreted in the narrow sense. However, contrary to the above, disproportionately extensive restrictions have been considered to be admissible.

Besides, when interpreting the notion "full – fledged", included in Article 9 of the Satversme, one should also take into consideration the Law on the Saeima Elections, adopted on June 9, 1922. It incorporated the norms, which were elaborated for the Satversme draft but had not been included in it. The law determined that "the right to vote shall not be given to persons, who, in the manner prescribed by law, have been declared imbecile or persons who are under guardianship", but Article 3 envisaged that the following persons "lose their right to vote:

1) if they have been deprived of their election rights on the basis of a court decision, if 10 years from serving a sentence have not passed or if they through amnesty or pardon have not received their rights back;

2) if they are serving a sentence of imprisonment for crimes, committed in greed, if 10 years from serving the sentence have not passed;

3) if they are subject to trial for crimes mentioned in Items 1 and 2; these persons lose their right to vote, but they may be elected;

4) if their right to vote has been deprived for disordering freedom or rightness of elections;

5) if they have been sentenced or are subject to trial for refusal from military service or desertation”.

When discussing the Saeima Election Law, the scientist of the Latvia State Rights Kārlis Dišlers has stressed that ”the citizens lose their political rights on the basis of the court decision in four cases, envisaged in Article 3 of the Election Law. The general principle is that the rights are not forfeited forever, but only for a certain time.”(Dišlers K. Introduction into the State Rights of Latvia. Riga, 1930, page 94).

Thus, in compliance with the understanding of the Constituent Assembly on Article 9 of the Satversme, restriction of the right to vote in cases, which are not connected with a person being under guardianship, is permissible only for a certain period. The Judgment also states that restrictions of the passive election rights may exist

only for a certain time. However, the decision on incompatibility of the disputable norms with the Satversme does not follow.

One should also take into consideration the fact that the Constituent Assembly adopted the Saeima Election Law only not much more than three years after proclamation of Latvia as an independent state. It was not only the period after break – down of the Russian empire and the Civil War, but also after a period during which side by side with the government of the democratic Latvian state the government of the Latvian Socialist Soviet Republic was functioning. However the Constituent Assembly did not consider it necessary to connect the right to vote with being in one or another position of the previous regime or during the fighting for freedom. Besides, the norms, included in 1919 Constituent Assembly Election Law adopted by the Nation Council, were analogous.

There is no reason to hold that under the present circumstances- ten years after the renewal of the Independence of Latvia, at the time when Latvia is a full-fledged member of the UNO, a member – state of the European Council and OSCE, has started talks on joining the European Union and strives to join the NATO – the democratic system, national security and territorial unity of Latvia are more endangered than during the first years after establishment of the state of Latvia or renewal of the independence of the State of Latvia.

5. From the very first days of its foundation, the State of Latvia has upheld democratic values, besides it has always connected the understanding of the notion "democracy" with the experience of other democratic states. In 1918 the newly formed

Provisional Government declared that its objective with regard to the political and civic values "is to ensure all rights of a democratic state to the inhabitants of Latvia. With a persistent will the government shall implement the rights, which all democratic states are enjoying, to its citizens". (Objectives of the Provisional Government of Latvia// Proclamation of the State of Latvia on November 18, 1918, Riga, 1998, page 153). The Provisional Government also declared that it "does not want to practise the policy of suppression but observe the principles of the up-to-date democratic state." (the same source, page 154).

The members of the Constituent Assembly, when elaborating the draft of the Satversme repeatedly, have referred to the experience of the democratic states of that time, thus confirming the organic link of the system to be organised in Latvia with other progressive states.

The deputies of the Supreme Council of Latvia made use of analogous method of approach when renewing the State of Latvia *de facto* and the authority of its Satversme. There is no reason to hold that the notion of democracy, incorporated in Article 1 of the Satversme, shall be interpreted separately from the understanding most democratic states have. Quite to the contrary, it shall be interpreted in compliance with the contents ascertained by the experience of democratic states.

When starting its talks about joining the European Union, Latvia has undertaken the obligation to observe the interpretation of legal norms, acknowledged by democratic states. To observe regulations expressed in Articles 69 and 70 of the June 12, 1995

Latvia- European Union Association Treaty, Latvia shall not only approximate the texts of its normative acts with the texts of legal norms of the European Union, but also adopt the Western legal theory, namely, the legal thinking. Only then the legislation, approximated on the content level, will function in the same way as in the European Union. Unified legal understanding in the European tradition and legal manner is one of the preconditions of functioning of the European Union. (*see Levits E. Approximation of the Latvian and European Union Legal Systems and Implementation of principles of A Law-Based State// Latvian and the European Union, 1997, No.6, pages 30 – 45*).

On February 2, 1995 by passing the Law "On the Statute of the European Council" the Saeima adopted and confirmed the above statute. Therefore the objective, expressed in Item "a" of the first Paragraph of the Statute of the European Council – to achieve greater unity between the members of the European Council "to ensure and implement those ideals and principles, which form the collective heritage of the states and favour their economic and social progress" is binding on Latvia. In conformity with Item "b" of the first Paragraph of the above statute, this objective shall be realised "with the help of institutions of the Council, by giving consideration to issues, important to all the members, by concluding agreements and co-operating in economic, social cultural, scientific, legislative and administrative sectors as well as by maintenance and further implementation of human rights and fundamental freedoms". In its turn, in compliance with the third Paragraph of the Statute of the European Council, Latvia has taken upon itself to accept the principles "which under legislature of the Council members ensure

legality and possibility of all persons to fully enjoy the human rights and fundamental freedoms” and to honestly and efficiently cooperate in implementing the above objective.

At the beginning of the nineties issues, connected with overcoming the consequences of the totalitarian regime and transition to the democratic state, have been solved in most post-socialist states, included in the European Council. The Judgment rightfully informs that the above experience has been summed up in Resolution No.1096 (1996) of the Parliamentary Assembly of the Council of Europe ” On Measures to Dismantle the Heritage of Former Communist Totalitarian Systems”.

Although the viewpoint expressed in resolutions and documents of the Parliamentary Assembly of the European Council and its committees is only a recommendatory one and not binding on Latvia, the above commitments, undertaken by Latvia when confirming the Statute of the European Council should be taken into consideration. Besides, the viewpoint, expressed by the Parliamentary Assembly of the European Council and its committees, is based on extensive and analytical conclusion of the experience of the member states. Thus, the documents may be used as a supplementary source of the rights, when interpreting the notion of democracy and legal principles, resulting from it, incorporated in Article 1 of the Satversme. Other Constitutional Courts also make use of the documents when interpreting the Constitution of their states (*see November 10, 1998 Decision of the Polish Constitutional Tribunal in case No. K 39/97*).

5.1. The content of the above Resolution has been mentioned in the Constitutional Court Judgment, without revealing the whole viewpoint, expressed in it. With regard to the disputable norms one should take into consideration not only the necessity to liquidate the heritage of the former regime and avert its "velvety" renewal but also the fact that a democratic law – based state "when dismantling the heritage of the former communist regime, shall apply the procedure of a democratic state. Other measures are worthless because then the state system will not be better than the totalitarian regime, which is to be liquidated." Besides the Parliamentary Assembly has stressed that "the restrictions are conformable with the principles of the democratic state if certain conditions are observed." The above conditions are formulated in the Document of the Legal and Human Rights Committee of the European Council No.7568 "On Ensurance of Compliance of Lustration Laws and Administrative Measures with the Requirements of a Law – Based State." The Judgment considers this document incompletely. It criticises the condition on the term of five years, not taking into consideration much more important and fundamental conditions: inadmissibility of applying lustration to elected institutions, inadmissibility of collective responsibility and the necessity of guaranteeing fair advocacy.

5.2. The above document of the Legal and Human Rights Committee of the European Council stresses that "lustration shall not be applied to elected institutions if the candidate himself/herself does not demand it, as the voters have the right to elect persons they wish to elect (election rights may be deprived only to a sentenced criminal on the basis of a court decision – it is not an administrative

but a criminal measure)”. This recommendation can be related to the viewpoint of the founders of the State of Latvia and the authors of the Satversme, who under similar circumstances did not include in the Election Law of the Constituent Assembly and the Saeima Election Law any restrictions with regard to officials of the former regime or persons who had actively fought against formation and existence of a democratic, independent Latvia.

Reference to the practice of the Federal Constitutional Court of GFR in the Judgment has been made without going into the heart of the matter and in an isolated from the context manner. The quotation ”He, who has spied on and oppressed his own people, who has deceived, betrayed and cheated or who is responsible for it all, shall have no place in the Bundestag even if one cannot deprive him of his mandate” is not the viewpoint of the Court but just a fragment from the speech of the Bundestag deputy Wiefelspütz, which was included in the Decision to illustrate the objective of the respective norm- self-purification of the Parliament. There does not exist a prohibition to elect the employees or agents of the former Security institutions of the German Democratic Republic in the Bundestag of the German Democratic Republic. When reviewing the case, quoted in the Constitutional Court Judgment, the Federal Constitutional Court of the GFR reached the decision on compliance of the procedure determined by the Bundestag to establish whether a Bundestag member has co-operated with the above institutions of the GDR with the Fundamental Law. The Court also made the decision on conformity of the probation procedure with the Fundamental Law. The probation resulted neither in losing the mandate of the deputy nor in prohibition to be nominated as a

candidate in the next elections. If it is established that the person had co-operated with the security institutions of the GDR, the deputy himself/herself on his/her conscience decides whether to continue his activities at the Bundestag and voters make the decision on work of the deputy at the next convocation of the Bundestag.

5.3. The Legal and Human Rights Committee of the European Council has stressed that in a law-based state no person shall be subjected to lustration just for membership or activity in an organisation, which was legitimate at the time (naturally, it shall not be applied to individuals, who issued orders, execution of which violated human rights). Besides, the principle of inadmissibility of collective responsibility is also stressed.

Items 6 of the disputable Articles determine restriction to all the persons who had been engaged in the enumerated organisations, without evaluating if the activity of every particular person had been directed against the Republic of Latvia and how the detriment was expressed. It is rightfully stressed in the Judgment that "Only formal membership to the above organisations cannot serve as the reason for forbidding a person to be included in the candidate list and being elected in the Saeima." However, it is incorrect to state that "the legislator has connected restrictions with the degree of individual responsibility of every person in realisation of the aims and programme of these organisations. And the restriction to be elected into the Saeima or local authority, included in the disputable norms, is connected with the activities of every concrete person in the respective socio – political organisations."

Well-grounded is the viewpoint of the applicant that traits of collective responsibility are felt in Items 6 of the disputable Articles. And even though the fact has been disclosed at the Court, it does not mean that the right of a person to just legal proceedings has been duly implemented. The person was not given the possibility of expressing explanations about essence of his/her activities and the court did not have the possibility of evaluating the extenuating circumstances with respect to the above activity.

5.4. The Judgment quotes the recommendation of the Legal and Human Rights Committee: "Disqualification, resulting from the lustration process, shall not exceed the period of five years, as one need not underestimate the possibility of positive changes in people's attitude and habits. It would be desirable to complete the lustration process to December 31, 1999, as up to that time the democratic system in the former communist totalitarian states should be stable." In this connection it is pointed out in the Judgment that the socio political situation of every state should be estimated individually. However, no motivation is given as to why the democratic system in Latvia should be considered as so very unstable that persons, who were against the independence in Latvia almost ten years ago could endanger it.

No motivation about the fact why the legislator precludes the possibility of positive changes in people's (who are mentioned in the disputable norms) attitude and habits just in Latvia has been included in the Judgment.

6. When evaluating compliance of the disputed norms with the Covenant, the fact that Article 25 of the Covenant shall be

interpreted together with Article 26 has not been taken into consideration in the Judgment. The Article envisages that "all people are equal before the law and they have the right of enjoying equal protection of the laws without any discrimination. Any kind of discrimination shall be prohibited by law, and the law has to guarantee equal and efficient protection against discrimination on any ground— such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Pursuant to the comment of the UNO High Human Rights Commissioner, accepted on November 10, 1989 at the 37th session of the UNO Human Rights Committee "the Committee holds that the term "discrimination" used in the Covenant should be applied to every distinction, exception, limitation or advantage connected on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, the aim or result of which is prohibition or worsening of enjoyment of any right or freedom to any of persons under the same circumstances."

This aspect has been neither analysed nor evaluated in the Judgment, besides, no motivation is given to the viewpoint that the passive election rights of the persons, mentioned in the disputable norms have to be limited.

7. When evaluating conformity of the disputed norms with the Convention, the fact that although the accessory nature of Article 14 does not give it an independent existence, the practice of the European Court of Human Rights acknowledges also its autonomous

meaning, has not been stressed in the Judgment. The autonomous status of this Article means that even if none of the substantive provisions of the Convention has been violated, the Convention organs nevertheless may find a violation of the prohibition against discrimination in the application of the provision at issue (*see Law and Practice of the European Convention on Human Rights and the European Social Charter, Council of Europe Publishing, 1996, pages 346 – 350*).

Even though Article 3 of the First Protocol of the Convention does not directly refer to the elections of the Dome (Council) of municipalities, one should take into consideration that the procedure and criteria envisaged for realisation of rights to elect the legislator – the Parliament – are interconnected with the procedure of electing the Dome (Council) of municipalities. If the peculiarities of electing the Dome (Council) of municipality do not envisage it otherwise, limitations, considered as well – grounded or groundless with regard to the elections of the Parliament, should be also considered as such with regard to the Dome (Council) of municipalities elections. Besides, in compliance with the Law "On the Accession to the October 15, 1985 European Charter of Local Self – Governments" and the second part of Article 3 of the above Charter, Latvia has undertaken the liability to ensure that the rights, determined by the Charter "shall be realised by Council or representative meetings, whose members are freely elected by secret ballot on the basis of equal, general and genuine election rights". Thus, even though Article 3 of the First Protocol of the Convention does not refer just to the elections of the Dome (Council) of the municipality, compliance of this Law with Article 14 of the Convention can be

seen. In its turn, the compliance of the Saeima Election Law with Article 14 of the Convention shall be evaluated together with compliance of the Law with Article 3 of the First Protocol of the Convention.

The logical development of the Convention i.e. development of norms, incorporated in Article 14 in Protocol 12 of the Convention, the project of which has been accepted at the Committee of Ministers of the European Council and will be signed in Rome in November, 2000 should be taken into consideration as well. Article 1 of this Protocol envisages general prohibition of discrimination, i.e. prohibition of discrimination independently from rights and freedoms, established in the Convention and its Protocols.

8. Article 116 of the Satversme enumerates objectives, legitimate in a democratic society, in case of determining restrictions to the fundamental rights: rights of other people. A democratic state system, public security, welfare and morality. The second parts of Articles 8 – 11 of the Convention envisage analogous objectives. Namely, the second part of Article 8 of the Convention permits restrictions "in the interests of national security, public safety or the economic well – being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." The second part of Article 9 allows limitations "in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others". The second part of Article 10 envisages restrictions, which are necessary 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 second part of Article 11, in its turn permits restrictions ” which are necessary in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of the others.”

It is stated in the Judgment that ”the aim of the restrictions of the passive election rights is to protect the democratic state system, national security and the territorial integrity of Latvia”. However, no explanations to the contents of the notions is given and it has not been proved that by electing the persons, mentioned in the disputed norms, in the Saeima or the Dome (Council) of municipalities, the mentioned values would be threatened.

Protection of the democratic state system is one of the legitimate aims of restrictions, mentioned in Article 116 of the Satversme, as human rights shall not be used against the democratic state system as such. In compliance with the principle of self – protecting democracy, the democratic state system shall be protected from attempts to liquidate it or hinder its functioning faculties.

However, neither at the Court session nor in the Judgment a statement was expressed in what way the persons, mentioned in the disputable norms, if they were elected in the Saeima or the Dome (Council) of the municipality could endanger the state democracy. It was also not proved that the above persons had any possibility of endangering democracy at this moment- ten years after adoption of

the Declaration "On Renewal of the Independence of the Republic of Latvia" and nine years after *de facto* renewal of the state.

Besides, persons, who had been active in the organisations, mentioned in Article 6, had experienced the right of being elected in the Saeima. Many of persons to whom the restrictions are applied had been elected in the 5th Saeima, as the Law "On the Elections to the 5th Saeima" did not include analogous restrictions. It does not matter whether the motion to include analogous restrictions in the Law "On the Elections to the 5th Saeima" had been expressed in the Supreme Council. The Constitutional Court should not review the fact what deputies voted against those restrictions and why. Essential is only the fact that the particular restrictions were not included in the Law. The wording of the Law "On the Elections of the City Dome, District Dome and Rural Councils", which was effective during the 1994 municipal elections, also did not contain analogous restrictions. Many persons, who in compliance with Items 6 of the disputable Articles are denied the passive election rights at the present moment, were engaged in the activities of the 5th Saeima and the Domes (Councils), elected in 1994, without causing threat to the state and public security. There are no references in the Judgment about circumstances, which have changed in such a way that the above persons, whose activity in the 5th Saeima or Dome (Councils) of municipalities did not threaten the state security, would cause danger if they were the Saeima or Dome deputies.

Content of the legitimate aim "public security" is extensive and includes also the territorial integrity of Latvia, which is mentioned in the Judgment as one of the objectives of the restrictions. "Public security" – that means ensurance of the interests

of the society. In a democratic state this notion means protection of life, liberty, health, honour and possessions of a person.

The text of the Judgment does not state the means and ways of the potential threat to the public security. At the Court session the Saeima representative named just the public security (interests of national security and territorial integrity of Latvia) as the main legitimate aim of determining the restrictions, incorporated in the disputable norms. However, he did not explain the content of it. It is not enough to name the legitimate aim without explaining how and by what means the persons, mentioned in the disputable norms, are able to threaten the public interests (life, liberty, health, honour and possessions).

Necessity to protect the democratic state system from "persons, who are ethically not qualified to become the representatives of a democratic state on the political or administrative level" has been named as the legitimate aim. The Saeima representative substantiated the objective by making references to two cases reviewed at the European Court of Human Rights. His reference is groundless as both cases had been connected with restrictions of rights of civil service officials – the teacher and the policeman (*see Decisions of the European Court of Human Rights in cases Vogt v. Germany, 1995 and Rekvenyi v. Hungary, 1999*). Restrictions with regard to officials – i.e. persons, who are appointed and not elected – established by the legislator of a democratic state may be more extensive than those, referring to persons, elected in direct elections.

Groundlessly referring to the publication by N.Horn "Introduction into the Legal Science and Philosophy of Rights", it is stated in the Judgment that "rights should be ethical". The Chapter of the above publication, to which reference has been made, discusses the role of religion and its problems in the society. Thus its ideas should not be attributed to restrictions of rights because of ethical aims.

Very often standards of morals are much broader than the ones determined by norms. "With the help of determined norms, the rights may implement only a **limited part of the norms of morality**. And in the name of **freedom** of the person, they leave quite a great part of the norms of morality unregulated." (*see Horn N. Introduction into the Legal Science and the Philosophy of Rights// The Law and the Rights, 2000, Volume 2, No.2, page 47*). Agreeing that the state and the society cannot exist without universally recognised norms of ethics (morality); it should be stressed that the norms may not be used to deprive the persons, mentioned in the disputable norms, from the passive election rights.

It is difficult to incorporate new social and ethical norms into the juridical normative form. If the normative protection is exaggerated, it may become undemocratic. As concerns members of elected institutions, the voter should make a decision on whether the candidate meets the ethical requirements. Certainly, the voters should have enough information on activities of the candidate in the organisations, mentioned in the disputable norms. Besides, the Latvian election system ensures the possibility of the voters to express their individual attitude to every candidate of the list they

are voting for. Thus, the voters themselves may decide whether the candidate meets their ethical requirements.

9. In the Western democracy the notion "necessity in the democratic society" establishes balance between the interests of an individual and the society. In a democratic society restrictions are necessary if they are socially needed and proportionate.

The viewpoint, expressed in the Judgment, that there is no reason to doubt the proportionality of the applied measure and the aim, has not been proved. It is not in conformity with the approach of a law – based state to issues on restrictions of human rights. Both, the legislator and the Constitutional Court had to evaluate if proportionality had been observed and whether the restrictions were socially necessary in the democratic society. Besides it had to be proved that restrictions to the criteria were in compliance also at the moment of declaring the Judgment – that is ten years after the Declaration "On the Renewal of the Independence of the Republic of Latvia" was adopted.

The restrictions are proportionate only if they not only serve in achieving the aim but also are necessary to achieve it. Benefit, gained by the society, when determining the restrictions to human rights, should be greater than loss inflicted to interests of an individual. In the Judgment it is not taken into consideration that the passive election rights to the persons, mentioned in the disputable norms, have been restricted so far that in fact the above persons do not enjoy the right at all.

Restrictions of the fundamental rights are proportionate only then if there are no other means, which are as effective, but – when

choosing – the fundamental rights are much less limited (*see Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, Berlin, 1995, S.155*). To achieve the benefit the society could gain from the restrictions included in the disputable norms, the legislator had the possibility of using other "softer" forms, e.g. to apply the restrictions of the passive election rights only to those persons who in the established time had not declared their membership to the organisations, mentioned in the disputable norms. Thus, the restrictions, incorporated in the disputable norms are not in compliance with the principle of proportionality.

In a democratic society the restrictions of the human rights are socially necessary only if without the restrictions the public interests on the whole could be violated. If the voters are informed about the connection of the deputy candidates with the organisations, mentioned in the disputable norms, the interests of the society are not violated, as, on the one hand, the persons, mentioned in the disputable norms have the right of running for the Saeima and local authority Dome (Council), but, on the other hand, the voter has the right to choose whether to trust the above persons. The final choice is in the hands of the voter. In a democratic state any voter should be trusted to choose and evaluate the candidates.

The Judgment does not prove that there exists a necessity to determine restrictions of the passive election rights to the persons, mentioned in the disputable norms. To speak of the necessity of determining human rights restrictions, suspicions, that the person might endanger the public security, should be substantiated with facts.

Thus, it is not proved in the Judgment that the restrictions of human rights, established in the disputable norms are necessary in a democratic society.

Taking into consideration the above, we, the justices of the Constitutional Court, A.Endziņš, J.Jelāgins and A.Ušacka disagree with the viewpoint, expressed in the Judgment, that Items 5 and 6 of Article 5 of the Saeima Election Law and Items 5 and 6 of Article 9 of the City Dome, Region Dome and Rural Council Election Law comply with Articles 89 and 101 of the Satversme, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3 of the First protocol of this Convention as well as Article 25 of the International Covenant on Civil and Political Rights.

Riga, September 4, 2000.

Justice of the Constitutional Court	A.Endziņš
Justice of the Constitutional Court	J.Jelāgins
Justice of the Constitutional Court	A.Ušacka