THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

JUDGEMENT
ON BEHALF OF THE REPUBLIC OF LATVIA
in Case No. 2012-16-01
10 May 2013, Riga

The Constitutional Court of the Republic of Latvia composed of the Chairperson of the court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinis and Sanita Osipova,

with Elīna Kursiša as the Secretary of the Court Hearing,

with the participation of the Applicant – Jānis Neimanis – and

the authorised representative of the institution, which has adopted the contested act – the Saeima of the Republic of Latvia – the Head of Legal Bureau Gunārs Kusiņš,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 1 of Section 16, Para 11 of Section 17 (1), as well as Section 19^2 of the Constitutional Court Law,

on 3 and 10 April 2013 at an open court hearing examined the case

"On Compliance of Section 86 (3) of the Law "On Judicial Power" with Article 102 of the Satversme of the Republic of Latvia."

The Facts

1. On 15 December 1992 the Supreme Council of the Republic of Latvia adopted the law "On Judicial Power". Section 86 (3) of this law provides: "The office of a judge may not be combined with membership in a party or other political organisation" (hereinafter – the contested norm).

The contested norm has not been amended since it came into force.

2. The applicant – **Jānis Neimanis** (hereinafter – the Applicant) **–** holds that the contested norm is incompatible with Section 102 of the Satversme.

2.1. With the decision of 13 December 2007 the Saeima appointed the Applicant to the office of the judge at the Department of Administrative Cases of the Supreme Court Senate. In the course of time the Applicant understood that it was important that his political views about processes in society were appropriately voiced and represented. Therefore he would like to take membership in a political party.

The contested norm restricts his fundamental right, set out in Article 102 of the Satversme, to join a political party. This has created infringement to the Applicant already as of the moment when he decided to join a political party or participate in establishing it. However, the Applicant notes that it is impossible to determine the moment, when the legal consequences of the contested norm set it. The Applicant emphasizes that he has no possibility to use general judicial remedies to protect his fundamental rights defined by the Satversme.

2.2. The purpose of the contested norm had been to prevent the influence of the communist party upon the judicial power, to ensure that the judge is not linked to the politics of this party. Currently this restriction is no longer justified. Every person, the judge as well, is politically active. For the political parties to be recognised in society and to be strong, there are no grounds to prohibit a group of society to express their political views and take membership in political parties.

2.3. The Applicant notes that the contested norm has the legitimate aim to ensure the independence of judge, i.e., judge's neutrality and objectivity. However, the contested norm places disproportional restrictions upon the Applicant's fundamental right set out in Article 102 of the Satversme. The principle of the independence of judges, set out in Article 83 of the Satversme, as well as the institutions for recusal or removal of a judge ensure that the legitimate aim of the contested norm is reached. Thus, the restriction set out by the contested norm is not necessary.

The contested norm systemically colludes with the provisions of Section 10 of The City Council and Municipality Council Election Law and Section 6 (4) of the Saeima Election Law. The Applicant holds that a judge should be a member of the political party in order to be on the candidates' list of the respective political party.

At the court hearing the Applicant noted additional considerations about the moment when his fundamental rights were infringed. At the time of assuming the judge's office, he could not forecast his future clearly. Thus, the moment, when the person notes that he has decided to join a political party should be considered the moment of infringement. The Applicant had taken this decision upon submitting the constitutional complaint to the Constitutional Court. The Applicant noted that in the case if the contested norm were applied to him, there would be not doubts about the infringement of fundamental rights. However, in such a case he would have violated the prohibition laid down by the contested norm. Such a requirement cannot be put forward, as that would urge him to act unlawfully.

The Applicant also noted that the judge's work and duty of neutrality is the most important thing for a judge. Thus, taking membership in a political party would not hinder him to hear cases objectively, examining the facts of each particular case. The Applicant holds that a judge should be allowed to become a member of a political party, however, the legislator could restrict a judges possibilities to exercise various rights of a party member.

3. The institution, which adopted the contested act, **– the Saeima** – does not

uphold the Applicant's opinion and holds that the contested norm complies with Article 102 of the Satversme. Therefore the Saeima requests assessing whether it is worthwhile to continue the judicial proceedings in the case. Doubts exist, whether the Applicant has abided by the term for submitting a constitutional complaint to the Constitutional Court defined by law.

3.1. The restriction to the right of association set out in the contested norm was defined by the Plenary Meeting of the Supreme Court in 1991, and later it was included in the law. Not only the requirements of legal acts, but also the code of professional ethics is binding upon a judge. The contested norm, essentially, is the judge's code of professional ethics, which the legislator has included into the law. Thus, amending or revoking of the contested norm *per se* would not grant the Applicant the right to join a political party.

The contested norm aims to ensure the independence of a judge, i.e., a judge's neutrality and objectivity, as well as to prevent possible politicization of the judges' corps in the future. The contested norm was adopted to safeguard the democratic order of the State. The prohibition that it contains applies not only to judges, but also to candidates for an office of a judge.

The Saeima does not uphold the Applicant's **statement** that the contested norm was adopted to prevent the influence of the communist party upon the judicial power, because at the time when the contested norm was adopted this party was no longer active. Moreover, the adoption of the contested norm falls within the discretion of the State, envisaged by the second sentence of Article 11 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3.2. The Saeima holds that the compliance of the contested norm with Article 102 of the Satversme should be examined jointly with Article 101, since taking membership in a political party is not an end in itself. A person's involvement in a political party is only one of the ways for a citizen to participate in the activities of the State and local governments, as well as to hold positions in the civil service.

The Applicant performs the duties of a judge at the cassation instance court,

which is of special importance. Thus, he has sufficient possibilities for giving his law policy contribution to strengthening the democratic order of the State. The office of the judge allows ample opportunities for dealing with state and local government matters. The contested norm does not prohibit the Applicant to run for other offices, in which he would see the possibility of more extensive use of his professional knowledge, for example, to run for the Saeima elections, without prior resignation from the judge's office.

3.3. The Saeima notes that the recusal and removal of a judge are not appropriate means for reaching the legitimate aim of the contested norm. For example, it is not possible to apply for the removal of a judge in all proceedings.

The members list of a political party is not a publicly accessible information, and the person cannot be imposed the duty to reveal his or her political affiliation publicly. The suspicion about a judge's membership in a political party might create negative attitude towards the judge, as well as the impression of politicized judicial power. Thus, the only effective means, which prevents any doubt about politicization of judicial power and the impact of particular political parties upon the judges' decisions, is the clause of political neutrality, i.e., a total ban on judges' membership in parties and political organisations.

During the court hearing **the representative of the Saeima Gunārs Kusiņš** emphasized in addition the importance of public trust in the judicial power. Direct membership in political parties might undermine this trust. The representative of the Saeima, referring to the findings of the European Court of Human Rights (hereinafter also – ECHR), noted the importance of ensuring justice and objectivity in the operations of court, which should be obvious, so that the society would not develop reasonable doubts about the judges' ability to administer fair trial.

4. The summoned person – **the Ministry of Justice** – holds that the contested norm complies with Article 102 of the Satversme.

4.1. The contested norm has the legitimate aim to ensure the independence

of the judicial power and the persons' right to defend their rights and lawful interests at a fair court. The Ministry of Justice holds that the contested norm ensures that its legitimate purpose is reached effectively. The legitimate aim cannot be reached by means less restrictive to a person's fundamental rights. The Applicant's opinion that the aim of the contested norm had been to prevent the influence of the communist party upon judicial power, is ungrounded. The contested norm is not only a norm of law, but also of ethics, therefore its revoking would not allow a judge to take membership in political parties.

4.2. The Ministry of Justice notes that a ruling must be made only on the basis of the facts and legal circumstances of the case. However, a political party may demand from its members loyalty to the aims of the party. A judge, expressing support to the aims of a concrete political party, might cause doubts in the parties to the case concerning his objectivity.

If a judge were a member of a political party, the independence of the judicial power could not be ensured, but it is a mandatory pre-conditions for exercising the right to fair court. Moreover, the judicial power has been entrusted with the control over the activities of political parties.

The Ministry of Justice holds that there should be a distinction between active political actions and personal political views and assessment. Namely, there should be a borderline between a judge as a socially active person, on the one hand, and a judge as a representative of the judicial power, on the other hand. Thus, for example, if the president of the court were a member of a political party, the public might form an impression that the court supports the political stance of the respective political party. Thus, the opinion would take root in society that the judicial power cannot be politically independent.

4.3. Recusal and removal are procedural tools, to be used within the framework of concrete cases, and their objective is not to strengthen the certainty in public about the independence of the judicial power. If a judge could be affiliated with a political party, the possibility to apply for the removal would be hindered, since the parties to the case would not always know to which political party this judge belongs. Moreover, the revoking of the prohibition included in the

contested norm would influence the procedure of case distribution in courts, sine it would require taking into consideration the possibility that an application for the removal of a judge might be submitted or that the judge might recuse himself in connection with affiliation to a concrete political party.

4.4. It is not required a candidate to be a member of a political party in order to run for the Saeima or city council or regional council elections. However, a judge, who is a candidate in elections, is not allowed to participate in active political campaigning.

A judge of a cassation instance court is not prohibited from expressing his stance in the field of law policy. He can participate in taking court rulings that are significant in law policy. The law policy position can be expressed, for example, by submitting an application to the Constitutional Court, submitting a request for a preliminary ruling to the Court of European Union regarding an interpretation of EU legal enactments, as well as by deciding on issues in connection with the decision adopted by the Central Election Committee to refuse registration of a draft law or draft amendments to the Satversme.

4.5. The legal advisor of the Ministry of Justice Court System Policy Division Uldis Dreimanis noted during the court hearing that in 2002 the draft law "Law on Judicial Power" was elaborated under the guidance of the Minister for Justice Ingrīda Labucka. This draft law, inter alia, envisaged that the office of a judge was incompatible with membership in parties or other political organisations. The international experts from the Venice Commission, the United Nations Development Program and the World Bank, who assessed this draft law, did not object to this restriction.

The representative of the Ministry of Justice also emphasized that the member lists of political parties are not publicly accessible information. Thus, it could be impossible for the parties to a case to find out the judge's affiliation with a concrete political party.

5. The summoned person – **the Supreme Court of the Republic of Latvia** – notes that the contested norm complies with Article 102 of the Satversme.

5.1. The Plenary Meeting of the Supreme Court of the Latvian SSR on 14 February 1990 adopted decision No.1. "On the compatibility of the principle of judge's independence with membership in political parties or public political organisations" and decided to request the Supreme Council of Latvian SSR to supplement Section 11 of the law "On the Judicial System of Latvian SSR" with a second part, which would include the requirement on the incompatibility of a judge's office with membership in political parties or public political organisations. This applied not only to the communist party, but also to any other party or political organisation.

5.2. The Code of Ethics of Latvian Judge was adopted at the Conference of Judges of the Republic of Latvia on 20 April 1995. Its Canon No. 5 stipulates that the judge or a candidate for a judge's office refrains from all political activities.

The prohibition included in the contested norm is still necessary and relevant, since its aim is to ensure that a judge, when performing his duties in office, would be independent and that the judge's political views would not influence the outcomes of performing his duties. This prohibition fosters public trust in the judicial power and is compatible with the values of democratic society.

5.3. The Chief Justice of the Supreme Court Ivars Bičkovičs noted during the court hearing that the Applicant in his constitutional complaint expresses his personal opinion and this should not be linked with the position of other judges. I. Bičkovičs stressed that he had no knowledge of other judges wishing to take membership in political parties.

The decision of 11 March 1991 by the Plenary Meeting of the Supreme Court "On the Independence of Courts of the Republic of Latvia" contains a number of principles, inter alia, the principle of the independence of judicial power. However, preventing the influence of the communist party upon the judicial power had not been the sole purpose for adopting this law.

In 2002, when the draft law "Law on Judicial Power" was elaborated, no one doubted the need of the prohibition included in the contested norm. At the

court hearing I.Bičkovičs did not deny that the legislator might reassess the necessity of the contested norm occasionally. However, at present judges support the prohibition set out by the contested norm.

6. The summoned person – **the Council of Justice** – supports the prohibition set out by the contested norm to combine the office of a judge with membership in parties and other political organisations.

7. The summoned person – **the Latvian Society of Judges,** which at the court hearing was represented by its **president Iveta Andžāne,** – notes tat the contested norm complies with Article 102 of the Satversme.

7.1. The aim of the contested norm is to ensure the independence of judges, neutrality in appointing judges to office and increasing public trust in judicial power.

Even though the contested norm is not the only means for reaching the aim, recusal and removal of a judge alone are not sufficiently effective means. There might be cases, when a removal has been requested or the judge must recuse himself from hearing the case, so that the society as a reasonable observer would trust the court. The aforementioned procedural measures operate only within the framework of concrete cases and are accessible only to the parties involved in the case. Thus, the prohibition included in the contested norm is proportional.

7.2. All parties have the right to include in their list of candidates also persons without party affiliation, including a judge. Thus, a judge is not prohibited to run for the office of a deputy, however, if he is elected, he has to lose the judge's office.

A judge can temporarily become involved in the work of public administration in connection with the system of courts or law policy, for example, at another court, the Ministry of Justice, Court Administration or an international organisation.

The office of a judge at cassation instance court does not give the respective person the possibility to express his law policy position while performing duties of

the office. The judge may do it only with the mediation of the Latvian Society of Judges, the Latvian Society of Administrative Judges or the Council of Justice.

8. The summoned person **- the Judges' Ethics Committee**, represented by it **deputy chairperson Dzintra Balta,** was heard at the court hearing.

During the court hearing the representative of the Judge's Ethics Committee noted that the prohibition set out by the contested norm is proportional and complies with Article 102 of the Satversme.

The aim of the prohibition defined by the contested norm is to strengthen the public trust in judicial power. As the political parties have rather low prestige, the involvement of judges in them could have a negative impact upon the public trust in judicial power. Therefore, under the present conditions this prohibition should be retained.

A legal regulation, which alongside the possibility of recusal and removal of judge also prohibits taking membership in political parties, ensures greater public trust in judicial power. In the absence of the contested norm the two aforementioned institutions of law could not ensure sufficient public trust in judicial power.

The representative of the Judges' Ethics Committee also expressed the opinion that the Latvian Judges' Code of Ethics might set out even more significant restrictions than the ones envisaged by the law "On Judicial Power".

9. The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – notes that the contested norm complies with Article 102 of the Satversme.

9.1. The international human rights documents allow restrictions to judges, civil servants and other officials regarding taking membership in political parties and associations thereof, likewise, these are recognised in the ECHR judicature. The states have a rather broad discretion in setting restrictions upon the political activities of particular groups of officials.

The legitimate aim of the contested norm is to ensure not only the

independence of a judge, but also to safeguard the interests of society, i.e., the right to fair, independent and objective court. The aim of the prohibition included in the contested norm was not to prevent the influence of the communist party, as at the time, when this norm was adopted, it was already banned.

The Ombudsman holds that only total freedom from external influence can ensure absolute independence of the court. Society should not feel anxiety about the objectivity of court; therefore the authority of the judicial power should be strengthened. The Ombudsman notes that currently judges' involvement in politics could diminish the public trust in the court system.

9.2. A measure, which clearly prohibits judges to take membership in political parties, is legally more accurate and more economic procedurally. In the absence of the prohibition included in the contested norm, there would be no certainty that the judge would be able to adjudicate the case without the influence of a political party.

The Ombudsman holds that the judge can be politically active even without joining a political party. A judge, for example, can use his active and passive voting rights. According to the Latvian Judges' Code of Ethics, a judge may retain his office during the pre-election campaign, while running for the Saeima or local government elections. Moreover, a judge of the Supreme Court can give law policy contribution to the strengthening of democratic state, enjoying broad discretion in the interpretation of the legal norms.

The advisor to the Ombudsman Artūrs Kučs noted during the court hearing that the practice of European democratic countries as regards a judge's possibility to take membership in a political party, is not uniform. The legal regulation must foster public trust in the judicial power. The Ombudsman's representative, referring to the Bangalore Principles of the United Nations Organisation (hereinafter – the UN) Economic and Social Council (hereinafter – the Bangalore principles) emphasized that membership in political parties would not ensure perception of judges' independence and objectivity in society.

10. The summoned person – **Professor of Turība University *Dr.***

iur. **Aivars Endziņš** – notes that the aim of the contested norm is to ensure the independence of courts and judges from the influence of political organisations, which could be linked with party discipline or the implementation of the political program. The aim of adopting the contested norm had not been to prevent the possible influence of the communist party upon the judicial power. The contested norm was adopted to prevent the new political parties from influencing the work of courts.

The laws on the structure of courts and even constitutions of many countries contain the prohibition to judges to take membership in political parties. It is admissible that proportional restrictions are set for the officials, in the service of the State, also judges with regard to uniting in associations, political parties and other public organisations.

A.Endziņž holds that the contested norm ensures politically neutral and nonpartisan judicial power. The contested norm fosters the implementation of the principle of judges' independence and is proportional. A judge may express his political and civic position by voting at the elections of the Saeima, the European Parliament and the local governments, as well as by participating in referendums.

A.Endziņš maintained this opinion also during the court hearing, in addition to that emphasizing that the judge is not prohibited to run for elections. He noted that a person must choose – to be a judge or a member of a political party. A. Endziņs admitted that perhaps the prohibition included in the contested norm might be revoked in the future, however, currently it is justified.

11. The summoned person – **sworn attorney Gvido Zemrībo** – notes that the contested norm complies with Article 102 of the Satversme, since the restriction to rights it sets out is legitimate, proportional, necessary in a democratic society in order to safeguard the rights of other persons, the democratic order of the state and public security.

11.1. The aim of the contested norm is to ensure that the judicial power is unbiased and adjudicates without any external pressure. Members of political parties and organisations are subject to party discipline, statutes and programmes.

Thus, the leaders of the party have the possibility to influence party members. If a judge were to take this office and at the same time belong to a political party, a conflict of interests could arise.

The contested norm was adopted to prevent politicization of the judges' corps. Thus, the Applicant's statement that the aim of the contested norm had been to prevent the influence of the communist party upon the judicial power is ungrounded.

11.2. G. Zemrībo holds that the contested norm is sufficiently effective. Article 83 of the Satversme is a legal norm of general nature, containing a principle with broad content. A number of other legal norms also ensure the realisation of the principle of the independence of courts, which form a set of legal norms. If any of these norms were to be revoked, the principle of the independence of courts, included in the Satversme, would no longer function as effectively.

Recusal and removal of a judge are not adequate means for reaching the legitimate aim, as these regulate other kinds of situations. The procedural laws do not envisage the obligation of a judge to recuse himself from hearing a case or the rights to the parties to case to apply for removal of a judge because of his membership in a political party. The institution of recusal is one of the weakest and not always ensures objective hearing of the case.

11.3. G. Zemrībo notes that prohibition to take membership in political parties is set not only to the judges of general jurisdiction courts, but is included also in the Constitutional Court Law, Law on Prosecutor's Office, Law on the Ombudsman, Law on the State Audit, Law on the Office for Preventing and Combatting Corruption, the law "On Police" and Law on Military Service.

G. Zemrībo emphasizes that a judge may openly reveal his political position. However, a judge, when expressing his opinion publicly, should avoid dealing with issues, which he might have to asses within the framework of adjudicating cases.

Also during the court hearing G.Zemrībo expressed his conviction that currently a judge should not be allowed to become a party member. A person, upon assuming the obligations of a judge's office, must be aware that these are

connected not only with rights, but also with certain restrictions.

12. The summoned person – **sworn attorney Lauris Liepa** – notes that the contested norm complies with Article 102 of the Satversme.

12.1. The contested norm has three aims:

1) to ensure the rights set out by the first sentence of Article 92 of the Satversme, since the judge' neutrality, inter alia, regarding his political views, is an essential pre-conditions for implementing this right. If a judge were a member of a political party, he would be perceived as a person, who is linked to the position adopted by the political party and interested in taking decisions compatible with it;

2) to ensure the principle of the division of state power within a modern judicial state;

3) to protect the judge against politicizing the procedure for appointing the judge to an office and dismissal from it. In Latvia the procedure for appointing judges to office is influenced by the representatives of political parties – the Minister for Justice and the members of the Saeima. Hence, a judge's involvement in a political party might influence the choice of the decision makers and to dispose them in favour of or against appointing the representative of a definite political party to the judge's office.

12.2. L. Liepa holds that Article 83 of the Satversme alone would not prevent the negative consequences that would occur if the contested norm were revoked. The parties to the judicial proceedings would not be able to assess the degree of judge's neutrality and objectivity.

The restriction of a judge's rights laid down by the contested norm affects active and direct participation in a political party, but does not restrict the judge's freedom of opinion and active voting rights.

A judge's participation in dealing with issues important for society is not totally prohibited, but only subordinated to a more important public interest, i.e., the judge's obligation to administer fair justice. L.Liepa is of the opinion that one of the reasons for adopting the contested norm had been the wish to separate the functioning of court system from politics.

At the court hearing L.Liepa noted that a political party or other political organisation unites individuals, who share similar political views, for reaching concrete political aims. If a judge were a member of a party, but would not abide by the position declared by the party, he could be expelled from the party or imposed disciplinary sanctions. The contested norm, as to its nature, is primarily ethical. The judge's social status and the obligations that he has assumed impose a special burden upon him, inter alia, the prohibition to take membership in a political party. However, L.Liepa holds that this prohibition, binding to judges, is proportional.

13. The summoned person – **professor, head of the Department of Political Science of the Faculty of Social Sciences at the University of Latvia, Jānis Ikstens** – notes that the requirements included in the contested norm do not ensure a judge's independence and objectivity in full, however, facilitate public acceptance of a judge's decision and the authority of court.

13.1. The dividing line between a political party and the other type of politically motivated group – an interest group – is the democratic fight for power and efforts to achieve places for their representatives in elected institutions.

In view of the judge's role in adjudicating legal disputes, it is important that the judges perform their obligations as objectively as possible. In Latvia society has low trust in political parties and their activities are criticized. To strengthen judges' independence and objectivity, it would not be useful to allow judges be members of political parties. The formal non-partisanship of judges should be seen as one of the factors promoting the acceptance of court rulings by society and abiding by them. The fact that the judges may not take membership in political parties intensifies the conviction in society that their rulings are not based upon party considerations. J. Ikstens holds that in Latvia the judges of administrative courts are at a greater risk of having to deal with political issues, because they have to decide upon acceptability of politically motivated events.

Public support is one of the corner stones for the functioning of courts. Considering the particularities of party activities and the requirements set for their

members, it should be concluded that membership in a party could threaten judges' independence and public support to courts as institutions. Thus, the restriction included in the contested norm should be considered justifiable.

13.2. Recusal and removal of a judge are subjective mechanisms, which cannot ensure that the aim of the contested norm is effectively reached. J.Ikstens indicates that the registers of party members are not public, thus, the parties to judicial proceedings could not know, in which political party the judge is taking membership in.

The restriction laid down by the contested norm does not prohibit to the judges other kinds of political expression, for example, voting in the elections of the Saeima, the European Parliament, local governments, the right to run for election, to participate in national referendums and proposing legislative initiatives.

J. Ikstens expressed the aforementioned views also at the court hearing, in addition emphasizing that judges' membership in political parties might threaten the principle of the independence of courts. If a judge were allowed to take membership in a party, then the aims and the decisions of the party would be binding to him. The basic aims of parties is fighting for power, however, they also have a number of other functions, for example, to educate society, and also these functions are closely connected with the aforementioned aim. J. Ikstens did not exclude the possibility that in the future this kind of restriction might become redundant.

14. The summoned person – **Jens-Christian Pastille, attorney of a European Union member state (Germany), practising in Latvia** – holds that currently the democratic society of Latvia has no valid social necessity to prohibit judges to exercise in their out-of-court activity the freedom of association, guaranteed with Article 102 of the Satversme and become members of political parties.

14.1. The contested norm has two aims: 1) to protect the interest of every person that fair court is ensured by independent and trusted lawyers (the aspect of

judges' objectivity; 2) to strengthen the perception of every person that court is fair (the aspect of the independence of judicial power). The contested norm ensures effective reaching of these aims. It creates the perception of the fairness of court, however, both aims could be reached with more proportional measures. There's no need of total prohibition to judges to unite in political parties with other persons. The prohibition included in the contested norm could be replaced with restrictions to judges' activities.

Even though a judge may express his political stance without becoming a member of a political party, however, he could exercise the rights envisaged in the Law on Political Parties only by taking membership in a political party.

14.2. The regulation of Article 83 of the Satversme, as well as recusal and removal of a judge are not the only legal instruments, which can be used to reach the aims of the contested norm. The requirement of the independence and objectivity of judicial power has been enshrined also in the Law on Judges' Disciplinary Liability and the Judges' Code of Ethics.

J. Pastille notes that the contested norm was adopted to prevent not only the impact of the communist party upon the judicial power, but also that of other parties. The main aim had been to establish a politically neutral judicial power, independent from political parties, in the absence of sufficient legal regulation and the necessary institutions.

J. Pastille expressed this position also during the court hearing and noted that the prohibition set for the judges to take membership in political parties does not guarantee objectivity and independence in the administration of justice. This prohibition, on the one hand, does not exclude the cases, when a judge, who is not impartial, secretly adjudicates in compliance with the aims of a party, but, on the other hand, robs an honest judge of the possibilities to become involved in the political life of society. J. Pastille emphasizes: the more abstract the aim of the restriction, the more convincingly this restriction should bear the test of proportionality.

In the concrete case the absolute restriction to the fundamental rights is justified with the hope that this would create the impression in society about the

independence if judicial power. J. Pastille holds that measures, which would make the judge observe neutrality in his public declarations, would not allow to participate in active pre-election fights or run for political offices, which, nevertheless, would not bar him from becoming a member of the political party, would be more lenient.

The Findings

15. The Saeima holds that the judicial proceedings in the case should be terminated. The Applicant has not indicated the moment when the infringement to his fundamental rights set out in Article 102 of the Satversme occurred and has not submitted evidence proving the existence of such infringement. Thus, there are doubts whether the Applicant has abided by the terms for submitting a constitutional complaint as stipulated by the second sentence of Section 19^2 (4) of the Constitutional Court Law, which is within six months after the moment the infringement of the fundamental rights occurred (*see Case Materials Vol.1, p.20*).

If arguments have been provided for terminating the judicial proceedings in a case, the Constitutional Court must examine them (*see Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 11*).

16. Pursuant to Para 11 of Section 17(1) of the Constitutional Court Law, a person may submit an application regarding initiation of case envisaged in Para 1 of Section 16 of the Constitutional Court Law in case his or her fundamental rights have been infringed, i.e., as a constitutional complaint. Section 19^2 (1) of the Constitutional Court Law provides that "a constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution are infringed upon by legal; norms that do not comply with the norms of a higher legal force", but Para 1 of part six requires justifying that that fundamental rights of the applicant, set out in the Satversme, have been infringed upon.

16.1. The Constitutional Court has noted that ”according to the first part and Item 1 of the sixth part of Article $19.^2$ of the Constitutional Court Law, it is substantial to establish in the case of this constitutional claim whether the basic rights of the Applicant, as established in the Satversme, have been infringed” (*Judgment of 15 April 2009 by the Constitutional Court in Case No. 2008-36-01, Para 9).*

The second sentence of Section 19^2 (4) of the Constitutional Court Law provides: if it is impossible to protect the fundamental rights enshrined in the Satversme with general remedies for protection of rights, then the constitutional complaint (application) may be submitted to the Constitutional Court within six months from the moment when the infringement of fundamental rights occurred.

Pursuant to Para 3 of Section 29 (1) of the Constitutional Court Law, judicial proceedings in a case may be terminated before the pronouncement of judgement with the decisions by the Constitutional Court, if the Constitutional Court establishes that the decision on initiating the case does not comply with the requirements of Section 20 (5) of this Law. I.e., if it is established that 1) the case is not under the jurisdiction of the Constitutional Court; 2) the applicant is not entitled to submit an application; 3) the application does not comply with the requirements specified in Sections 18 or 19-19^3 of this Law; 4) an application is submitted regarding a claim that has already been adjudicated; 5) legal substantiation or the facts included in the application has not essentially changed if compared to previous application, in respect of which the Panel has already adopted a decision.

16.2. The case under review contains no dispute whether the case falls within the jurisdiction of the Constitutional Court.

Likewise, it is not disputed that the Applicant as a natural person is entitled to submit an application to the Constitutional Court, if the requirements set for the constitutional complaint are met. However, the Saeima holds that the Applicant has failed to abide by the aforementioned requirements – has not substantiated the infringement of his fundamental rights and the moment when it occurred. Thus,

the Constitutional Court has to verify, whether the application complies with the requirements set for the constitutional complaint in the Constitutional Court Law.

16.3. In order for the Constitutional Court to examine a case with respect to a constitutional complaint, the applicant must substantiate that:

1) the contested norm applies to such rights of the Applicant, which fall within the scope of fundamental rights defined by the Satversme;

2) a direct infringement of the Applicant's fundamental rights exists;

3) the requirement with the regard to defending one's rights by general means of legal remedies has been complied with or it is impossible to prevent significant harm to the Applicant by using them, or no such remedies exist, by which the Applicant could protect his rights, or the constitutional complaint is to be recognised as *action popularis*;

4) the terms set out by the Constitutional Court law have been abided by.

The finding that "at the stage of making the judgement the legal substantiation provided by the applicant is not binding to the Constitutional Court and it must assess the totality of circumstances established during the hearing of the case" has become enshrined in the case law of the Constitutional Court (*Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.3*).

16.4. To establish, whether the judicial proceedings in the case under examination should be continued, the Constitutional Court shall assess:

1) whether the contested norm applies also to such rights of the Applicant, which are defined in Article 102 of the Satversme;

2) whether direct and concrete infringement of the Applicant's fundamental rights exists;

3) whether the legal requirement regarding the use of general means of legal remedies and the term for submitting the constitutional complaint have been met.

17. To assess, whether the contested norm pertains to the Applicant's fundamental defined in Article 102 of the Satversme, the Constitutional Court must establish the scope of these rights.

Article 102 of the Satversme provides: “Everyone has the right to form and join associations, political parties and other public organisations.”

The Constitutional Court has recognised the freedom of association as one of the most essential political right of a person (*see Judgement of 23 November 2006 by the Constitutional Court in Case No. 2006-03-0106, Para 7*). This freedom is one of the pre-conditions for a democratic state order. The freedom of association ensures to persons the possibility to protect their lawful interests through uniting in order to reach shared aims. By exercising the fundamental right defined in Article 102 of the Satversme a person gains the possibility to co-participate in democratic processes.

The Applicant request assessing the compatibility of the contested norm with the words “everyone has the right to joint political parties” of Article 102 of the Satversme. The Applicant has not noted that the contested norm prohibits judges to take membership in associations and other public organisations (*see Case Materials, Vol. 3, pp.13 – 14*).

Hence, the Constitutional Court will first of all establish the content of everyone’s right to join political parties.

18. Article 89 of the Satversme provides that the State shall recognise and protect fundamental rights in accordance with the Satversme, laws and international agreements binding upon Latvia.

18.1. The Constitutional Court has recognised that the legislator did not wish to contrast the provisions of the Satversme and the provisions of international law (*see Judgement of 30 August 2000 by the Constitutional Court in Case No. 2000-03-01, Para 5 of the Findings).* It follows from Section 89 of the Satversme that the legislator’s aim was to achieve harmony between the norms of human rights included in the Satversme and the norms of international law. The norms of international law binding upon Latvia and the practice of their application on the level of constitutional law serves as a means of interpretation, to establish the content and scope of fundamental rights and the principles of judicial state, insofar this does not lead to decreasing or restricting the fundamental rights included in

the Satversme (*see Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 5 of the Findings).*

18.2. The first part of Article 11 of the Convention defines everyone's right to peaceful assembly and freedom of association, including the right to establish trade unions and join them for the protection of one's interests. The second part of the same article of the Convention notes that no restrictions may be imposed upon exercise of these rights, except for such, which are prescribed by law and are necessary in democratic society to protect the state or public security, to prevent disorder or crime, to protect health or morality, or the rights and freedoms of others. However, Article 11 of the Convention does not prohibit setting lawful restrictions upon exercise of these rights to persons belonging to armed forces, the police or public administration.

18.3. The significance of political parties in a democratic state has been examined in the case law of the European Court of Human Rights. For instance, ECHR has recognised that parties ensure diversity of opinion, which is of special importance in a democratic society [*see Judgement of 3 February 2005 by the European Court of Human Rights in Case "Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania", Application No. 46626/99*, Para *44*]. Political parties are one among the forms of freedom of association, which is of special importance for the functioning of democracy (*see Judgement of 30January 1998 by the European Court of Human Rights in Case "United Communist Party of Turkey and others v. Turkey", Application No. 19392/92, Para 25*). The level of democracy in each concrete state is reflected in the way the national regulatory enactments regulate the freedom of association and the way this freedom is implemented in practice (*see Judgement of 10 July 1998 by the European Court of Human Rights in Case "Sidiropoulus and Others v. Greece", Application No. 26695/95, Para 40*).

Thus, everyone's right to join political parties is a significant pre-condition for the existence of a democratic state order.

19. The Satversme does not provide explanation of the concept "political parties". The definition of a political party is included in Law on Political Parties, adopted by the Saeima on 22 June 2006.

The first part of Section 2 of Law on Political Parties provides: a political party is an organisation that is established in order to perform political activities, to participate in election campaigns, to nominate candidates for deputy positions, to participate in the work of the Saeima or the local government councils (parish councils) or the European Parliament, to implement the party programme with the intermediation of deputies, as well as to be involved in the establishment of public administrative bodies.

The functions of political parties have been examined, inter alia, by advisory international documents, which have been adopted to provide support in legislation and the practical application of law to states. A political party is an association, the purpose of which is to express the citizens' political will. The task of a political party is to participate in political processes and, most significantly, to nominate its candidates for elections, so that the party were represented in political institutions and could exercise political power. The elaboration of a programme is one among the most important functions of a political party, since the programme defines the actions of the party [*see, for example, the Council of Europe Commission "Democracy Through Law" (Venice Commission) Guidelines on Political party Regulation, Para 3, and the Council of Europe Commission "Democracy Through Law" (Venice Commission") Code of Good Practice in the Field of Political Parties", Para. 10, 15, 45, 46 and 49]*.

Thus, a political party is an association of persons, the members of which hold similar views, which has a defined ideology and the main purpose of which is to gain political power, to exercise it in the state in accordance with the aims and principles included in the party's programme.

Section 29 of Law on Political Parties contains general regulation on the rights and obligations of party members, for example, to participate in decision taking, to elect the executive board and other bodies of the party, to express one's

views freely. The Statutes of the Party may envisage also other rights and obligations of its members, which do not collude with the aforementioned law.

Joining political parties is persons' participation in an organisation, the main aim of which is gaining political power.

20. The Applicant holds that the contested norm, which sets out a general prohibition to judges to take membership in parties and other political organisations, is incompatible with the rights of a person prescribed in Article 102 of the Satversme to join in political parties.

The contested norm mentions not only parties, but also "other political organisations". The legislator has provided explanation to the content of the term "political organisations" in Section 4 of the Law on the Procedure of Coming into Force of Law on Political Parties. I.e., the term "political party", which is used in Law on Political Parties, corresponds to the term "political organisation (party)" used in other regulatory enactments.

The Applicant emphasizes in the constitutional complaint his wish to be a member of a political party. At the court hearing the Applicant noted that recognises the terms "political party" and "political organisation" as identical as to their content (*see Case Materials, Vol. 3, p.8*). Thus, the case contains a dispute regarding the prohibition binding upon the Applicant to be a member of a political party.

Article 102 of the Satversme sets out that everyone has the right to join political parties. The contested norms, in their turn, *expressis verbis* prohibits the persons, who hold the office of judge, to take membership in political parties.

Hence, the Applicant's rights, which the contested norm infringes upon, fall within the scope of Article 102 of the Satversme.

21. The Constitutional Court has established that a constitutional complaint may be submitted in cases, when, firstly, the infringement of fundamental rights is direct, concrete, the contested norms affects the applicant himself and, secondly,

infringes at the moment of submitting the application, i.e., the infringement of a fundamental right already exists (*see, for example, Judgement of 18 February 2010 by the Constitutional Court in Case No. 2009-74-01, Para 12, and Decision of 11 November 2002 on terminating judicial proceedings in Case No. 2002-07-01*), or in the presence of a totality of circumstances requiring that the case is heard "now" (*see, for example, Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.4 of the Findings).*

The infringement of fundamental rights may be expected in the future or be potential, however, substantiated and credible possibility should exist that the application of the legal norm would create adverse consequences for the submitter of the constitutional complaint (*see Judgement of 18 February 2010 by the Constitutional Court in Case No. 2009-74-01, Para 12.1*).

21.1. Usually an infringement of a person's fundamental rights exists, if the legal norm, which the person considers to be incompatible with a legal norm of higher legal force, has been applied. In this case in order to identify an infringement of fundamental rights, an act of applying the legal norm causing adverse consequences for the person is needed.

The Constitutional Court Law requires the contested act (norm) to infringe upon the applicant's fundamental rights, however, it does not require that it should have happened in all cases, applying this act to the applicant (*see Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.4 of the Findings).* Thus, it is possible to identify an infringement of fundamental rights, if a totality of circumstances exists, which allows the Constitutional Court to ascertain that the infringement exists.

21.2. When Panel of the Constitutional Court examines the submitted constitutional complaint and takes the decision regarding initiation of a case, it assesses the compliance of the constitutional complaint with the requirements of the Constitutional Law Court. The Panel, inter alia, verifies, whether the submitter of the complaint has substantiated the infringement upon his fundamental rights. The Court, in its turn, during the adjudication of the case, verifies the existence of

an infringement, by taking into consideration the materials and opinions collected in the case (*see, for example, the Judgement of 8 November 2012 by the Constitutional Court on terminating judicial proceedings in Case No. 2012-04-03, Para 18*).

Hence, the Constitutional Court will establish, whether the regulation envisaged by the contested norm causes such consequences to the Applicant that should be considered infringement of the fundamental rights prescribed in Article 102 of the Satversme in the understanding of Section 19^2 of the Constitutional Court Law.

22. It is not disputed in the case that the contested norm has not been applied to the Applicant. Thus, it must be assessed, whether a totality of circumstances exists allowing the Constitutional Court to ascertain that the infringement exists.

The Constitutional Court has recognised the infringement upon the fundamental rights of the submitter of the constitutional complaint and examined the case as to its merit in a number of cases, when the contested norms had not yet been applied to the person through an act of applying the legal norm (*see, for example, Judgement of 20 May 2002 by the Constitutional Court in Case No.2002-01-03; Judgement of 29 October 2003 in Case No. 2003-05-01 and Judgement of 22 February 2010 in Case No. 2009-45-01*).

ECHR has also recognised that a law may infringe upon the applicant's rights *per se*, i.e., even a person, to whom the law is not applied, may experience its impact or consequences. In certain cases, if appropriate circumstances exist, an individual may consider himself a victim in the understanding of the Convention only because the law comprises a concrete legal norm, and he even does not have to prove that it has been directly applied to him (*see Decision of 6 March 2003 by Section I of the European Court of Human Rights in Case "Ždanoka v. Latvia, Application No. 58278/00*). The threat of an infringement, which will become manifest in the future, may serve as sufficient grounds for the person to be recognised a victim in the understanding of the Convention, however, this threat has to be real (*see. Gomien D., Harris D., Zwaak. L. Law and practice of the*

European Convention on Human Rights and the European Social Charter. Strasbourg: Council of Europe Publishing, 1996, p. 44).

Thus, in certain cases a person may submit a constitutional complaint regarding an unfavourable legal norm, which directly and immediately pertains to this person, but has not yet been applied to him.

22.1. In those cases, when the infringement of the applicant's fundamental rights is not linked with the act of applying law, it must be first of all assessed, whether the applicant himself has experienced the infringement.

The Constitutional Court has recognised that the term "infringe" has been included in the law with the aim to draw a boundary between the constitutional complaint and *action popularis*. It requires the existence of substantiated possibility that the contested norm infringes upon the applicant (*see Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.4 of the Findings).*

To differentiate between the cases, when a person submits a constitutional complaint to protect his own rights, from those cases, when a person does it for the general good, for example, to protect other persons' rights or to reach political, scientific or other aims, it is not enough to establish that a person belongs to the group, to which this legal norm applies. The person must provide credible substantiation that the adverse consequences caused by the legal norm infringe upon his fundamental rights.

The applicant had chosen the office of a judge voluntarily, in the circumstances, when the contested norm had been in force for a long period of time. Therefore the Applicant must substantiate when and why he started to perceive the prohibition included in the contested norm as an infringement.

22.2. The Applicant holds that the very existence of the contested norms causes an infringement upon his fundamental rights. At the court hearing the Applicant emphasized that he wanted to become a member of a political party. However, the Applicant's substantiation with regard to the infringement of his fundamental rights was contradictory. The constitutional complaint notes that the infringement caused by the contested norm is permanent and continuous, and that

it is impossible to identify the moment when it occurs. Simultaneously the Applicant notes that the wish to join a political party did not arise in December 2007, upon assuming the office of a judge, but later, when he drafted the application to the Constitutional Court. Finally, during the court hearing the Applicant expressed the opinion that 4 July 2012, when he submitted the constitutional complaint to the Constitutional Court, should be considered the moment when the infringement upon fundamental rights occurred (*see Case Materials, Vol. 1, pp.1 – 3, pp. 142 – 143; Vol. 3, pp. 3 – 22, 104 – 108.*).

The Saeima, in its turn, holds that the Applicant has not substantiated the moment, as of which his fundamental rights have been infringed. No evidence, based upon verifiable facts, has been submitted proving the occurrence of the infringement, while preparing the constitutional complaint and submitting it to the Constitutional Court. Thus, it is impossible to verify, whether the six-month term set by the second sentence of Section 19^2 (4) for submitting the constitutional complaint has been abided by (*see Case Materials, Vol. 1, pp. 19 – 20; Vol. 3, pp.22 – 28, pp. 112 – 115*).

22.3. If it is impossible for the person to protect his rights with general legal remedies, then the term of six months, prescribed by the second sentence of Section 19^2 (4) of the Constitutional Court Law starts at the moment of right infringement. I.e., a person may not submit a constitutional complaint to the Constitutional Court, if more than six months have passed since the moment when the infringement occurred.

The main purpose of this term is to ensure legal stability and protect the legal certainty of other persons. In time the rights acquired by other persons may become more important than the adverse consequences that the contested norm has created for the submitter of constitutional complaint. This term has also been set so that persons were to turn to the Constitutional Court only in cases of actual infringement upon their fundamental rights. The following insight had become enshrined in the case law of the Constitutional Court already before Section 19^2 (4) was supplemented with the second sentence: "[..] the longer a person tolerates the infringement upon his rights, the less he is interested in protecting his

constitutional rights" (*see Judgement of 26 November 2002 by the Constitutional Court in Case No. 2002-09-01, Para 1 of the Findings).* The legislator, by prescribing the six months term in the second sentence of Section 19^2 (4) of the Constitutional Court Law, presumed that if the contested norm (acts) caused a significant infringement upon a person's fundamental rights, he would immediately apply to the Constitutional Court. If a person has not done it within six months after the infringement occurred, then, most probably, the infringement is not significant.

Thus, establishing the moment when the infringement upon the fundamental rights occurred cannot be formal and limited to naming a certain date. If the person has not indicated objectively verifiable facts, which characterise the infringement and allow identifying the moment it occurred, then his subjective opinion is not sufficient grounds for identifying an infringement upon fundamental rights.

As noted above, the possible infringement upon the Applicant's fundamental rights did not occur as the result of applying the contested norm. However, the Applicant has not provided convincing arguments proving that a concrete event during the period from his coming into judge's office until the submission of constitutional complaint has caused an infringement upon his fundamental rights prescribed in Article 102 of the Satversme. Applying to the Constitutional Court for the protection of fundamental rights is to be recognised as a means for preventing an infringement, not as the moment when the infringement upon fundamental rights occurred.

Thus, the Applicant's opinion that the drafting and submission of the constitutional complaint to the Constitutional Court is the moment when the infringement upon his fundamental rights occurred is ungrounded.

22.4. If the legal norm, which, possibly, infringes upon a person's fundamental rights prescribed by the Satversme, has not been applied, a number of situations can occur.

Firstly, the adverse consequences following from the legal norm may exist independently from the person's actions and the person is unable to achieve application of this norm with actions contrary to the requirements of this legal

norm. I.e., the legal norm prohibits a person to achieve a certain legal status, prohibits exercising certain rights or envisages differential treatment of the person (*see Judgement of 15 June 2006 by the Constitutional Court in Case No. 2005-13-0106*). In this case the possible infringement upon the fundamental rights usually occurs already at the moment when the legal norm comes into force and the period of six months prescribed by the second sentence of Section 19^2 (4) begins at the same moment. If the person fails to abide by this term, he loses the right to apply to the Constitutional Court.

Secondly, the legal norm might envisage a prohibition or other imperative requirements, for the infringement of which the State has prescribed significant adverse consequences for the person. The person has the possibility to achieve that this norm is applied by actions contrary to the regulation prescribed by the legal norm. An act on applying the legal norm, which causes adverse consequences for the person, is issued only after such actions. Thus, adverse consequences for the person may set in in the future.

If the law envisages significant adverse consequences for the Applicant because of violating the prohibition set out in the legal norm, then under certain conditions this situation is to be recognised as a potential or future infringement of fundamental rights, to which the term of six months for submitting a constitutional complaint stipulated in the second sentence of Section19^2 (4) of the Constitutional Court Law is not applicable.

23. The Constitutional Court in its previous case law contains the finding that the infringement upon fundamental rights can be expected in the future or potential (*see Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001-06-03, Para 2.4 of the Findings, and Judgement of 20 May 2002 in Case No. 2002-01-03).*

Pursuant to the opinion expressed in legal science, in the case of an infringement to be expected in the future, it is obvious that this will occur sooner or later, but definitely. As regards the potential infringement, in its turn, only a probability or possibility can be identified, that the implementation of the contested legal norm will cause an infringement for the concrete person. This

probability is as big as the possibility that the contested norm will not have an impact upon the person's legal relations (*see: Rodiņa A. Konstitucionālās sūdzības teorija un prakse Latvijā. Rīga: Latvijas Vēstnesis, 2009, pp. 161 – 168).*

23.1. The Constitutional Court recognises that the infringement of the Applicant's fundamental rights prescribed in Article 102 of the Satversme might occur, if the contested norm, which contains a prohibition for a judge to be a member of a political party, were applied to him.

Pursuant to Para 5 of Section 1(1) of the Law on Judges' Disciplinary Liability, a judge's refusal to terminate his membership in political parties or political organisations is grounds for making a judge disciplinary liable. If the Applicant, being a judge, were to join a political party or to continue taking membership in it, he would be made disciplinary liable.

Pursuant to Para 3 of Section 7(2) of the Law on Judges' Disciplinary Liability, the Judges' Disciplinary Panel may take the decision to propose dismissal of the judge. In accordance with the provisions of the Law on Judge's Disciplinary Liability, the judge may appeal against this decision at the Disciplinary Court, but the decision of the Disciplinary Court comes into force as of the moment of its pronouncement and is not subject to appeal. If it were unfavourable for the Applicant, then the issue regarding his dismissal from the office would be forwarded to the Saeima for voting.

It was already concluded in Para 20 of this Judgement that the contested norm envisages a general and imperative prohibition, which is binding to all judges. Therefore if the Applicant were to join a political party, he would have to reckon with dismissal from the judge's office, which is the most severe type of disciplinary liability. That would mean that significant adverse consequences for the Applicant would set in.

Thus, a direct, concrete and already existing infringement upon the Applicant's fundamental rights might set in only with the application of the contested norm. The Applicant does not experience such an infringement, however, it might potentially occur in the future. Thus, a potential infringement upon the Applicant's fundamental rights is identified in this case.

23.2. The Applicant notes that he might achieve the application of the contested norm only by violating the law. Both the Applicant and the Saeima admit that the Applicant should not violate the law in order to submit a constitutional complaint (*see Case Materials, Vol.1, pp. 16 – 17, 142 – 143)*. The legal science has found that an unlawful action cannot be a legitimate criterion for meeting the pre-conditions of a constitutional complaint (*see: Rodiņa A. Konstitucionālās sūdzības teorija un prakse Latvijā. Rīga: Latvijas Vēstnesis, 2009, p. 161*). One can agree that in the case under review it were ungrounded to require from the Applicant violation of the prohibitions prescribed by the contested norm only for him to acquire the right to turn to the Constitutional Court for the protection of his fundamental rights.

At the same time the Constitutional Court notes: the prohibition or imperative requirement included in the legal norm is not sufficient grounds to consider that the infringement upon fundamental rights will potentially occur in the future and to recognise a person's right to submit a constitutional complaint. A potential infringement upon fundamental rights may be the grounds for initiating a case and examining it as to its merits only in those cases when the adverse consequences envisaged by law, which would set in for the person in case the legal norm were applied, would create significant damage to the person. The Constitutional Court or the Panel of the Constitutional Court identifies the existence of such infringement on case-by-case basis, and identifies whether grounds exist for initiating a case and examining a person's claim as to its merit.

23.3. The Panel of the Constitutional Court in its decision on initiating the case under review recognised that the Applicant has no possibilities to protect his fundamental rights with general legal remedies (*see Case Materials, Vol. 1, pp. 6 – 7*). Thus, only the Constitutional Court, examining his constitutional complaint, could prevent the infringement upon the Applicant's fundamental rights.

The claim in the case under review must be considered as a case, to which the requirement set out in the second sentence of Section 19^2 (4) of the Constitutional Court Law regarding the six month term from the moment of right

infringement, cannot be applied.

Hence, the judicial proceedings in the case must be continued.

24. Article 102 of the Satversme does not restrict the range of persons, who have the right to join in political parties, but envisages this right to everyone. The contested norm, in its turn, prescribes a general prohibition to persons, who take the position of a judge, to join political parties and other political organisations. On 13 December 2007 the Saeima appointed the Applicant to the office of a Supreme Court Judge.

Thus, the contested norm restricts the Applicant's right set out by Article 102 of the Satversme to join political parties.

25. The close link between the principle of democracy and the fundamental rights means that the State should not restrict the fundament rights, but "whenever possible, should guarantee them in the broadest scope possible, using the available methods of interpretation accordingly, so that they would ensure sufficiently wide application of the content of the norm" (*Ziemele I. Cilvēktiesību īstenošana Latvijā: tiesa un administratīvais process. Rīga: Latvijas Universitātes Cilvēktiesību institūts, 1998, p. 25*).

The legislator may impose restrictions upon the freedom of association, inter alia, upon everyone's right to join political parties. Thus the State ensures exercise of the respective fundamental rights, as well as protects other persons' rights and other constitutional values. Such restrictions have been included predominantly in the Law on Political Parties, however, its regulation is not exhaustive either. For example, the prohibition to judges to take membership in political parties and other political organisations is included in the contested norm, i.e., the law "On Judicial Power".

However, arbitrary restriction of fundamental rights is inadmissible. Article 116 of the Satversme *expressis verbis* provides that the fundamental rights enshrined in Article 102 of the Satversme may be restricted in circumstances

provided for by law in order to protects the rights of other people, the democratic structure of the State, and public safety, welfare and morals. Hence, the fundamental rights set out in Article 102 of the Satversme, inter alia, the right to join political parties, are not absolute and the State may restrict them.

Restrictions to the freedom of association is admissible, if the restriction has been: 1) provided by law: 2) is justifiable by a legitimate aim; 3) is proportional or commensurate to this aim.

26. The restriction included in the contested norm has been prescribed by law. The case contains no materials doubting that the contested norm was adopted and promulgated in due procedure.

Hence, the restriction to the fundamental rights set out in Article 102 of the Satversme has been prescribed by law.

27. Any restriction to fundamental rights must be based upon circumstances and arguments proving their necessity, i.e., the restriction is imposed because of significant interests – a legitimate aim (*see, for example, Judgement of 22 December 2005 by the Constitutional Court in Case No. 2005-19-01, Para 9*).

The Applicant holds that the contested norm has the legitimate aim to ensure the judge's independence, i.e., his neutrality and objectivity. The legislator had intended the contested norm to prevent the influence of the communist party upon the judicial power (*see Case Materials, Vol.1, p.2).*

The Saeima, in its turn, notes that the restriction included in the contested norm was defined by the judicial power. Hence, the contested norm essentially is a rule of judges' professional ethics, and its legitimate aim is to protect the democratic structure of the State (*see Case Materials, Volume1, pp. 14 – 15*).

Para 6 of 11 March 1991 Decision No.1 by the Plenary Meeting of the Supreme Court of the Republic of Latvia contains the requirement that "pursuant to law a judge may not be a member of a party or other type of political public organisation". Thus, the prohibition to take membership in parties and other

political organisations was already initially linked with the need to set a minimum of guarantees that would ensure an independent and objective court.

The prohibition prescribed by the contested norm helps to ensure the functioning of fair, independent and objective judicial power. The contested norm facilitates public trust in the judicial power, and it is essential in a democratic, judicial State.

The legitimate aim of the contested norm is to protect the democratic structure of the State and other persons' rights.

28. To assess the proportionality of the restriction upon fundamental rights it must be established, whether:

1) the chosen measures are appropriate for reaching the legitimate aim;

2) means less restrictive (mitigating) to persons' fundamental rights exist;

3) the benefit gained by society exceeds the damage inflicted upon an individual's rights and lawful interests *(see, for example, Judgement of 30 March 2011 by the Constitutional Court in Case No. 2010-60-01, Para 23*).

29. Several among the summoned persons emphasise that the State needs such a legal regulation, which not only ensures that the judicial power adjudicates cases objectively and independently, but also creates public trust in it (*see Case Materials, Vol. 1, pp. 60 – 73, pp. 80 – 108;Vol. 3 pp. 39 – 103*).

The Applicant, in his turn, as well as the summoned person J. Pastille notes that the influence of a political party upon the judicial power can manifest itself indirectly. For example, in certain cases the judge's opinion might coincide with a programme of a certain political party. Thus, it would be in public interests to know about the existence of such an opinion of the judge before the case is adjudicated in court (*see Case Materials, Vol. 3, pp. 3 – 22, 90 – 102*).

29.1. The case materials allow establishing that the proposals regarding the concept paper regarding the law of the Republic of Latvia "On Judicial Power" were collected already in 1990 (*see Case Materials, Vol. 1, p. 154),* when the Supreme Council of the Republic of Latvia had not yet adopted the decision "On

terminating the activities of some public and public political organisations", which, inter alia, envisaged terminating the activities of the communist party. The materials for drafting the draft law "On Judicial Power" and the opinion provided by the summoned person G. Zemrībo allow concluding that the contested norm was adopted to prevent politicization of courts in the future, not to prevent the impact of communist party upon the judicial power (*see Case Materials, Vol.3, pp. 67 – 75*). Thus, the contested norm was elaborated and adopted in order to create a legal regulation, which also in the future would facilitate the public trust in independent and objective judicial power.

29.2. The Constitutional Court has already recognised the principle of legality as one of the principles of democratic state. Only an independent judicial power can ensure fair outcome of judicial proceedings, which is the foundation of legality. Everyone, with regard to whom justice is administered, is interested in ensuring the independence of judges (*see Judgement of 18 January 2010 by the Constitutional Court in Case No. 2009-11-01, Para 7.2*). Likewise, the UN Economic and Social Council has noted in the Preamble to the Bangalore Principles: in order for the courts to fulfil their task to protect the constitutional order of state and legality, it is important to have competent, independent and fair judicial power (*see: Bangalore Principles of Judicial Conduct, 29 April, 2003, United Nations Commission on Human Rights resolution 2003/43, Preamble*).

The principle of propriety is one among the Bangalore principles, which applies to all actions of a judge. A judge must not only abide by this principle, but also create certainty in other persons that this principle is followed. The principle of propriety allows the judge to participate in other public institutions or government commissions, however, under the conditions that such activities are compatible with the judge's political neutrality (*see Bangalore Principles on Judicial Conduct, Value 4, 4.11*).

The ability to take an unbiased view upon the dispute reviewed in judicial proceedings is important for the judge's office. Every state exercises its discretion to set the balance between the judge's freedom to express his opinions and voice his views about issues important for society, on the one hand, and the requirement

of neutrality, on the other hand. However, even if a certain state allows a judge to take membership in a political party or to participate in debates on sensitive public issues, the judge must abstain from such political activities, which might threaten his independence or other persons' conviction about the judge's neutrality (*see Commentary on the Bangalore principles of Judicial conduct, September 2007, p. 16, 95. – 96, http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf*).

29.3. Likewise, Canon 2 and Canon 5 of the Code of Ethics of Latvian Judges contain requirements aiming to strengthen the judges' neutrality. Pursuant to the aforementioned norms of the judges code of ethics, a judge may not allow that the political relations influence his actions while administering justice, moreover, the judge or a candidate for a judge's office must abstain from political activities.

One may agree that the judges have developed their own opinions and views about the political processes taking place in society. Such situations, when a judge's personal views coincide with the ideas expressed by a political party, are possible in practice. However, such similarity of opinions may not influence the judge's ability to administer the cases in his jurisdiction objectively and independently, as well as to adopt a substantiated and fair ruling appropriate for actual facts of the case. A judge, in view of the specific features of his office and the high level of responsibility must be able to differentiate between his own political views and fair and objective adjudication of a case.

The prohibition included in the contested norm is binding to all judges of the Republic of Latvia. At the same time it protects judges from probable interference by the political parties in the administration of justice. The contested norm does not envisage a possibility that a judge might be connected with a political party. This means that a judge is not subject to the discipline of a political party and he does not have to abide by the party programme. Thus, the contested norm creates public certainty that the judge does not represented the opinion of a political party. It helps to prevent cases, when doubts regarding a judge's ability to

administer justice objectively and independently might occur.

Thus, the contested norm is appropriate for reaching the legitimate aim.

30. The Constitutional Court has recognised a number of times that it must be assessed to what extent alternative measures might be appropriate for solving the situation (*see, for example, Judgement of 8 March 2006 by the Constitutional Court in Case No. 2005-16-01, Para 15.,8 and Judgement of 13 February 2009 in Case No. 2008-34-0, Para 22*). The jurisdiction of the Constitutional Court envisages verification, whether, in restricting a person's rights, alternative measures allowing to reach the same aim, but less restrictive to the a persons fundamental rights set out in the Satversme have been have been duly evaluated.

30.1. The Application notes solutions by which, as the Applicant holds, the legislator has already ensured that the legitimate aim of the contested norm is reached. These are said to recusal and removal of a judge (*see Case Materials, Vol.1, p.3).*

ECHR has recognised that it is possible to establish the lack of judge's independence and objectivity not only in cases, when it has been proven, but also in cases when valid doubts about the judge's independence and objectivity can arise (*see, Judgement of 17 January 1970 by the European Court of Human Rights in Case "Delcourt v. Belgium", Application No. 2689/65*).

Recusal and removal of a judge allows dispersing valid and reasonable doubt about the judge's ability to adjudicate the case in an objective manner. These procedural measures are envisaged for avoiding a potential conflict of interests. Parties to the case, who have doubts concerning the judge's objectivity, may apply for the removal of a judge. The judge, in his turn, may recuse himself from adjudicating the case, if he believes that certain obstacles might prevent him from objective adjudication of the case.

The summoned person L.Liepa validly notes that if the prohibition prescribed by the contested norm did not exist, the judges, who were members of

political parties, were to recuse from adjudicating cases, in which the political parties, represented by them, have shown interest. Thus, many judges would be unable to adjudicate concrete cases or even cases belonging to concrete categories (*see Case Materials, Vol.2, p. 107)*.

30.2. The Saeima, the Ministry of Justice and the summoned person A. Endziņš emphasize that the member lists of political parties are not publicly accessible and that a person is not obliged to publicise his political affiliation (*see Case Materials Vol.1, p.18; Vol.2, pp. 90 – 95, 128 – 129*). Hence, the parties to the case would not be able to find out, the opinions of which political party the judge, who adjudicates the concrete case, represents, and they would not be able to asses the necessity to apply for removal of the judge.

The Saeima validly notes that the majority of procedural laws envisage the possibility to recuse or remove a judge. However, the application of both procedural measures is closely linked with the judge's or the court's subjective assessment. The only exception is those cases, when the law directly envisages the judge's obligation recuse himself from hearing the case. The court adopts the decision on whether the application for removal submitted by the party to the case has objective grounds and whether the judge must recuse himself from hearing the case following its internal conviction.

Thus, recusal and removal of a judge are not measures allowing reaching the legitimate aim of the contested norm with the same quality.

31. The Constitutional Court must verify whether the public benefit ensured by the contested norm exceeds the damage inflicted upon the person's rights and lawful interests.

31.1. The Constitutional Court has recognised: to obtain the necessary answer regarding the concrete issue of law, an individual norm of the Satversme must be interpreted in interconnection with other norms of the Satversme, since the Satversme as a uniform document influences the scope and content of each separate norm (*see, for example, Judgement of 27 June 2003 by the Constitutional*

Court in Case No. 2003-04-01, Para 1.1 of the Findings, and Judgement of 16 December 2005 in Case No. 2005-12-0103, Para 13).

The Saeima notes that Article 102 of the Satversme should be examined jointly with Article 101 of the Satversme, since a person's involvement in political parties is only one of the ways, in which a citizen of Latvia can participate in the activities of the State and local governments, as well as to hold a position in the civil service (*see Case Materials, Vol.1, pp. 16 – 17*).

Article 101(1) of the Satversme sets out that "every citizen of Latvia has the right, as provided for by the law, to participate in the work of the State and of local government, and to hold a position in the civil service."

The Constitutional Court has recognised that Article 101 of the Satversme envisages rights, which serve as a safeguard for the existence of a democratic order and are aimed at ensuring the legitimacy of the state order (*see Judgement of 30 August 2000 by the Constitutional Court in Case No. 2000-03-0, Para 1 of the Findings).*

The civil service includes all public offices established in the institutions of legislative, executive and judicial power (*see: Nowak M. U. N. Covenant on Civil and Political Rights: CCPR Commentary. 2nd revised ed. Kehl, Strasbourg, Arlington: N. P. Engel, 2005, p. 585 – 586*).

The legislator, by including the words "as provided for by the law" into the text of Article 101 of the Satversme, has provided that the party applying the law in each concrete case has to interpret the words "every citizen of Latvia" in interconnection with the restrictions prescribed by laws (*see Judgement of 30 August 2000 by the Constitutional Court in Case No. 2000-03-01, Para 1 of the Findings).*

31.2. The Applicant's right to hold a position in the civil service, i.e., to exercise the official duties of a judge, is closely linked with the restrictions set out in the law "On Judicial Power".

At the court hearing the Applicant admitted that upon assuming the judge's office he has been aware of the restrictions set for it, inter alia, the prohibition to take membership in parties and other political organisations (*see Case Materials,*

Vol.3, pp. 3 – 7). The summoned person G. Zemrībo noted at the court hearing that upon assuming the office of a judge a person must be aware not only of one's rights, but also the obligations and restrictions related to this office (*see Case Materials, Vol.3, pp. 72 – 75*).

Pursuant to the regulatory enactments that are in force, the Applicant has a number of possibilities to express his position with regard to significant issues in the work of the State and local governments. The Applicant, without being a member of a political party, may participate in the elections, national referendums and legislative initiatives, as well as to decide upon the laws or amendments to the Satversme adopted by the Saeima. The Applicant may run for office at the elections of the Saeima or the Council of the city or region, without losing the judge's office. The Applicant, while holding a position in civil service, has the right to submit applications to state and local government institutions.

Moreover, Section 86 (2) of the law "On Judicial Power" sets out the judges' right to join together in organisations, which protect their independence, promote their professional development and defend their rights and interests.

31.3. Even though the contested norm applies not only to the Applicant, but also to other judges, the Saeima validly notes that Applicant – a judge of cassation instance court – has the possibility to contribute to the strengthening of the democratic state order in exercising his professional duties (*see Case Materials, Vol.1, p.17).* Likewise, it has been recognised in the case law of the Constitutional Court: the cassation instance fulfils a special function, which determines the particularities of the judicial proceedings in this instance. One of the aims of the cassation instance is to promote uniform interpretation and application of legal norms throughout the state (*see Judgement of 27 June 2003 by the Constitutional Court in Case No. 2003-04-01, Para 2.1 of the Findings).*

The applicant may, as provided by the law, participate in the work of the State and local governments, and the restriction included in the contested norm, which the Applicant has tolerated for a long period of time, does not cause significant damage to his rights and lawful interests.

31.4. The summoned person J. Pastille noted at the court hearing that the

legislator should replace the prohibition set out in the contested norm with "a number of reasonable restrictive norms". For example, envisaging the possibility for a judge to make public his political affiliation, so that a party to the case could apply for a removal, providing appropriate substantiation. Various restrictions could be imposed upon a judge, a member of a political party, for example, observe neutrality in public pronouncements, prohibition to participate in active pre-election campaign or to be nominated for political offices (*see Case Materials, Vol. 3, pp. 100 – 102*).

In accordance with the regulatory enactments currently in force, the member lists of political parties are not publicly accessible. To allow the parties to a case to verify a judge's affiliation to a certain political party, a mechanism would be needed allowing them to verify it. The Saeima, however, notes, that the disclosure of such information would be considered a significant restriction upon the freedom of association (*see Case Materials, Vol.1, p. 18).*

The measures referred to by the summoned person J. Pastilles are linked with restricting the rights of a member of a political party defined by Section 29 of the Law on Political Parties and the statutes of political parties. Compared to the general prohibition prescribed by the contested norm the measures mentioned by J. Pastilles would be more favourable for the judge, wanting to become a member of a political party, but would decrease the possibilities for the society to rely upon fair, independent and objective judicial power. Moreover, in Latvia the decision on appointing and approving of judges to office is adopted by the Saeima, the members of which are representatives of the political parties. A judge's career development might be significantly influenced by the judge's affiliation to a certain political party. Considering the procedure for approving judges, the legal regulation should instil certainty in society that judges are not subject to the influence of political parties.

The Applicant does not doubt the need to facilitate the public trust in judicial power and the need to strengthen its authority (*see Case Materials, Vol.1, pp. 2. – 3, 142 – 143; Vol. 3, pp. 109 – 115*). A number of summoned persons, in their turn, recognised that judges' participation in political parties would facilitate

negative attitude towards the judicial power (*see Case Materials, Vol.3, pp. 46 – 47, 39 – 42, 51 – 52, 64 – 66, 67 – 72, 83 – 84*). One can uphold the view that judges' membership in political parties might create the perception in society that the judicial power is merging with political parties. The contested norm, however, serves to strengthen the authority of the judicial power, and society benefits from the restriction set out in the contested norm.

31.5. The Constitutional Court notes that the legislator's obligation to ensure effective protection of, respect for and ensuring of fundamental rights cannot be recognised as completely fulfilled with the adoption or entering into force of the respective legal regulation. The legislator must *ex officio* follow, to the extent possible, whether in the practical application of the law these norms indeed successfully fulfil their task, also after the legal norms have come into force. The Constitutional Court has recognised the obligation of the legislator to consider, whether the legal regulation continues to be effective, appropriate and necessary and whether it should be improved in any way (*see, for example, Judgement of 11 November 2005 by the Constitutional Court in Case No. 2005-08-01, Para 9.5, Judgement of 15 June 2006 in Case No. 2005-13-0106, Para 17.3 and 18.8, Judgement of 8 June 2007 in Case No. 2007-01-01, Para 26, and Judgement of 2 June 2008 in Case No. 2007-22-01, Para 18.3*).

Even though the contested norm complies with the principle of proportionality, in the future the legislator may assess the further necessity of the restriction set out by it in democratic society.

The benefit granted by the contested norm to the society exceeds the damage inflicted upon the Applicant's rights and lawful interests, and the contested norm is compatible with Article 102 of the Satversme.

The Substantive Part

Pursuant to Sections 30 –32 of the Constitutional Court Law the

held

to recognise Section 86 (3) of the law "On Judicial Power" compatible with Article 102 of the Satversme of the Republic of Latvia.

The Judgement is final and not subject to appeal.

The Judgement comes into force as of the day of its pronouncement.

The Presiding Judge G. Kūtris