COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF ŽDANOKA v. LATVIA

(Application no. 58278/00)

JUDGMENT

STRASBOURG

16 March 2006

In the case of Ždanoka v. Latvia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luzius Wildhaber, *President,*
Christos Rozakis,
Jean-Paul Costa,
Nicolas Bratza,
Boštjan M. Zupančič,
Loukis Loucaides,
Rıza Türmen,
Josep Casadevall,
András Baka,
Rait Maruste,
Javier Borrego Borrego,
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Ljiljana Mijović,
Dean Spielmann,
Renate Jaeger, *judges,*
Jautrite Briede, ad hoc *judge,*

and Lawrence Early, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 1 June 2005 and 15 February 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 58278/00) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms Tatjana Ždanoka ("the applicant"), on 20 January 2000.

2. The applicant was represented by Mr W. Bowring, a lawyer practising in Colchester, United Kingdom. The Latvian Government ("the Government") were represented by their Agent, Ms I. Reine, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that her disqualification from standing for election to the Latvian parliament and to municipal elections infringed her rights as guaranteed by Article 3 of Protocol No. 1 and Articles 10 and 11 of the Convention.

4. The application was assigned to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 1 November 2001 the Court changed the composition of its sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 6 March 2003, the Chamber declared the application partly admissible.

7. On 17 June 2004, following a hearing on the merits (Rule 59 § 3), a Chamber of the First Section, composed of Christos Rozakis, President, Peer Lorenzen, Giovanni Bonello, Françoise Tulkens, Egils Levits, Anatoly Kovler, Vladimiro Zagrebelsky, judges, and Søren Nielsen, Section Registrar, delivered a judgment in which it held, by five votes to two, that there had been a violation of Article 3 of Protocol No. 1 and Article 11 of the Convention, and that it was not necessary to examine separately the applicant's complaint under Article 10 of the Convention. The Chamber also decided, by five votes to two, to award compensation for pecuniary damage in the amount of 2,236.50 lati, non-pecuniary damage in the amount of 10,000 euros (EUR), and legal costs and expenses in the amount of EUR 10,000. The dissenting opinions of Judges Bonello and Levits were annexed to the judgment.

8. On 17 September 2004 the Government requested, in accordance with Article 43 of the Convention, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted this request on 10 November 2004.

9. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 June 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms I. REINE, *Agent*,
Mr E. PLAKSINS, *Counsel*;

(b) *for the applicant*
Mr W. BOWRING, *Counsel*.

The Court heard addresses by Mr Bowring and Ms Reine.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant is a Latvian national who was born in 1950 and lives in Riga. She is currently a member of the European Parliament.

A. The historical context and the background to the case

1. The Molotov-Ribbentrop Pact and the Soviet period

12. On 23 August 1939 the foreign ministers of Germany and the Union of the Soviet Socialist Republics (USSR) signed a non-aggression treaty (the Molotov-Ribbentrop Pact). The treaty included a secret additional protocol, approved on 23 August 1939 and amended on 28 September 1939, whereby Germany and the Soviet Union agreed to settle the map of their "spheres of influence" in the event of a future "territorial and political rearrangement" of the territories of the then independent countries of central and eastern Europe, including the three Baltic States of Lithuania, Latvia and Estonia. After Germany's invasion of Poland on 1 September 1939 and the subsequent start of the Second World War, the Soviet Union began exerting considerable pressure on the governments of the Baltic States with a view to taking control of those countries pursuant to the Molotov-Ribbentrop Pact and its additional protocol.

13. Following an ultimatum to allow an unlimited number of Soviet troops to be stationed in the Baltic countries, on 16-17 June 1940 the Soviet army invaded Latvia and the other two independent States. The government of Latvia was removed from office, and a new government was formed under the direction of the Communist Party of the Soviet Union ("the CPSU"), the USSR's only party. From 21 July to 3 August 1940 the Soviet Union completed the annexation of Latvia, which became part of the USSR under the name "Soviet Socialist Republic of Latvia" ("Latvian SSR").

14. The applicant was born in Riga into a Russian-speaking family. In 1971 she joined the Communist Party of Latvia ("the CPL") while studying at the University of Latvia in Riga. The CPL was in fact a regional branch of the CPSU. From 1972 to 1990 the applicant worked as a lecturer at the University of Latvia. Throughout this period she was a member of the CPL.

15. In the late 1980s there was considerable social pressure in Latvia, as in other east European countries, for the democratisation of political life. As a result of the newly introduced freedom of expression in the territory of the Soviet Union, mass political movements were formed in Latvia, as well as in the other Baltic States, condemning the annexation of the country,

asserting the need to construct a new society based, *inter alia*, on Latvian identity and values, and emphasising the need to restore State independence.

16. The first independent elections under the Soviet regime took place on Latvian territory in March 1990. The applicant was elected to the Supreme Council (*Augstākā Padome*) of the Latvian SSR as a representative for the Pļavnieki constituency in Riga. She subsequently joined the CPL's local branch. In April 1990 this branch selected her to attend the CPL's 25th Congress, where she was elected to the party's Central Committee for Supervision and Audit. According to copies of that committee's minutes, the applicant was a member of a sub-committee responsible for supervising the implementation of decisions and activities arising from the CPL programme.

17. At the same congress, a group of delegates expressed their disagreement with the CPL's general policy, which remained loyal to the Soviet Union and the CPSU. According to those delegates, the CPL was opposed to any democratisation of public life and sought to maintain the status quo of the Soviet rule. These delegates publicly announced their withdrawal from the CPL and established a new party, the "Independent Communist Party of Latvia", which immediately declared its support for Latvian independence and for a multi-party political system. The applicant did not join the dissident delegates and remained with the CPL.

2. Latvia's Declaration of Independence

18. On 4 May 1990 the Supreme Council adopted a Declaration on the Restoration of the Independence of the Republic of Latvia, which declared Latvia's incorporation into the USSR unlawful and void and restored legal force to the fundamental provisions of the Latvian Constitution (*Satversme*) of 1922. However, paragraph 5 of the Declaration introduced a transition period, aimed at a gradual restoration of genuine State sovereignty as each institutional tie with the USSR was severed. During that transition period, various provisions of the Constitution of the Latvian SSR would remain in force. A special governmental commission was given responsibility for negotiating with the Soviet Union on the basis of the Russo-Latvian Peace Treaty of 11 August 1920.

The above-mentioned Declaration was adopted by 139 out of a total of 201 Supreme Council members, with one abstention. Fifty-seven members of the *Līdztiesība* parliamentary bloc ("Equal Rights", in fact the CPL group), including the applicant, did not vote. On the same day, 4 May 1990, the Central Committee of the CPL adopted a resolution strongly criticising the Declaration and calling on the President of the Soviet Union to intervene.

19. On 7 May 1990 the Supreme Council approved the government of the independent Republic of Latvia.

3. The events of January and March 1991

20. On the evening of 12 January 1991 the Soviet army launched military operations against the neighbouring country of Lithuania, whose government had been formed in the same way as the Latvian government. Soviet troops entered the television tower of Vilnius and the headquarters of Lithuanian public television, and also tried to take the seats of the Lithuanian parliament and other authorities. Massive crowds, made up of Lithuanian citizens, came to the rescue of the institutions of the newly independent Lithuania. Thirteen Lithuanian civilians were killed and hundreds injured during the clash with the Soviet army.

21. The parties disagree as to who was responsible for the deaths during the events in Vilnius on 12-13 January 1991. According to the respondent Government, the CPSU was directly responsible for those deaths, in that it had full and effective control of the Soviet troops. The applicant contested the Government's version, stating that the Soviet army's aggression against the Lithuanian government and the Lithuanian people was not a proven fact; in this connection, she submitted a copy of a Russian newspaper article which alleged that it had been the Lithuanian independence supporters themselves who fired into the crowd with the aim of discrediting the Soviet army.

22. At the same time, an attempted coup was launched in Latvia. On 13 January 1991 the plenum of the CPL Central Committee called for the resignation of the Latvian government, the dissolution of the Supreme Council and the assumption of full powers by the Latvian Public Rescue Committee (*Vislatvijas Sabiedriskās glābšanas komiteja*), set up on the same date by several organisations including the CPL. On 15 January 1991 this committee announced that the Supreme Council and the government were stripped of their respective powers and declared that it was assuming full powers. After causing the loss of five civilian lives and injuries to thirty-four persons during armed clashes in Riga, this attempted coup failed.

23. According to the respondent Government, it was absolutely clear that the attempted coup in Latvia was launched by the CPL against the background of the Vilnius events, in the hope that Soviet troops would also invade Riga to support the pro-Soviet coup. The applicant submitted that, at the material time, a series of public demonstrations had been held in Latvia to protest against the rise in food prices introduced by the Latvian government; those demonstrations were thus the main reason for the events of January 1991. The applicant also emphasised that, in their respective statements of 13 and 15 January 1991, the plenum of the CPL Central Committee and the Latvian Public Rescue Committee had not only called for and announced the removal of the Latvian authorities, but had also stated that early elections would be held for the Supreme Council.

24. On 3 March 1991 a national plebiscite was held on Latvian territory. Electors had to reply to a question worded as follows: "Do you support a

democratic and politically independent Republic of Latvia?" According to figures supplied by the Government, 87.5% of all residents registered on the electoral roll voted, and 73.6% of them replied in the affirmative. According to the Government, this was a genuine national referendum, confirming the support of the overwhelming majority of the Latvian population for the idea of national independence. The applicant maintains that it was a simple consultative vote and contests the above-mentioned turnout, and thus the very legitimacy of the plebiscite.

4. The events of August and September 1991

25. On 19 August 1991 there was an attempted coup in Moscow. The self-proclaimed "National State of Emergency Committee" announced that Mr Gorbachev, President of the USSR, was suspended from his duties, declared itself the sole ruling authority and imposed a state of emergency "in certain regions of the USSR".

26. On the same day the Central Committee and the Riga Committee of the CPL declared their support for the National State of Emergency Committee and set up an "operational group" to provide assistance to it. According to the Government, on 20 August 1991 the CPL, the *Līdztiesība* parliamentary bloc and various other organisations signed and disseminated an appeal entitled "*Godājamie Latvijas iedzīvotāji!*" ("Honourable residents of Latvia!"), urging the population to comply with the requirements of the state of emergency and not to oppose the measures imposed by the National State of Emergency Committee in Moscow. According to the applicant, the CPL's participation in all those events has not been proved; in particular, the members of the *Līdztiesība* bloc were taking part in parliamentary debates over two consecutive days and were not even aware that such an appeal was to be issued.

27. This coup also failed. On 21 August 1991, the Latvian Supreme Council enacted a constitutional law on the status of the Republic of Latvia as a State and proclaimed the country's immediate and absolute independence. Paragraph 5 of the Declaration of 4 May 1990, concerning the transition period, was repealed.

28. By a decision of 23 August 1991, the Supreme Council declared the CPL unconstitutional. The following day, the party's activities were suspended and the Minister of Justice was instructed "to investigate the unlawful activities of the CPL and to put forward ... a motion on the possibility of authorising its continued operations". On the basis of the proposal by the Minister of Justice, the Supreme Council ordered the party's dissolution on 10 September 1991.

29. In the meantime, on 22 August 1991 the Supreme Council set up a parliamentary committee to investigate the involvement of members of the *Līdztiesība* bloc in the coup. On the basis of that committee's final report,

on 9 July 1992 the Supreme Council revoked fifteen members' right to sit in Parliament. The applicant was not one of those concerned.

5. Subsequent developments involving the applicant

30. In February 1993 the applicant became chairperson of the Movement for Social Justice and Equal Rights in Latvia (*Kustība par sociālo taisnīgumu un līdztiesību Latvijā*), which later became a political party, *Līdztiesība* ("Equal rights").

31. On 5 and 6 June 1993 parliamentary elections were held in accordance with the restored Constitution of 1922. For the first time since Latvian independence had been regained, the population elected the parliament (*Saeima*), which took over from the Supreme Council. It was at that point that the applicant's term of office as a member of parliament expired. As a result of the Latvian authorities' refusal to include her on the residents' register as a Latvian citizen, she was unable to take part in those elections, in the following parliamentary elections held in 1995, or in the municipal elections of 1994. Following an appeal by the applicant, the courts recognised her as holding Latvian nationality by right in January 1996, on the ground of her being a descendant of a person who had possessed Latvian nationality before 1940. The courts therefore instructed the electoral authorities to register the applicant and to supply her with the appropriate documents.

6. Criminal proceedings against two former leaders of the CPL

32. By a final judgment of the Supreme Court of 27 July 1995, A.R. and O.P., formerly the most senior officials of the CPL, were found guilty of attempting to overthrow the legitimate authorities of independent Latvia by violent means. The judgment accepted, *inter alia*, the following circumstances as historical facts:

(a) Having failed to obtain a majority on the Supreme Council in the democratic elections of March 1990, the CPL and the other organisations listed in section 5(6) of the Parliamentary Elections Act decided to take the unconstitutional route and set up the Latvian Public Rescue Committee, which attempted to usurp power and to dissolve the Supreme Council and the legitimate government of Latvia. Such actions were contrary not only to Article 2 of the 1922 Constitution, which stated that sovereign power was vested in the people, but also to Article 2 of the Constitution of the Latvian SSR, which conferred authority to act on behalf of the people on elected councils (*soviets*) alone.

(b) The Central Committee of the CPL provided financial support to the special unit of the Soviet police which was entirely responsible for the fatal incidents of January 1991 (see paragraphs 22-23 above); at the same time,

the Latvian Public Rescue Committee publicly expressed its support for this militarised body.

(c) During the coup of August 1991 the Central Committee of the CPL openly declared its support for the National State of Emergency Committee, set up an "operational group" with a view to providing assistance to it and published an appeal calling on the public to comply with the regime imposed by this self-proclaimed and unconstitutional body.

B. The 1997 municipal elections

33. On 25 January 1997 the Movement for Social Justice and Equal Rights in Latvia submitted to the Riga Electoral Commission a list of ten candidates for the forthcoming municipal elections of 9 March 1997. The applicant was one of those candidates. In accordance with the requirements of the Municipal Elections Act, she signed the list and attached a written statement confirming that she was not one of the persons referred to in section 9 of that Act. Under the terms of the Act, individuals who had "actively participated" (*darbojušās*) in the CPSU, the CPL and several other named organisations after 13 January 1991 were not entitled to stand for office. In a letter sent on the same day, the applicant informed the Electoral Commission that she had been a member of the CPL's Pļavnieki branch and of its Central Committee for Supervision and Audit until 10 September 1991, the date of the CPL's official dissolution. However, she argued that the restrictions mentioned above were not applicable to her, since they were contrary to Articles 2 and 25 of the International Covenant on Civil and Political Rights.

34. By a decision of 11 February 1997, the Riga Electoral Commission registered the list submitted by the applicant. At the elections of 9 March 1997 this list obtained four of the sixty seats on Riga City Council (*Rīgas Dome*). The applicant was one of those elected.

C. The 1998 parliamentary elections

35. With a view to participating in the parliamentary elections of 3 October 1998, the Movement for Social Justice and Equal Rights in Latvia formed a coalition with the Party of National Harmony (*Tautas Saskaņas partija*), the Latvian Socialist Party (*Latvijas Sociālistiskā partija*) and the Russian Party (*Krievu partija*). The four parties formed a united list entitled "Party of National Harmony". The applicant appeared on this list as a candidate for the constituencies of Riga and Vidzeme.

On 28 July 1998 the list was submitted to the Central Electoral Commission for registration. In accordance with the requirements of the Parliamentary Elections Act, the applicant signed the list and attached to it a written statement identical to the one she had submitted prior to the

municipal elections. As she had done for the 1997 elections, she likewise sent a letter to the Central Electoral Commission explaining her situation and arguing that the restrictions in question were incompatible with the International Covenant on Civil and Political Rights and with Article 3 of Protocol No. 1 to the Convention.

36. On 29 July 1998 the Central Electoral Commission suspended registration of the list on the ground that the applicant's candidacy did not meet the requirements of the Parliamentary Elections Act. Not wishing to jeopardise the entire list's prospects of being registered, the applicant withdrew her candidacy, after which the list was immediately registered.

D. The procedure for determining the applicant's participation in the CPL

37. By a letter of 7 August 1998, the President of the Central Electoral Commission asked the Prosecutor General to examine the legitimacy of the applicant's election to the Riga City Council.

38. By a decision of 31 August 1998, a copy of which was sent to the Central Electoral Commission, the Office of the Prosecutor General (*Ģenerālprokuratūra*) noted that the applicant had not committed any act defined as an offence in the Criminal Code. The decision stated that, although the applicant had provided false information to the Riga Electoral Commission regarding her participation in the CPL, there was nothing to prove that she had done so with the specific objective of misleading the commission. In that connection, the prosecutors considered that the statement by the applicant, appended to the list of candidates for the elections of 9 March 1997, was to be read in conjunction with her explanatory letter of 25 January 1997.

39. On 14 January 1999 the Office of the Prosecutor General applied to the Riga Regional Court for a finding that the applicant had participated in the activities of the CPL after 13 January 1991. The prosecutors attached the following documents to their submission: the applicant's letter of 25 January 1997; the minutes of the meeting of 26 January 1991 of the CPL's Central Committee for Supervision and Audit; the minutes of the joint meeting of 27 March 1991 of the Central Committee for Supervision and Audit and the municipal and regional committees for supervision and audit; and the annexes to those minutes, indicating the structure and composition of the said committee and a list of the members of the Audit Committee at 1 July 1991.

40. Following adversarial proceedings, the Riga Regional Court allowed the prosecutors' request in a judgment of 15 February 1999. It considered that the documents in its possession clearly attested to the applicant's active participation in the party's activities after the critical date, and that the evidence provided by the applicant was insufficient to refute this finding.

Consequently, the court dismissed the applicant's arguments to the effect that she was only formally a member of the CPL, did not participate in the meetings of its Central Committee for Supervision and Audit and that, accordingly, she could not be held to have "acted", "been a militant" or "actively participated" (*darboties*) in the party's activities.

41. The applicant appealed against this judgment to the Civil Division of the Supreme Court. On 12 November 1999 the Civil Division began examining the appeal. At the oral hearing, the applicant submitted that the content of the above-mentioned minutes of 26 January and 27 March 1991, referring to her by name, could not be held against her since on both those dates she had been carrying out her duties in the Latvian Supreme Council and not in the CPL. After hearing evidence from two witnesses who stated that the applicant had indeed been present at the Supreme Council, the Division suspended examination of the case in order to enable the applicant to submit more cogent evidence in support of her statements, such as a record of parliamentary debates or minutes of the *Līdztiesība* parliamentary bloc's meetings. However, as the above-mentioned minutes had not been preserved by the Parliamentary Record Office, the applicant was never able to produce such evidence.

42. By a judgment of 15 December 1999, the Civil Division dismissed the applicant's appeal. It stated that the evidence gathered by the Office of the Prosecutor General was sufficient to conclude that the applicant had actively taken part in the CPL's activities after 13 January 1991. The Division further noted that the CPL's dissolution had been ordered "in accordance with the interests of the Latvian State in a specific historical and political situation" and that the international conventions relied on by the applicant allowed for justified limitations on the exercise of electoral rights.

43. Following the Civil Division's judgment, enforceable from the date of its delivery, the applicant was disqualified from electoral office and lost her seat as a member of Riga City Council.

44. The applicant applied to the Senate of the Supreme Court to have the Civil Division's judgment quashed. She stressed, *inter alia*, the restriction's incompatibility with Article 11 of the Convention. By a final order of 7 February 2000 the Senate declared the appeal inadmissible. In the Senate's opinion, the proceedings in question were limited to a single strictly-defined objective, namely a finding as to whether or not the applicant had actively taken part in the CPL's activities after 13 January 1991. The Senate concluded that it did not have jurisdiction to analyse the legal consequences of this finding, on the ground that this was irrelevant to the finding itself. In addition, the Senate noted that any such analysis would involve an examination of the Latvian legislation's compatibility with constitutional and international law, which did not come within the final appeal court's jurisdiction.

45. Proceedings similar to those against the applicant were also instituted against a small number of other CPL activists, not all of whom were recognised by the courts as having "actively participated" in the activities of the CPL after January 1991.

E. The 2002 parliamentary elections

46. The next parliamentary elections took place on 5 October 2002. With a view to taking part in those elections, the *Līdztiesība* party, chaired by the applicant, formed an alliance entitled "For Human Rights in a United Latvia" (*Par cilvēka tiesībām vienotā Latvijā*, abbreviated to PCTVL) with two other parties, the Party of National Harmony and the Socialist Party. The alliance's electoral manifesto expressly referred to the need to abolish the restrictions on the electoral rights of persons who had been actively involved in the CPL after 13 January 1991.

47. In spring 2002 the Executive Council of the *Līdztiesība* party put the applicant forward as a candidate for the 2002 elections; the Council of the PCTVL alliance approved this nomination. Shortly afterwards, however, on 16 May 2002, the outgoing parliament rejected a motion to repeal section 5(6) of the Parliamentary Elections Act. The alliance's council, which was fully aware of the applicant's situation and feared that her candidacy would prevent registration of the PCTVL's entire list, changed its opinion and decided not to include her name on the list of candidates. The applicant then decided to submit a separate list containing only one name, her own, entitled "Party of National Harmony".

48. On 23 July 2002 the PCTVL electoral alliance submitted its list to the Central Electoral Commission. In all, it contained the names of seventy-seven candidates for Latvia's five constituencies. On the same date the applicant asked the commission to register her own list, for the constituency of Kurzeme alone. As she had done for the 1998 elections, she attached to her list a written statement to the effect that the disputed restrictions were incompatible with the Constitution and with Latvia's international undertakings. On 25 July 2002 the commission registered both lists.

49. By a decision of 7 August 2002, the Central Electoral Commission, referring to the Civil Division's judgment of 15 December 1999, removed the applicant from its list. In addition, having noted that the applicant had been the only candidate on the "Party of National Harmony" list and that, following her removal, there were no other names, the commission decided to cancel the registration of that list.

50. At the elections of 5 October 2002, the PCTVL alliance's list obtained 18.94% of the votes and won twenty-five seats in Parliament.

F. Elections to the European Parliament

51. Latvia became a member of the European Union on 1 May 2004. Prior to that date, on the basis of the European Parliament Elections Act (*Eiropas Parlamenta vēlēšanu likums*) of 12 February 2004, the applicant was granted permission to run in those elections. They were held on 12 June 2004 and the applicant was elected as a member of the European Parliament.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions regarding Latvia's status

52. The operative provisions of the Declaration of 4 May 1990 on the Restoration of the Independence of the Republic of Latvia read as follows:

> "The Supreme Council of the Latvian SSR *decides*:
>
> (1) in recognition of the supremacy of international law over the provisions of national law, to consider illegal the Pact of 23 August 1939 between the USSR and Germany and the subsequent liquidation of the sovereignty of the Republic of Latvia through the USSR's military aggression on 17 June 1940;
>
> (2) to declare null and void the Declaration by the Parliament [*Saeima*] of Latvia, adopted on 21 July 1940, on Latvia's integration into the Union of Soviet Socialist Republics;
>
> (3) to restore the legal effect of the Constitution [*Satversme*] of the Republic of Latvia, adopted on 15 February 1922 by the Constituent Assembly [*Satversmes sapulce*], throughout the entire territory of Latvia. The official name of the Latvian State shall be the REPUBLIC of LATVIA, abbreviated to LATVIA;
>
> (4) to suspend the Constitution of the Republic of Latvia pending the adoption of a new version of the Constitution, with the exception of those Articles which define the constitutional and legal foundation of the Latvian State and which, in accordance with Article 77 of the same Constitution, may only be amended by referendum, namely:
>
> **Article 1** – Latvia is an independent and democratic republic.
>
> **Article 2** – The sovereign power of the State of Latvia is vested in the Latvian people.
>
> **Article 3** – The territory of the State of Latvia, as established by international agreements, consists of Vidzeme, Latgale, Kurzeme and Zemgale.
>
> **Article 6** – Parliament [*Saeima*] shall be elected in general, equal, direct and secret elections, based on proportional representation.

Article 6 of the Constitution shall be applied after the restoration of the State and administrative structures of the independent Republic of Latvia, which will guarantee free elections;

(5) to introduce a transition period for the re-establishment of the Republic of Latvia's *de facto* sovereignty, which will end with the convening of the Parliament of the Republic of Latvia. During the transition period, supreme power shall be exercised by the Supreme Council of the Republic of Latvia;

(6) during the transition period, to accept the application of those constitutional and other legal provisions of the Latvian SSR which are in force in the territory of the Latvian SSR when the present Declaration is adopted, in so far as those provisions do not contradict Articles 1, 2, 3 and 6 of the Constitution of the Republic of Latvia.

Disputes on matters relating to the application of legislative texts will be referred to the Constitutional Court of the Republic of Latvia.

During the transition period, only the Supreme Council of the Republic of Latvia shall adopt new legislation or amend existing legislation;

(7) to set up a commission to draft a new version of the Constitution of the Republic of Latvia that will correspond to the current political, economic and social situation in Latvia;

(8) to guarantee social, economic and cultural rights, as well as universally recognised political freedoms compatible with international instruments of human rights, to citizens of the Republic of Latvia and citizens of other States permanently residing in Latvia. This shall apply to citizens of the USSR who wish to live in Latvia without acquiring Latvian nationality;

(9) to base relations between the Republic of Latvia and the USSR on the Peace Treaty of 11 August 1920 between Latvia and Russia, which is still in force and which recognises the independence of the Latvian State for all time. A governmental commission shall be set up to conduct the negotiations with the USSR."

53. The operative provisions of the Constitutional Law of 21 August 1991 on the status of the Republic of Latvia as a State (*Konstitucionālais likums "Par Latvijas Republikas valstisko statusu"*) read as follows:

"The Supreme Council of the Republic of Latvia *decides*:

(1) to declare that Latvia is an independent and democratic republic in which the sovereign power of the State of Latvia belongs to the Latvian people, the status of which as a State is defined by the Constitution of 15 February 1922;

(2) to repeal paragraph 5 of the Declaration of 4 May 1990 on the Restoration of the Independence of the Republic of Latvia, establishing a transition period for the *de facto* restoration of the Republic of Latvia's State sovereignty;

(3) until such time as the occupation and annexation is ended and Parliament is convened, supreme State power in the Republic of Latvia shall be fully exercised by the Supreme Council of the Republic of Latvia. Only those laws and decrees enacted

by the supreme governing and administrative authorities of the Republic of Latvia shall be in force in its territory;

(4) this constitutional law shall enter into force on the date of its enactment."

B. The status of the CPSU and the CPL

54. The role of the CPSU in the former Soviet Union was defined in Article 6 of the Constitution of the USSR (1977) and in Article 6 of the Constitution of the Latvian SSR (1978), which were worded along identical lines. Those provisions stated:

"The leading and guiding force of Soviet society and the nucleus of its political system and of all State organisations and public organisations is the Communist Party of the Soviet Union. The CPSU exists for the people and serves the people.

The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the USSR's domestic and foreign policy, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically substantiated character to their struggle for the victory of communism.

All party organisations shall function within the framework of the Constitution of the USSR."

55. The Supreme Council's decision of 24 August 1991 on the suspension of the activities of certain non-governmental and political organisations was worded as follows:

"On 20 August 1991 the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives, the Republican Council of War and Labour Veterans, the Central Committee of the Communist Party of Latvia and the Central Committee of the Latvian Union of Communist Youth issued a proclamation informing the Republic's population that a state of emergency had been decreed in Latvia and encouraging all private individuals to oppose those who did not submit to the orders of the National State of Emergency Committee. In so doing, the above-mentioned organisations ... declared their support for the organisers of the *coup d'état* and encouraged other individuals to do the same.

The actions of those organisations are contrary to Articles 4, 6 and 49 of the Latvian Constitution, which state that Latvian citizens are entitled to form parties and other associations only if their objectives and practical activities are not aimed at the violent transformation or overthrow of the existing constitutional order ... and that associations must observe the Constitution and legislation and act in accordance with their provisions.

The Supreme Council of the Republic of Latvia decrees:

1. The activities of the Communist Party of Latvia [and of the other above-mentioned organisations] are hereby suspended ..."

56. The relevant parts of the Supreme Council's decision of 10 September 1991 on the dissolution of the above-mentioned organisations read as follows:

> "... In May 1990 the Communist Party of Latvia, the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives and the Republican Council of War and Labour Veterans set up the Committee for the Defence of the Constitution of the USSR and the Latvian SSR and the Rights of Citizens, which was renamed the Latvian Public Rescue Committee on 25 November 1990 ...
>
> On 15 January 1991 the Latvian Public Rescue Committee declared that it was seizing power and dissolving the Supreme Council and the Government of the Republic of Latvia.
>
> In August 1991 the Central Committee of the Communist Party of Latvia [and the other above-mentioned organisations] supported the coup ...
>
> Having regard to the preceding, the Supreme Council of the Republic of Latvia decrees:
>
> 1. The Communist Party of Latvia [and the other above-mentioned organisations], together with the coalition of these organisations, the Latvian Public Rescue Committee, are hereby dissolved on the ground that they have acted against the Constitution ...
>
> 2. Former members of the Communist Party of Latvia [and of the other above-mentioned organisations] are informed that they are entitled to associate within parties and other associations whose objectives and practical activities are not aimed at the violent transformation or overthrow of the existing constitutional order, and which are not otherwise contrary to the Constitution and the laws of the Republic of Latvia ..."

C. The electoral legislation

1. Substantive provisions

57. The relevant provisions of the Constitution (*Satversme*) of the Republic of Latvia, adopted in 1922 and amended by the Law of 15 October 1998, are worded as follows:

Article 9

> "All citizens of Latvia who enjoy full civic rights and who have reached the age of 21 on the day of the elections may be elected to Parliament."

Article 64

> "Legislative power lies with Parliament and with the people, in the conditions and to the extent provided for by this Constitution."

Article 91

"All persons in Latvia shall be equal before the law and the courts. Human rights shall be exercised without discrimination of any kind."

Article 101

"All citizens of Latvia are entitled to participate, in accordance with the law, in the activities of the State and of local government ..."

58. The relevant provisions of the Parliamentary Elections Act (*Saeimas vēlēšanu likums*) of 25 May 1995 provide:

Section 4

"All Latvian citizens who have reached the age of 21 on the date of the elections may be elected to Parliament, on condition that they are not concerned by one of the restrictions provided for in section 5 of the present Act."

Section 5

"The following may not stand as candidates in elections or be elected to Parliament:

...

(6) persons who actively participated [*darbojušās*] after 13 January 1991 in the CPSU (CPL), the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans or the Latvian Public Rescue Committee, or in their regional committees; ..."

Section 11

"The following documents must be appended to the list of candidates:

...

(3) a signed declaration by each candidate on the list confirming that he or she meets the requirements of section 4 of this Act and that he or she is not concerned by section 5(1)-(6) of the present Act; ..."

Section 13

"...

(2) Once registered, the candidate lists are definitive, and the Central Electoral Commission may make only the following corrections:

1. removal of a candidate from the list, where: ...

(a) the candidate is not a citizen enjoying full civic rights (sections 4 and 5 above);

...

(3) ... [A] candidate shall be removed from the list on the basis of a statement from the relevant authority or of a court decision. The fact that the candidate:

...

6. actively participated after 13 January 1991 in the CPSU (CPL), the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans or the Latvian Public Rescue Committee, or in their regional committees, shall be attested by a judgment of the relevant court; ...”

59. The Law of 13 January 1994 on elections to municipal councils and city councils (*Pilsētas domes un pagasta padomes vēlēšanu likums*) contains similar provisions to the provisions of the Parliamentary Elections Act cited above. In particular, section 9(5) is identical to section 5(6) of that Act.

2. Procedural provisions

60. The procedure for obtaining a judicial statement attesting to an individual’s participation or non-participation in the above-mentioned organisations is governed by Chapter 23-A of the Code of Civil Procedure (*Civilprocesa kodekss*), which was inserted by a law of 3 September 1998 and is entitled “Examination of cases concerning the attestation of restrictions on electoral rights”. The provisions of that chapter read as follows:

Article 233-1

“A request for a statement of restriction on electoral rights may be submitted by the prosecutor ...

The request must be submitted to the court in whose territorial jurisdiction is situated the home of the person in respect of whom the attestation of a restriction on electoral rights is requested.

The request may be submitted where an electoral commission has registered a list of candidates which includes ... a citizen in respect of whom there is evidence that, subsequent to 13 January 1991, he or she actively participated in the CPSU (in the CPL) ... A request concerning a person included in the list of candidates may also be submitted once the elections have taken place.

The request must be accompanied by a statement from the electoral commission confirming that the person in question has stood as a candidate in elections and that the list in question has been registered, as well as by evidence confirming the allegations made in the request.”

Article 233-3

"After examining the request, the court shall give its judgment:

(1) finding that, after 13 January 1991, the person concerned did actively participate in the CPSU (in the CPL) ...;

(2) declaring the request ill-founded and dismissing it ..."

D. Proposals to repeal the disputed restrictions

61. The Parliamentary Elections Act was enacted on 25 May 1995 by the first parliament elected after the restoration of Latvia's independence, otherwise known as the "Fifth Legislature" (the first four legislatures having operated between 1922 and 1934). The following legislature (the Sixth), elected in October 1995, examined three different proposals seeking to repeal section 5(6) of the above-mentioned Act. At the plenary session of 9 October 1997, the three proposals were rejected by large majorities after lengthy debates. Likewise, on 18 December 1997, during a debate on a proposal to restrict section 5(6), the provision's current wording was confirmed. Elected in October 1998, the following legislature (the Seventh) examined a proposal to repeal section 5(6) at a plenary session on 16 May 2002. After lengthy discussions, the majority of members of parliament refused to accept the proposal. Finally, the Eighth Legislature, elected in October 2002, examined a similar proposal on 15 January 2004. It was also rejected.

E. The Constitutional Court's judgment of 30 August 2000

62. In a judgment of 30 August 2000 in case no. 2000-03-01, the Constitutional Court (*Satversmes tiesa*) found that the restrictions imposed by section 5(6) of the Parliamentary Elections Act and section 9(5) of the Municipal Elections Act were compatible with the Latvian Constitution and with Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

In that judgment, adopted by four votes to three, the Constitutional Court first reiterated the general principles laid down in the settled case-law of the Convention institutions in applying Article 14 of the Convention and Article 3 of Protocol No. 1. It further held:

"4. The argument that the provisions complained of, forbidding certain Latvian citizens from standing as candidates or being elected to Parliament and municipal councils, discriminate against them on the basis of their political allegiance is without foundation ... The impugned provisions do not provide for a difference in treatment on the basis of an individual's political convictions (opinions) but for a restriction on

electoral rights for having acted against the re-established democratic order after 13 January 1991 ...

Accordingly, Parliament limited the restrictions to the degree of each individual's personal responsibility [*individuālās atbildības pakāpe*] in carrying out those organisations' objectives and programmes, and the restriction on the right to be elected to Parliament or to a municipal council ... is related to the specific individual's activities in the respective ... associations.

In itself, formal membership of the above-mentioned organisations cannot serve as a basis for preventing an individual from standing as candidate or being elected to Parliament ...

Consequently, the impugned provisions are directed only against those who attempted, subsequent to 13 January 1991 and in the presence of the army of occupation, to re-establish the former regime through active participation [*ar aktīvu darbību*]; on the other hand, they do not affect persons who have differing political convictions (opinions). The tendency of certain courts to concentrate solely on the finding of the fact of formal membership and not to evaluate the person's behaviour is inconsistent with the objectives sought by Parliament in enacting the provision in issue ...

6. ... Given that those organisations' objectives were linked to the overthrow of the existing State regime [*pastāvošās valsts iekārtas graušana*], they were essentially unconstitutional ...

Consequently, the aim of the restrictions on passive electoral rights is to protect the democratic State order, national security and territorial integrity of Latvia. The impugned provisions are not directed against pluralism of ideas in Latvia or against a person's political opinions, but against those who, through their active participation, have attempted to overthrow the democratic State order ... The exercise of human rights may not be directed against democracy as such ...

The substance and effectiveness of law is demonstrated in its ethical nature [*ētiskums*]. A democratic society has a legitimate interest in requiring loyalty to democracy from its political representatives. In establishing restrictions, the candidates' honour and reputation is not challenged, in the sense of personal legal benefit [*personisks tiesisks labums*]; what is challenged is the worthiness of the persons in question to represent the people in Parliament or in the relevant municipal council. These restrictions concern persons who were permanent agents of the occupying power's repressive regime, or who, after 13 January 1991, participated in the organisations mentioned in the impugned provisions and actively fought against the re-established Latvian Constitution and State ...

The argument ... that democratic State order must be protected against individuals who are not ethically qualified to become representatives of a democratic State at political or administrative level ... is well-founded ...

... The removal from the list of a candidate who was involved in the above-mentioned organisations is not an arbitrary administrative decision; it is based on an individual judgment by a court. In accordance with the law, evaluation of individual responsibility comes under the jurisdiction of the courts ...

> 7. ... In order to determine whether the measure applied, namely the restrictions on passive electoral rights, is proportionate to the objectives being pursued, namely the protection, firstly, of democratic State order and, secondly, of the national security and integrity of the Latvian State, it is necessary to assess the political situation in the country and other related circumstances. Parliament having evaluated the historical and political circumstances of the development of democracy on several occasions ... the Court does not consider that at this stage there would be grounds for challenging the proportionality between the measure applied and its aim.
>
> However, Parliament, by periodically examining the political situation in the State and the necessity and merits of the restrictions, should decide to establish a time-limit on these restrictions ... since such limitations on passive electoral rights may exist only for a specific period."

63. Three of the Constitutional Court's seven judges who examined the above-mentioned case gave a dissenting opinion in which they expressed their disagreement with the majority's conclusions. Referring, *inter alia*, to *Vogt v. Germany* (26 September 1995, Series A no. 323) and *Rekvényi v. Hungary* ([GC], no. 25390/94, ECHR 1999-III), they argued that the disputed restrictions could be more extensive with regard to civil servants than to elected representatives. According to those judges, Latvia's democratic regime and institutional system had become sufficiently stable in the years since 1991 for individuals who had campaigned against the system ten years previously no longer to represent a real threat to the State. Consequently, the restriction on those persons' electoral rights was not proportionate to the legitimate aim pursued.

F. The European Parliament Elections Act

64. Prior to Latvia becoming a member of the European Union, the Latvian parliament adopted the European Parliament Elections Act (*Eiropas Parlamenta vēlēšanu likums*), which was enacted on 29 January 2004 and came into force on 12 February 2004. The Act contains no provision similar to section 5(6) of the Parliamentary Elections Act. Consequently, the applicant was free to stand as a candidate in the elections to the European Parliament.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

65. The Government claimed that the European Parliament Elections Act contained no provision similar to section 5(6) of the Parliamentary Elections Act (see paragraphs 58 and 64 above). Consequently, the

applicant was free to stand as a candidate in the elections to the European Parliament, to which she was in fact subsequently elected. The Government argued that, as a supranational legislature, the European Parliament ought to be considered a "higher" legislative body than the Latvian parliament, and that "the applicant will be able to exercise her 'passive' electoral rights effectively at an even higher level than that foreseen at the outset".

66. The Government acknowledged that no amendments had so far been made to the laws on parliamentary and municipal elections. The disputed restriction therefore remained in force and the applicant was still disqualified from standing for Parliament and for municipal councils. However, they did not consider that this fact was material to the outcome of the case. Latvia's accession to the European Union in spring 2004 marked the culmination of the transitional period, that is, the country's journey from a totalitarian to a democratic society, and the members of parliament had been aware of this. Furthermore, the periodic review of the disputed provisions constituted a stable parliamentary practice (see paragraph 61 above) and the restrictions complained of by the applicant were provisional in nature.

67. For the above reasons, the Government considered that the dispute at the origin of the present case had been resolved, and that the application should be struck out of the list in accordance with Article 37 § 1 (b) of the Convention.

68. The applicant disagreed. She acknowledged that she was entitled to stand in the European elections and had done so. However, this fact did not resolve the dispute in that the restrictions contained in the laws on parliamentary and local elections were still in force and that it was by no means certain that they would be repealed in the near future.

69. In the Court's view, the question posed by the Government's pleadings is whether the applicant has in fact lost her status as "victim" within the meaning of Article 34 of the Convention. In that connection, the Court refers to its settled case-law to the effect that a decision or measure favourable to an applicant is not in principle sufficient to deprive him or her of victim status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Labita v. Italy* [GC], no. 26772/95, § 142, ECHR 2000-IV; and *Ilaşcu and Others v. Moldova and Russia* (dec.) [GC], no. 48787/99, 4 July 2001). In the present case, the impugned legislative provisions remain in force, and the applicant is still disqualified from standing for the national parliament (and for municipal councils).

70. In so far as the Government refer to the fact that the applicant was entitled to take part in the European Parliament elections, the Court recognises that Article 3 of Protocol No. 1 is applicable in this respect (see

Matthews v. the United Kingdom [GC], no. 24833/94, §§ 39-44 and 48-54, ECHR 1999-I). However, the fact that the applicant is entitled to stand for election to the European Parliament cannot suffice to release the State from its obligation to respect the rights guaranteed in Article 3 of Protocol No. 1 with regard to the national parliament.

71. In sum, to this day the Latvian authorities have not recognised, let alone redressed, the violations alleged by the applicant. She therefore remains a "victim" of those alleged violations.

72. Accordingly, the Government's preliminary objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1

73. The applicant complained that her disqualification from standing for election to the national parliament, on the ground that she had actively participated in the CPL after 13 January 1991, constituted a violation of Article 3 of Protocol No. 1, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

A. The Chamber's judgment

74. The Chamber considered at the outset that the duty of political loyalty established by the Court in relation to the limitations on the political activities of public servants could not be applied to the same extent in the context of the eligibility of individuals to stand for Parliament. It further found that the disqualification of the applicant pursued legitimate aims, namely the protection of the State's independence, democratic order and national security. The Chamber observed that the restriction was not limited in time, and that a permanent disqualification could only be justified in cases of grievous criminal offences, such as war crimes or treason. At the same time, it considered that barring the leading figures of the former regime from standing as parliamentary candidates could be considered a legitimate and balanced measure during the early years following the re-establishment of Latvia's independence, without it being necessary to look into the conduct of the individual concerned.

75. However, after a certain time it became necessary to establish whether other factors, particularly an individual's personal participation in the disputed events, continued to justify his or her ineligibility. In the view of the Chamber, since the domestic courts only had limited, if any, powers to assess the real danger posed to the current democratic order by each individual to whom the restriction applied, the Court had itself to examine

whether the applicant's conduct more than a decade previously still constituted sufficient justification for barring her from standing in parliamentary elections. It noted in this connection that although the applicant had occupied an important position within the CPL structure, there was no evidence that her actual conduct at the material time in 1991 justified the continuing restriction. The Chamber also considered it noteworthy that the applicant was never prosecuted for an offence, that the CPL had not been dissolved until after the events of August 1991 and that there was no proof that the applicant's current conduct justified the continuing restriction. It further criticised the Latvian legislature for adopting the impugned restriction only in 1995, and not before the elections held in 1993. This showed that former leading figures at the CPL were not considered to pose a danger to democracy. In sum, and having regard in particular to the case-law principles derived from Article 11 of the Convention to support its reasoning and conclusion, the Chamber considered that the applicant's disqualification from standing as a parliamentary candidate was disproportionate and therefore in violation of Article 3 of Protocol No. 1.

B. The parties' submissions

1. The applicant

76. The applicant requested that the Chamber's judgment be upheld. She considered that the reasons given for her disqualification should be examined in the light of the principles and conclusions identified by the Court in *United Communist Party of Turkey and Others v. Turkey* (30 January 1998, §§ 45-46, *Reports* 1998-I). The applicant contested the allegations regarding the CPL's allegedly totalitarian and dangerous nature with reference to the party's official programme adopted in April 1990, which advocated "constructive cooperation between different political forces favourable to the democratic transformation of society" and "a society based on the principles of democracy [and] humanism". Moreover, at the time of the CPL's 25th Congress, the party had had no intention of restoring the former totalitarian communist regime. She further pointed out that the CPL was declared unconstitutional only on 23 August 1991 and that the party's activities had remained perfectly legal until that date, including in the period after the events of January 1991.

77. The applicant further argued that the very facts of her membership in the CPL and her position in the structure of the party did not suffice to prove a lack of loyalty towards Latvia. Indeed, of the 201 members of the Supreme Council, 106 had originally been members of the CPL and the division of members of parliament into two main camps had been based solely on their attitude to the Declaration of Independence, and not on

whether they had been members of that party. Equally, the CPL could not be accused of having attempted to overthrow the democratic regime. With regard to the events of January 1991, the applicant repeated her own version of events (see paragraphs 21 and 23-24 above). She submitted a copy of the appeal by the CPL parliamentary group, published on 21 January 1991, containing a denial that the party had been involved in organising the armed incursions and deploring "political provocation ... misleading world opinion". In any event, the applicant herself had never been a member of the Latvian Public Rescue Committee. As to the events of 19 August 1991, she contended that there was evidence exculpating the CPL.

78. The applicant considered that the Republic of Latvia's ambiguous constitutional status during the period in question was an important factor to be taken into consideration. In that connection, she noted that the Declaration of Independence of 4 May 1990 had established a transition period so that institutional links with the USSR could be gradually severed. In reality, it had been a period of diarchy, during which Soviet and Latvian constitutional and legislative texts, and even some Soviet and Latvian institutions, coexisted and functioned in parallel throughout the national territory. The applicant acknowledged that the Constitutional Law of 21 August 1991 had ended the transition period; however, it was impossible to declare null and void the very existence of that period. Since the legitimacy of the institutions which were then functioning on the territory of Latvia was not clearly established, it was not correct to speak of a *coup d'état* in the proper meaning of the term.

79. Nor could the CPL be criticised for having taken a pro-Soviet and anti-independence stance during the transition period. While acknowledging that the CPL and she herself had declared their firm support for a Latvia which enjoyed greater sovereignty but remained an integral part of the USSR, the applicant observed that, at the material time, there was a very wide range of opinions on how the country should develop politically, even among those members of parliament who supported independence in principle. In addition, leaders of foreign States had also been divided on this subject: some had been very sceptical about the liberation of the Baltic States and had preferred to adopt an approach based on non-interference in the Soviet Union's internal affairs. In short, in supporting one of the possible avenues for development, the CPL had in fact exercised its right to pluralism of political opinions, a right which was inherent in a democratic society.

80. The applicant considered ill-founded and unsubstantiated the Government's argument that to allow persons who had been members of the CPL after 13 January 1991 to become members of the national parliament would be likely to compromise national security. She pointed out that the impugned restriction had not existed before 1995 and that, in the first parliamentary elections following restoration of the 1922 Constitution, three

individuals in the same position as herself had been elected to the Latvian parliament. In those circumstances, the applicant could not see how her election could threaten national security such a long time after the facts held against her.

81. In so far as the Government referred to the Constitutional Court's judgment of 30 August 2000, the applicant referred to the dissenting opinion signed by three of the seven judges who had examined the case and found that the restriction was disproportionate. With regard to the Constitutional Court's restrictive interpretation of the electoral law, which presupposed an evaluation of the individual responsibility of each person concerned, the applicant argued that nothing in her personal conduct justified the disputed measure, since she had never attempted to restore the totalitarian regime or to overthrow the legitimate authorities. On the contrary, she had campaigned for democratisation and reform within the CPSU, the CPL and society as a whole.

82. The applicant also argued that nothing in her personal conduct justified the restriction imposed on her electoral rights. Subsequent to January 1990, she had campaigned in a non-governmental organisation, the Latvian Committee for Human Rights (*Latvijas Cilvēktiesību komiteja*), and had co-chaired that organisation until 1997. Working within the committee, she had become very well known for her activities in providing legal assistance to thousands of individuals; she had helped to promote respect for human rights in Latvia and she had been responsible for implementing three Council of Europe programmes.

83. Finally, and contrary to the Government's submissions, the applicant considered that the impugned restriction was not provisional. In that connection, she pointed out that, although Parliament had indeed re-examined the electoral law before each election, this re-examination had always resulted in an extension rather than a reduction in the number of circumstances entailing disqualification. Consequently, it had to be acknowledged that the disqualification of individuals who had been active within the CPL after 13 January 1991 was likely to continue. In conclusion, the applicant emphasised that the Government's restoration of her ability to stand as a candidate to the Latvian parliament was long overdue, in particular in view of her recent election as a member of the European Parliament, a fact which confirmed that she had the confidence and support of a significant part of the Latvian electorate.

2. The Government

84. The Government requested the Grand Chamber to find no violation of Article 3 of Protocol No. 1. They submitted a detailed description of the historical events leading to the restoration of Latvian State independence. They stated that the Chamber had failed to take due account of these events in reaching its conclusions. In addition, they referred to the historical facts

established by the Latvian judicial and parliamentary authorities, confirming the CPL's responsibility for the unconstitutional attempted coups between January and August 1991 (see paragraphs 20-29, 32, 37-44 and 54-55 above). The Government emphasised that the applicant had been fully aware of the scale of the events, but she had nevertheless chosen to remain a CPL activist rather than dissociate herself from that organisation's clearly subversive activities.

85. The Government acknowledged that a national parliament was not part of the "civil service" in the same way as the police or the armed forces. However, they emphasised that Parliament was a public institution and, in enacting legislation, MPs were participating directly in the exercise of powers conferred on them by the Constitution and other laws. Consequently, the criteria identified by the Court under Articles 10 and 11 of the Convention with regard to restrictions on the political activity of civil servants were applicable by analogy to candidates for parliamentary office as well as elected representatives. The Government therefore disagreed with the Chamber's finding that the criteria of political loyalty had no relevance to the right to stand as a candidate for election.

86. With regard to the aim pursued by the impugned restriction, the Government observed that the disqualification from standing for election applied to those persons who had been active within organisations which, following the declaration of Latvia's independence, had openly turned against the new democratic order and had actively sought to restore the former totalitarian communist regime. It was therefore necessary to exclude those persons from exercising legislative authority. Having failed to respect democratic principles in the past, there was no guarantee that they would now comply with such principles. Relying on *Ahmed and Others v. the United Kingdom* (2 September 1998, § 52, *Reports* 1998-VI), the Government argued that the disputed disqualification was preventative in nature and did not require proof of actual dangerous or undemocratic actions on the part of those persons. The Government therefore disagreed with the Chamber's finding on the allegedly punitive nature of the impugned restriction.

87. With reference to *Rekvényi* (cited above, § 41), the Government underlined that the principle of a "democracy capable of defending itself" was compatible with the Convention, especially in the context of the post-communist societies of central and eastern Europe.

88. Furthermore, *Vogt* (cited above) could not be relied on in support of the applicant's submissions. Mrs Vogt's activities within the German Communist Party had been legal activities within a legal organisation. In contrast, in the present case the enactment on 4 May 1990 of the Declaration of Independence had created a new constitutional order for Latvia, of which that Declaration had become the basis. Accordingly, during the period from 4 May 1990 to 6 June 1993, the date on which the 1922

Constitution was fully re-established, any action against the said Declaration or against the State system founded by it had to be considered unconstitutional. The Government also disputed the applicant's assertion regarding the existence of a constitutional diarchy during the events of 1991.

89. In addition, the applicant's disqualification had the aim of protecting the State's independence and national security. Referring in that connection to the resolutions adopted in April 1990 by the CPL's 25th Congress, the Government noted that that party had always been hostile to the restoration of Latvia's independence and that one of its main aims had been to keep the country within the Soviet Union. Accordingly, the very existence of a State Party to the Convention was threatened in the instant case, and granting access to the bodies of supreme State power to individuals who were hostile to that State's independence would be likely to compromise national security.

90. Furthermore, the restriction in question was proportionate to the legitimate aims pursued. The impugned disqualification was not applicable to all those individuals who had officially been members of the CPL after 13 January 1991, but only to those who had "acted" or "actively participated" in the party's operations after the above-mentioned date, that is, to persons who, in their administrative or representative functions, had threatened Latvia's democratic order and sovereignty. This restrictive interpretation of the electoral legislation had in fact been imposed by the Constitutional Court in its judgment of 30 August 2000.

91. In the present case, the applicant's hostile attitude to democracy and to Latvia's independence had been clear since the CPL's 25th Congress, during which she chose not to align herself with the dissident progressive delegates, opting instead to remain with those who supported the "hard-line" Soviet policy (see paragraph 17 above). Equally, the Central Committee for Supervision and Audit had a leading position in the CPL's internal structure and the applicant was a member of a sub-committee responsible for supervising implementation of the party's decisions and policies. The majority of decisions taken by CPL bodies reflected an extremely hostile attitude to the re-establishment of a democratic and independent republic. In that connection, the Government referred once again to the statement issued by the CPL's Central Committee on 13 January 1991, establishing the Latvian Public Rescue Committee and aimed at usurping power, even though they admitted that the applicant herself had not been present at the Central Committee's meeting on that date. In short, as one of those responsible for supervising implementation of the CPL's decisions, the applicant could not have failed to oppose an independent Latvia during the period in question.

92. Although the applicant's position within the CPL sufficed in itself to demonstrate her active involvement in that party's activities, the domestic courts had nonetheless based their reasoning on the extent of her personal

responsibility rather than on a formal finding regarding her status in the party's organisational structure. The Government therefore disagreed with the Chamber's finding that the review of the applicant's case by the domestic courts had been excessively formal or insufficient.

93. Moreover, the applicant's current conduct continued to justify her disqualification. Relying on numerous press articles, they submitted that the applicant's political activities were part of a "carefully scripted scenario" aimed at harming Latvia's interests, distancing it from the European Union and NATO and bringing it closer to the Commonwealth of Independent States. The Government referred to certain critical statements recently made by the applicant about the State's current policy towards the Russian-speaking minority and the new Language Act; they also criticised the applicant's role in the organisation of public meetings on the dates of former Soviet festivals.

94. They stressed that since the reinstatement of the 1922 Constitution, each successive parliament had examined the need to maintain the disqualification of individuals who had been active members of the CPSU or the CPL after 13 January 1991. This periodic re-examination constituted an established parliamentary practice and showed that the restriction in question was provisional in nature. The Chamber had failed to give sufficient weight to that fact.

95. Finally, the Government emphasised the fact that the CPSU, through its subordinate sections within the Soviet Union and elsewhere in central and eastern Europe, had to be seen as the only party having control of all branches of power, as well as of the "lives and minds" of the people, for a period of many decades following the Second World War. The former communist States of central and eastern Europe were thus to be distinguished from other countries where a political party might be considered as posing a threat to national security and other vital interests within the context of the established framework of democratic institutions. The new democracies of central and eastern Europe were more sensitive than other European countries to the threat to the democratic regime presented by the resurgence of ideas akin to those espoused by the CPSU and CPL. In view of these special circumstances, the Government considered that the Latvian authorities were best placed to evaluate the steps needed to protect the democratic regime, including by means of measures such as those in issue in the present case.

C. The Court's assessment

1. The facts in dispute

96. The Court observes, in the first place, that a number of historical events are disputed between the parties. Thus, the applicant contests the

Government's version of events with regard to the origin and nature of the first attempted coup in January 1991, the plebiscite of March 1991 and the CPL's collaboration with the perpetrators of the second attempted coup in August 1991 (see paragraphs 20-29, 32, 37-44 and 55-56 above). However, in exercising its supervisory jurisdiction, the Court's task is not to take the place of the competent national authorities but rather to review the decisions they delivered pursuant to their power of appreciation. In so doing, it has to satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts, and did not reach arbitrary conclusions (see, for example, *Vogt*, cited above, § 52; *Socialist Party and Others v. Turkey*, 25 May 1998, § 44, *Reports* 1998-III; *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 39, ECHR 1999-VIII). Furthermore, the Court will abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them (see *Marais v. France*, no. 31159/96, Commission decision of 24 June 1996, Decisions and Reports (DR) 86-B, p. 184, and *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX).

97. In the present case, there is no indication of arbitrariness in the way in which the Latvian courts evaluated the relevant facts. In particular, the CPL's participation in the events of 1991 has been established by a Supreme Court judgment in the context of a criminal case brought against two former senior officials of the party (see paragraph 32 above). Equally, the Court does not see any reason to dispute either the findings of fact made by the Riga Regional Court and the Civil Division of the Supreme Court with regard to the events of 1991 and the applicant's standing in the CPL at the material time, or the reasons given by the Supreme Council to justify the suspension of the CPL's activities in September 1991. It accepts the facts concerning the CPL's role during the events of January and August 1991, as well as its activities in the wake of these events, as established by the Latvian judicial and parliamentary authorities (see paragraphs 20-29, 32, 37-44 and 55-56 above).

2. The general principles established by the case-law under the Convention

(a) Democracy and its protection in the Convention system

98. Democracy constitutes a fundamental element of the "European public order". That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. The Preamble goes

on to affirm that European countries have a common heritage of political traditions, ideals, freedom and the rule of law. This common heritage consists in the underlying values of the Convention; thus, the Court has pointed out on many occasions that the Convention was in fact designed to maintain and promote the ideals and values of a democratic society. In other words, democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it (see, among many other examples, *United Communist Party of Turkey and Others*, cited above, § 45; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 86, ECHR 2003-II; and, lastly, *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 89, ECHR 2004-I).

99. It cannot be ruled out that a person or a group of persons will rely on the rights enshrined in the Convention or its Protocols in order to attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention; any such destruction would put an end to democracy. It was precisely this concern which led the authors of the Convention to introduce Article 17, which provides: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention" (see *Collected Edition of the "Travaux Préparatoires": Official Report of the Consultative Assembly*, 1949, pp. 1235-39). Following the same line of reasoning, the Court considers that no one should be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 99).

100. Consequently, in order to guarantee the stability and effectiveness of a democratic system, the State may be required to take specific measures to protect itself. Thus, in the above-cited *Vogt* judgment, with regard to the requirement of political loyalty imposed on civil servants, the Court acknowledged the legitimacy of the concept of a "democracy capable of defending itself" (§§ 51 and 59). It has also found that pluralism and democracy are based on a compromise that requires various concessions by individuals, who must sometimes be prepared to limit some of their freedoms so as to ensure the greater stability of the country as a whole (*Refah Partisi (the Welfare Party) and Others*, cited above, § 99). The problem which is then posed is that of achieving a compromise between the requirements of defending democratic society on the one hand and protecting individual rights on the other (see *United Communist Party of Turkey and Others*, cited above, § 32). Every time a State intends to rely on the principle of "a democracy capable of defending itself" in order to justify interference with individual rights, it must carefully evaluate the scope and

consequences of the measure under consideration, to ensure that the aforementioned balance is achieved.

101. Finally, with regard to the implementation of measures intended to defend democratic values, the Court stated in *Refah Partisi (the Welfare Party) and Others* (cited above, § 102):

> "The Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. The Court accepts that where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may 'reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime'. ..."

(b) The Court's test under Article 3 of Protocol No. 1

102. Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

103. The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Matthews*, cited above, § 63; *Labita*, cited above, § 201; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005-IX).

104. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions imposed on the rights to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair their very essence and deprive them of their effectiveness; that

they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst*, cited above, § 62).

105. In relation to the cases concerning the right to vote, that is, the so-called "active" aspect of the rights under Article 3 of Protocol No. 1, the Court has considered that exclusion of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V). In particular, the Court has found that domestic legislation imposing a minimum age or residence requirements for the exercise of the right to vote is, in principle, compatible with Article 3 of Protocol No. 1 (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI; see also *Hirst*, cited above, § 62). The Convention institutions have also held that it was open to the legislature to remove political rights from persons convicted of serious or financial crimes (see *Holland v. Ireland*, no. 24827/94, Commission decision of 14 April 1998, DR 93-A, p. 15, and *M.D.U. v. Italy* (dec.), no. 58540/00, 28 January 2003). In *Hirst* (§ 82), however, the Grand Chamber underlined that the Contracting States did not have *carte blanche* to disqualify all detained convicts from the right to vote without having due regard to relevant matters such as the length of the prisoner's sentence or the nature and gravity of the offence. A general, automatic and indiscriminate restriction on all detained convicts' right to vote was considered by the Court as falling outside the acceptable margin of appreciation.

106. The Convention institutions have had fewer occasions to deal with an alleged violation of an individual's right to stand as a candidate for election, that is, the so-called "passive" aspect of the rights under Article 3 of Protocol No. 1. In this regard the Court has emphasised that the Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with the historical and political factors specific to each State. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned (see *Mathieu-Mohin and Clerfayt*, § 54, and *Podkolzina*, § 33, both cited above).

107. In *Podkolzina*, the Court found a violation of Article 3 of Protocol No. 1 with regard to restrictions on an individual's eligibility to stand as a candidate for election. In that case, the applicant was removed from the list of parliamentary candidates on account of her allegedly insufficient knowledge of the official language of the State. The Court acknowledged that a decision determining a parliament's working language was in principle one which the State alone had the power to take, this being a factor shaped by the historical and political considerations specific to the country concerned. A violation of Article 3 of Protocol No. 1 was found, however, because the procedure applied to the applicant to determine her proficiency in the official language was incompatible with the requirements of procedural fairness and legal certainty, with the result that the negative conclusion reached by the domestic authorities in this connection could be deemed deficient (§§ 33-38).

108. In *Melnychenko v. Ukraine* (no. 17707/02, §§ 53-67, ECHR 2004-X), the Court also recognised that legislation establishing domestic residence requirements for a parliamentary candidate was, as such, compatible with Article 3 of Protocol No. 1. At the same time, the decision of the Ukrainian authorities to deny the applicant registration as a parliamentary candidate was found to be in breach of the above provision, given that the domestic law governing proof of a candidate's residence lacked the necessary certainty and precision to guarantee the applicant adequate safeguards against arbitrary treatment. The Court underlined in that case that, while the Contracting States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure itself contains sufficient safeguards to prevent arbitrary decisions (§ 59).

109. In certain older cases, the former Commission was required on several occasions to consider whether the decision to withdraw an individual's so-called "active" or "passive" election rights on account of his or her previous activities constituted a violation of Article 3 of Protocol No. 1. In all those cases, the Commission found that it did not. Thus, in the cases of *X v. the Netherlands* (no. 6573/74, Commission decision of 19 December 1974, DR 1, p. 87) and *X v. Belgium* (no. 8701/79, Commission decision of 3 December 1979, DR 18, p. 250), it declared inadmissible applications from two persons who had been convicted following the Second World War of collaboration with the enemy or "uncitizen-like conduct" and, on that account, were permanently deprived of the right to vote. In particular, the Commission considered that "the purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote [was] to ensure that persons who [had] seriously abused, in wartime, their right to participate in the public life of their country are prevented in future from abusing their

political rights in a manner prejudicial to the security of the State or the foundations of a democratic society" (see *X v. Belgium*, p. 253).

110. In the case of *Van Wambeke v. Belgium* (no. 16692/90, Commission decision of 12 April 1991, unreported), the Commission declared inadmissible, on the same grounds, an application from a former member of the *Waffen-SS*, convicted of treason in 1945, who complained that he had been unable to take part in the elections to the European Parliament in 1989. In the case of *Glimmerveen and Hagenbeek v. the Netherlands* (nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187), the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic tendencies, to stand for election. On that occasion, the Commission referred to Article 17 of the Convention, noting that the applicants "intended to participate in these elections and to avail themselves of the right [concerned] for a purpose which the Commission [had] found to be unacceptable under Article 17" (ibid., p. 197). In that case it was also underlined that the standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.

111. In the context of employment restrictions imposed on public officials on political grounds, the Court has held that Article 10 of the Convention may apply in connection with their dismissal. A violation of Article 10 was found in this respect in *Vogt* (cited above, §§ 43-44), where the applicant was dismissed as a civil servant in relation to her specific activities as a member of the Communist Party in West Germany. However, in *Volkmer v. Germany* ((dec.), no. 39799/98, 22 November 2001) and *Petersen v. Germany* ((dec.), no. 39793/98, ECHR 2001-XII), the Court declared inadmissible as unsubstantiated the applicant civil servants' complaints under Article 10 about their dismissal on account of their collaboration with the regime and secret services of the former German Democratic Republic. In the case of *Sidabras and Džiautas v. Lithuania* (nos. 55480/00 and 59330/00, §§ 51-62, ECHR 2004-VIII), the Court found a violation of Article 14 taken in conjunction with Article 8 as regards the existence of wide-ranging restrictions barring former KGB officers in Lithuania from access to various spheres of employment in the private sector, which were introduced almost a decade after the re-establishment of Lithuanian independence. At the same time, it is to be noted that those applicants' dismissal from their positions as, respectively, a tax inspector

and prosecutor, on the ground of their former KGB employment was not considered to amount to an interference with their rights under Article 10 of the Convention (ibid., §§ 67-73).

112. It is also relevant in this context to note that Article 3 of Protocol No. 1, or indeed other Convention provisions, do not prevent, in principle, Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention (see, in the context of a legislative ban on a police officer from engaging in political activities, examined by the Court under Articles 10 and 11 of the Convention, *Rekvényi*, cited above, §§ 34-50 and 58-62).

113. In *Rekvényi*, no violation of the Convention was found in that the domestic legislation in issue was judged to be sufficiently clear and precise as to the definition of the categories of persons affected (members of the armed forces, police and security services) and as to the scope of the application of the impugned statutory restriction, the statute's underlying purpose of excluding the whole group from political activities being compatible with the proportionality requirements under Articles 10 and 11 of the Convention. It was thus immaterial for the Court's assessment of the compatibility of the impugned measures with the Convention whether or not the applicant in that case could have requested the domestic courts to scrutinise whether his own political involvement represented a possible danger to the democratic order (ibid.). Similarly, in *Podkolzina* and *Melnychenko*, both cited above, the Court did not state that the Convention required that the domestic courts be empowered to review matters such as the proportionality of the statutory obligations imposed on those applicants to comply with, respectively, language and residence requirements in order to exercise their rights to stand as candidates for election, given that those statutory requirements were in themselves perfectly acceptable from the Convention point of view.

114. It follows from the above analysis that, as long as the statutory distinction itself is proportionate and not discriminatory as regards the whole category or group specified in the legislation, the task of the domestic courts may be limited to establishing whether a particular individual belongs to the impugned statutory category or group. The requirement for "individualisation", that is the necessity of the supervision by the domestic judicial authorities of the proportionality of the impugned statutory restriction in view of the specific features of each and every case, is not a precondition of the measure's compatibility with the Convention.

(c) The Court's conclusion as to the principles to be applied under Article 3 of Protocol No. 1

115. Against the background of the aforementioned cases, the Court reaches the following conclusions as to the test to be applied when examining compliance with Article 3 of Protocol No. 1.

(a) Article 3 of Protocol No. 1 is akin to other Convention provisions protecting various forms of civic and political rights such as, for example, Article 10 which secures the right to freedom of expression or Article 11 which guarantees the right to freedom of association including the individual's right to political association with others by way of party membership. There is undoubtedly a link between all of these provisions, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms. In addition, the Convention and the Protocols must be seen as a whole. However, where an interference with Article 3 of Protocol No. 1 is in issue the Court should not automatically adhere to the same criteria as those applied with regard to the interference permitted by the second paragraphs of Articles 8 to 11 of the Convention, and it should not necessarily base its conclusions under Article 3 of Protocol No. 1 on the principles derived from the application of Articles 8 to 11 of the Convention. Because of the relevance of Article 3 of Protocol No. 1 to the institutional order of the State, this provision is cast in very different terms from Articles 8 to 11 of the Convention. Article 3 of Protocol No. 1 is phrased in collective and general terms, although it has been interpreted by the Court as also implying specific individual rights. The standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8 to 11 of the Convention.

(b) The concept of "implied limitations" under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 of Protocol No. 1 is not limited by a specific list of "legitimate aims" such as those enumerated in Articles 8 to 11 of the Convention, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case.

(c) The "implied limitations" concept under Article 3 of Protocol No. 1 also means that the Court does not apply the traditional tests of "necessity" or "pressing social need" which are used in the context of Articles 8 to 11 of the Convention. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In this

connection, the wide margin of appreciation enjoyed by the Contracting States has always been underlined. In addition, the Court has stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another (see, *inter alia*, *Mathieu-Mohin and Clerfayt* and *Podkolzina*, both cited above).

(d) The need for individualisation of a legislative measure alleged by an individual to be in breach of the Convention, and the degree of that individualisation where it is required by the Convention, depend on the circumstances of each particular case, namely the nature, type, duration and consequences of the impugned statutory restriction. For a restrictive measure to comply with Article 3 of Protocol No. 1, a lesser degree of individualisation may be sufficient, in contrast to situations concerning an alleged breach of Articles 8 to 11 of the Convention.

(e) As regards the right to stand as a candidate for election, that is, the so-called "passive" aspect of the rights guaranteed by Article 3 of Protocol No. 1, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote, the so-called "active" element of the rights under Article 3 of Protocol No. 1. In *Melnychenko* (cited above, § 57), the Court observed that stricter requirements may be imposed on eligibility to stand for election to Parliament than is the case for eligibility to vote. In fact, while the test relating to the "active" aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a certain group of persons from the right to vote, the Court's test in relation to the "passive" aspect of the above provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate (see, in particular, paragraphs 106-08 above).

3. Application of these principles in the present case

116. Turning to the circumstances of the present case, the Court notes that the applicant alleges a violation of Article 3 of Protocol No. 1 in view of her exclusion from standing as a candidate for election to the Latvian parliament pursuant to section 5(6) of the Parliamentary Elections Act 1995 on the ground that she had "actively participated" in the activities of the CPSU (CPL) after 13 January 1991.

117. The Court points out in the first place that the criterion of political loyalty which may be applied to public servants is of little, if any, relevance to the circumstances of the instant case, which deals with the very different matter of the eligibility of individuals to stand for Parliament. The criterion of "political neutrality" cannot be applied to members of parliament in the

same way as it pertains to other State officials, given that the former cannot be "politically neutral" by definition.

118. The Court further finds that the impugned restriction pursued aims compatible with the principle of the rule of law and the general objectives of the Convention, namely the protection of the State's independence, democratic order and national security.

119. It remains to be established whether the restriction was proportionate. It is to be observed in this connection that Latvia, along with the other Baltic States, lost its independence in 1940 in the aftermath of the partition of central and eastern Europe agreed by Hitler's Germany and Stalin's Soviet Union by way of the secret protocol to the Molotov-Ribbentrop Pact, an agreement contrary to the generally recognised principles of international law. The ensuing annexation of Latvia by the Soviet Union was orchestrated and conducted under the authority of the Communist Party of the Soviet Union (CPSU), the Communist Party of Latvia (CPL) being a satellite branch of the CPSU. In the late 1980s, a feeling of discontent with the Soviet regime among the Latvian population led to a movement in favour of State independence and democratisation of the political system, which was confirmed by the results of a national plebiscite.

120. In March 1990, the newly elected parliament (the Supreme Council) adopted a declaration re-establishing Latvia's independence. As the Court has observed (see paragraphs 96-97 above), it sees nothing arbitrary in the domestic courts' findings that the unsuccessful attempted coups in the Baltic States in January 1991 and then in August 1991 were organised and conducted under the direction of the CPSU and its regional branches, including the CPL. The applicant referred to the CPL's official programme in order to exonerate the party from any responsibility for the events of 1991. In her opinion, the programme showed that this organisation had chosen the path to democratisation since 1990. However, the intentions of a party must be judged, above all, by the actions of its leaders and members rather than by its official slogans.

121. The impugned restriction introduced by the Latvian legislature by way of section 5(6) of the 1995 Act, precluding persons from standing for Parliament where they had "actively participated" in the activities of the CPL between 13 January 1991 and the date of that party's dissolution in September 1991, must be assessed with due regard to this very special historico-political context and the resultant wide margin of appreciation enjoyed by the State in this respect (see paragraph 115 (c) above).

122. The parties disagree as to whether the impugned restriction constituted a preventive or punitive measure. In the Court's opinion, what was at the heart of the impugned legislation was not an intention to punish those who had been active in the CPL. Rather, it was to protect the integrity of the democratic process by excluding from participation in the work of a

democratic legislature those individuals who had taken an active and leading role in a party which was directly linked to the attempted violent overthrow of the newly-established democratic regime. It is true that it is not stated in the legislation that the disqualification is unlimited in time, but nor does it appear that it is temporary. Notwithstanding this ambiguity, the intention of the legislature was clearly motivated by prevention rather than by punishment. The Constitutional Court's conclusions of 30 August 2000 and the subsequent periodic review of the legislation at the national level confirm this conclusion (see paragraphs 61-62 above).

123. In *Refah Partisi (the Welfare Party) and Others* (cited above, § 115) the Court held that acts of leaders of a party were imputable to the party unless it distanced itself from them. The corollary may be equally true in circumstances such as those of the instant case, namely that the acts of a party are imputable to its members, particularly those who are leading figures in it, unless those members distance themselves from those acts. A politician's conduct usually includes not only actions or speeches but also omissions or a lack of response, which can equally constitute acts indicating that politician's stance. In view of the critical events surrounding the survival of democracy in Latvia which occurred after 13 January 1991, it was reasonable for the Latvian legislature to presume that the leading figures of the CPL held an anti-democratic stance, unless by their actions they had rebutted this presumption, for example, by actively dissociating themselves from the CPL at the material time. However, the applicant has not made any statement distancing herself from the CPSU/CPL at the material time, or indeed at any time thereafter (see paragraphs 21, 23 and 120 above).

124. Criminal proceedings were never brought against the applicant. If this had been the case, she would have benefited from safeguards such as the presumption of innocence and the resolution of doubts in her favour in respect of such proceedings. The disqualification imposed under section 5(6) of the 1995 Act constitutes a special public-law measure regulating access to the political process at the highest level. In the context of such a procedure, doubts could be interpreted against a person wishing to be a candidate, the burden of proof could be shifted onto him or her, and appearances could be considered of importance. As observed above, the Court is of the opinion that the Latvian authorities were entitled, within their margin of appreciation, to presume that a person in the applicant's position had held opinions incompatible with the need to ensure the integrity of the democratic process, and to declare that person ineligible to stand for election. The applicant has not disproved the validity of those appearances before the domestic courts; nor has she done so in the context of the instant proceedings.

125. It should also be recalled that the Convention does not exclude a situation where the scope and conditions of a restrictive measure may be

determined in detail by the legislature, leaving the courts of ordinary jurisdiction only with the task of verifying whether a particular individual belongs to the category or group covered by the statutory measure in issue. This is particularly so in matters relating to Article 3 of Protocol No. 1. The Court's task is essentially to evaluate whether the measure defined by Parliament is proportionate from the standpoint of this provision, and not to find fault with the measure simply on the ground that the domestic courts were not empowered to "fully individualise" the application of the measure in the light of an individual's specific situation and circumstances (see paragraphs 112-15 above).

126. It is to be observed in this respect that section 5(6) of the 1995 Act is worded in relatively narrow terms. The very fact that the restriction relates only to those having "actively participated" in CPL activities at the material time confirms that the legislature clearly distinguished between the various forms of involvement in the party of its former members, as correctly pointed out in the Constitutional Court's decision of 30 August 2000.

127. Further, the Act conferred on individuals affected by the provisions of section 5(6) the right to have determined by a court the issue of whether they belonged to the category defined by the legislature, that is to say whether they could be deemed to have been "active participants". It is clear that this was not an illusory right (see paragraph 45 above). The applicant does not allege that the proceedings in her case were not adversarial. The Court also recalls that it has accepted the domestic courts' findings that the applicant was more than a formal member of the CPL, that she had participated in the party's activities after the critical date of 13 January 1991, and that the CPL itself had taken an active role in the events of 1991, including the abortive coup (see paragraphs 23 and 37-44 above). The procedures applied in the applicant's case, or indeed the conclusions reached by the domestic courts in applying the relevant domestic legislation, could not be considered arbitrary (see, by contrast, the *Podkolzina* and *Melnychenko* cases referred to in paragraphs 107-08 above).

128. In view of the above considerations, the Court considers that the impugned legislation was clear and precise as to the definition of the category of persons affected by it, and it was also sufficiently flexible to allow the domestic courts to examine whether or not a particular person belonged to that category. In the present case, a sufficient degree of individualisation as required by Article 3 of Protocol No. 1 was thus effected by the Latvian parliament in adopting section 5(6) of the 1995 Act, and thereafter by the domestic courts in establishing that the impugned statutory measure applied to the applicant. There was no obligation under Article 3 of Protocol No. 1 for the Latvian parliament to delegate more extensive jurisdiction to the Latvian courts to "fully individualise" the applicant's situation so as to enable them to establish as a fact whether or

not she had done anything which would justify holding her personally responsible for the CPL's activities at the material time in 1991, or to reassess the actual danger to the democratic process which might have arisen by allowing her to run for election in view of her past or present conduct (see, by way of contrast, paragraph 75 above).

129. Furthermore, it is not of central importance, for the purpose of justifying the applicant's inability to run for the national parliament, that she was never prosecuted for a criminal offence and was not one of the fifteen members of parliament who were stripped of their seats (see paragraphs 29 and 75 above). On the contrary, by choosing to bring a criminal prosecution only against the two former leaders of the CPL (see paragraph 32 above) and imposing more lenient restrictions on the political rights of other CPL activists such as the applicant, the Latvian authorities demonstrated a certain flexibility towards the latter group of persons.

130. Moreover, the Court considers irrelevant the question whether the CPL should be regarded as a legal or an illegal organisation during the period after 13 January 1991, given that the subversive nature of its activities was obvious at least from that date (see paragraphs 96, 97 and 120 above). It is clear that the applicant chose to support the CPL's anti-democratic stance, and her silence in the face of the events at the material time was just as telling as any overt action in support of the CPL's activities (see paragraphs 123-24 above).

131. Finally, the fact that the impugned statutory measure was not introduced by Parliament immediately after the restoration of Latvian independence does not appear in this case to be crucial, any more than it was in *Rekvényi* (cited above), where the provision excluding police officers from political activities became effective almost four years after Hungary's transition to a democratic system. It is not surprising that a newly established democratic legislature should need time for reflection in a period of political turmoil to enable it to consider what measures were required to sustain its achievements. This is all the more so in the case of Latvia, where troops of a foreign country, Russia, remained until 1994 (see *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X). Furthermore, the fact that the Latvian parliament enacted the statutory measure only in 1995 cannot be equated with the much more far-reaching restriction of personal rights barring former KGB officers in Lithuania from access to various spheres of employment in the private sector, which were introduced almost a decade after the re-establishment of Lithuanian independence, and which were considered, partly for this reason, disproportionate from the point of view of the Convention (see *Sidabras and Džiautas*, cited above, ibid.). It cannot therefore be concluded that the fact of Latvia having introduced the measure only in 1995 showed that the State itself did not deem such a restriction to be necessary to protect the democratic process in the country.

4. The Court's observations in conclusion

132. The Latvian authorities' view that even today the applicant's former position in the CPL, coupled with her stance during the events of 1991 (see, in particular, paragraphs 123-24 above), still warrant her exclusion from standing as a candidate to the national parliament, can be considered to be in line with the requirements of Article 3 of Protocol No. 1. The impugned statutory restriction as applied to the applicant has not been found to be arbitrary or disproportionate. The applicant's current or recent conduct is not a material consideration, given that the statutory restriction in question relates only to her political stance during the crucial period of Latvia's struggle for "democracy through independence" in 1991.

133. While such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.

134. The Court therefore accepts in the present case that the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order. Those authorities should therefore be left sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions, including the national parliament, and to answer the question whether the impugned measure is still needed for these purposes, provided that the Court has found nothing arbitrary or disproportionate in such an assessment. In this respect, the Court also attaches weight to the fact that the Latvian parliament has periodically reviewed section 5(6) of the 1995 Act, most recently in 2004. Even more importantly, the Constitutional Court carefully examined, in its decision of 30 August 2000, the historical and political circumstances which gave rise to the enactment of the law in Latvia, finding the restriction to be neither arbitrary nor disproportionate at that point in time, that is, nine years after the events in question (see paragraphs 61-63 above).

135. It is to be noted that the Constitutional Court observed in its decision of 30 August 2000 that the Latvian parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under Article 3 of Protocol No. 1, it is nevertheless the case that the Latvian parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which

Latvia now enjoys, *inter alia*, by reason of its full European integration (see paragraph 51 above). Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court (see, *mutatis mutandis*, *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 60, *Reports* 1998-V; see also the follow-up judgment to that case, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§ 71-93, ECHR 2002-VI).

136. The Court concludes that there has been no violation of Article 3 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

137. The applicant complained that her disqualification from standing for election to the national parliament as well as municipal councils amounted to a violation of Articles 10 and 11 of the Convention. The relevant parts of these Articles provide:

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, ... for the protection of the reputation or rights of others ..."

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. The Chamber's judgment

138. The Chamber considered that there had been a disproportionate interference with the applicant's rights, in breach of Article 11 of the

Convention. The Chamber also considered that it was not required to rule on the applicant's complaints under Article 10.

B. The parties' submissions

1. The applicant

139. The applicant acknowledged that the interference in question was "prescribed by law" within the meaning of Articles 10 § 2 and 11 § 2 of the Convention. However, she considered that the Government's submissions concerning the legitimacy of the aims pursued by the impugned measure and their respect for the principle of proportionality were unsubstantiated. In particular, neither the *Rekvényi* judgment cited above, nor Article 17 of the Convention supported the Government's position in the present case.

2. The Government

140. The Government maintained that the interference complied with the requirements of the second paragraphs of Articles 10 and 11 and that the impugned measure was "necessary in a democratic society".

C. The Court's assessment

141. The Court considers in the circumstances of the case that Article 3 of Protocol No. 1 is the *lex specialis*, and no separate examination of the applicant's complaints is warranted under Article 11. Nor can the Court find any argument that would require a separate examination of the applicant's complaints about her inability to stand for election from the point of view of Article 10.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objection;

2. *Holds*, by thirteen votes to four, that there has been no violation of Article 3 of Protocol No. 1;

3. *Holds*, by thirteen votes to four, that it is not necessary to examine separately the applicant's complaints under Article 11 of the Convention;

4. *Holds*, unanimously, that it is not necessary to examine separately the applicant's complaints under Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 March 2006.

Lawrence Early	Luzius Wildhaber
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Wildhaber;
(b) partly dissenting opinion of Judges Spielmann and Jaeger;
(c) dissenting opinion of Judge Rozakis;
(d) dissenting opinion of Judge Zupančič;
(e) joint dissenting opinion of Judges Mijović and Gyulumyan.

L.W.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE WILDHABER

I agree with the majority that this case concerns a complaint by the applicant under Article 3 of Protocol No. 1 about her disqualification from standing for election to the national parliament. If I dissented from the finding that it was not necessary to examine separately the applicant's complaint under Article 11 of the Convention, it was merely to emphasise that the applicant is not and has not been prevented from joining a party of her choice. Nor do the facts underlying her complaint that she was prevented from standing as a candidate in municipal elections give rise to an interference under Article 11.

PARTLY DISSENTING OPINION OF JUDGES SPIELMANN AND JAEGER

(Translation)

1. We do not agree with the majority's decision that no separate examination of the applicant's complaints was warranted under Article 11 of the Convention (see paragraph 141 and point 3 of the operative provisions).

We consider that the applicant's disqualification from standing for election to Parliament and to municipal councils as a result of her active participation in the CPL, a ban maintained more than a decade after the events of which that party was accused, ought to have been examined by the Court from the perspective of its compatibility with Article 11 of the Convention.

2. The applicant's leading position within the CPL and her conduct during the events of 1991 were used to justify the refusal to allow her to stand in either parliamentary or local elections. Those elements, namely the applicant's membership of and leading position within the CPL and her conduct during a crucial period of Latvia's struggle for "democracy through independence" in 1991, are thus at the core of the restriction that the Court has found to be compatible with Article 3 of Protocol No. 1.

An examination of the compatibility of that disqualification was required not only with regard to Article 3 of Protocol No. 1, but also with regard to Article 11.

3. It should be noted that when the crucial events occurred, namely when the attempted coup took place on 13 January 1991 with the CPL's backing, that party was not prohibited. It was only on 23 August 1991 that the CPL was declared unconstitutional by a decision of the Supreme Council, and, on the following day, that the party's activities were suspended and the Minister of Justice was instructed "to investigate the unlawful activities of the CPL and to put forward ... a motion on the possibility of authorising its continued operations". The Supreme Council did not order the party's dissolution until 10 September 1991.

4. Admittedly, the applicant's disqualification was not based *solely on the ground of her membership* of the CPL. However, in the instant case, such membership was nevertheless one of the *sine qua non* conditions for the impugned restriction.

Thus, given that her membership of the CPL and her leading position within that party *were among the elements* used to justify the disqualification, we consider that the scope of the protection (*Schutzbereich*) offered by Article 11 has been brought into play.

5. In this context, it is incumbent on us to emphasise that the right guaranteed under Article 11 of the Convention involves not only the right to

join a political party but also restricts the possibilities for penalising past party membership.

6. In addition, the exercise of the rights guaranteed by Article 11 § 1 of the Convention can only be construed within the limits of the second paragraph of that provision, which does not, however, leave States the same margin of appreciation as that granted by the Court in respect of Article 3 of Protocol No. 1 and which is described in the judgment as "wide" (see paragraphs 103, 115 (c), 121 and 135).

The Court has noted this fundamental distinction more specifically in paragraph 115 (a) of the judgment, where it states:

> "... where an interference with Article 3 of Protocol No. 1 is in issue the Court should not automatically adhere to the same criteria as those applied with regard to the interference permitted by the second paragraphs of Articles 8 to 11 of the Convention, and it should not necessarily base its conclusions under Article 3 of Protocol No. 1 on the principles derived from the application of Articles 8 to 11 of the Convention. Because of the relevance of Article 3 of Protocol No. 1 to the institutional order of the State, this provision is cast in very different terms from Articles 8 to 11 of the Convention. Article 3 of Protocol No. 1 is phrased in collective and general terms, although it has been interpreted by the Court as also implying specific individual rights. The standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8 to 11 of the Convention."

7. Finally, the parties agreed before the Court that a separate issue arose under this Article. The respondent Government alleged that the interference with the applicant's rights under Article 11 was compatible with the requirements of the second paragraph of that provision and that the impugned measure was "necessary in a democratic society". The applicant contested the legitimacy of the aims pursued by the impugned measure, and considered that it was disproportionate.

8. In consequence, we consider that the Court ought to have made a separate finding on this important question.

DISSENTING OPINION OF JUDGE ROZAKIS

While I concur with a number of the majority's considerations in this case – including their finding that no separate issue arises in so far as Articles 10 and 11 are concerned – I am unable to agree with some of their conclusions which, in my view, are of central importance in this case, and justify my departure from the majority's decision to find that there had been no violation of Article 3 of Protocol No. 1 in the circumstances. I would also like, from the outset, to point out that I can in many respects readily follow the thread of thinking of Judge Zupančič as reflected in his own dissent; still, his approach is basically a principled one and I would like to concentrate here primarily on certain considerations of a more, I would say, technical nature than his own broadly theoretical approach.

Let me start by what I consider an indispensable preliminary clarification, which may be justified by the somewhat dubious position of the majority with regard to the nature of the rights under Article 3 of Protocol No. 1. In paragraph 115 of the judgment the Court considers that "Article 3 ... is phrased in collective and general terms, although it has been interpreted by the Court as also implying specific individual rights". This sentence, although it ultimately does not have a radical impact on the Court's further pronouncements (the sentence which follows in the same paragraph shows that this finding simply affects the standards to be applied for establishing compliance with Article 3, and does not constitute a complete negation of the Article's substance as containing an individual right), is an obscure generalisation which contradicts not only the drafting history of the Protocol and the previous case-law of the Court, but also the letter of the present judgment itself, paragraph 102 of which states in less dubious, but still open-ended, terms that "the Court has established that this provision also implies individual rights, including the right to vote and to stand for election".

I consider that, regardless of whether Article 3 of Protocol No. 1 is "phrased in collective and general terms", it is clear that this Article does not simply imply an individual right but actually provides for one. The drafters' aim was to enrich the Convention with a political right not differing from the other individual human rights contained in the original Convention. The Convention lays down, without exception, individual rights whose bearers are indiscriminately entitled to invoke them in their relations *vis-à-vis* the States Parties and the Convention institutions. Hence, regardless of other possible functions, Article 3 *does* confer a specific individual right, which does not differ qualitatively from any other right provided for by the Convention. This conclusion is in agreement with the *locus classicus* of our case-law, the judgment in *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987, §§ 49-50, Series A no. 113), in which the Court stated, *inter alia*:

> "49. Such a restrictive interpretation [that Article 3 does not give rise to an individual right] does not stand up to scrutiny. According to its Preamble, Protocol No. 1 ensures 'the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention'; furthermore, Article 5 of the Protocol provides: 'as between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 ... shall be regarded as additional Articles to the Convention', all of whose provisions – including Article 25 – 'shall apply accordingly'. Moreover, the Preamble to Protocol No. 4 refers, *inter alia*, to the 'rights and freedoms' protected in 'Articles 1 to 3' of Protocol No. 1.
>
> Nor do the *travaux préparatoires* of Protocol No. 1 disclose any intention of excluding the operation of the right of individual petition as regards Article 3, whereas for a long time the idea was canvassed – only to be finally abandoned – of withholding the subject from the Court's jurisdiction. The *travaux préparatoires* also frequently refer to 'political freedom', 'political rights', 'the political rights and liberties of the individual', 'the right to free elections' and 'the right of election'.
>
> 50. Accordingly – and those appearing before the Court were agreed on this point – the inter-State colouring of the wording of Article 3 does not reflect any difference of substance from the other substantive clauses in the Convention and Protocols. The reason for it would seem to lie rather in the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections."

Coming now to the findings of the majority which are pertinent to the concrete case before us, my main observation concerns the nature of a parliamentarian's functions in a democratic society. The Court correctly points out, in paragraph 117 of the judgment, that "the criterion of political loyalty which may be applied to public servants is of little, if any relevance, to the circumstances of the instant case, which deals with the very different matter of the eligibility of individuals to stand for Parliament. The criterion of 'political neutrality' cannot be applied to members of parliament in the same way as it pertains to other State officials, given that the former cannot be 'politically neutral' by definition."

Indeed, the role of a parliamentarian is totally different from all the other roles played by those involved in public matters, including the members of the executive when they exercise their administrative function. In a representative democracy parliamentarians represent, by definition, the opinions and the positions of their electorate – that is, those who have voted for them. They replace them in expressing opinions and positions within and outside Parliament, and, theoretically, act instead of them in a system which, by definition, is not a direct democracy. It is obvious that in this system of representative democracy not everyone can claim to validly represent others. There are at least two safeguards which secure the direct accountability of parliamentarians in faithfully expressing their electorate's broad wishes: firstly, the safety valve of the democratic election (candidates

are elected on the basis of their personality, ideas and opinions as revealed to the public before the elections), and, secondly, the safety valve of post-electoral scrutiny: if an elected representative does not stand up to the expectations of his or her electorate, he or she will probably lose their confidence, and, in the end, his or her seat in Parliament.

The election of parliamentarians to express their electorate's expectations lies at the core of a representative democracy, whatever their opinions are, and however displeasing these latter are to other strata of society. In a system of sound democratic governance the criterion of eligibility cannot be determined by whether a politician expresses ideas which seem to be acceptable to the mainstream of the political spectrum, or loyal to the established ideologies of the State and society, but by the real representativeness of his or her ideas *vis-à-vis* even a very small segment of society. Accordingly, if a politician is prevented from representing part of society's ideas, it is not only he or she who suffers; it is also the electorate which suffers, it is democracy which suffers.

For these reasons prohibitions on eligibility to stand for election should be very exceptional and very carefully circumscribed. One can, of course, understand that a State may introduce eligibility conditions of a technical nature, such as those referred to in the Convention's jurisprudence and considered in some cases already examined by the Strasbourg institutions (see paragraphs 103 et seq. of the judgment). One can also understand that in certain very exceptional circumstances, the very protection of the primary value of democracy may call for a prohibition on the exercise of the rights contained in Article 3 of Protocol No. 1. But in such circumstances, the State cannot of course escape the scrutiny of the Convention institutions, which should carefully delineate the limits of the State's liberty to restrain the passive right of a politician or a political party to be elected.

In this respect, the judgment of this Court in the case of *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II) is extremely illustrative of the way in which the Strasbourg institution has dealt with the very difficult and delicate matter of the prohibition of a political party from participating in national elections. Indeed, in *Refah Partisi* we were confronted with a situation in which a political party propagating undemocratic ideas directly threatening the fragile political infrastructure of Turkey had had a strong possibility of seizing power by using the democratic electoral procedures provided by the system. The danger was "real and present", to use the famous *dictum* of the United States Supreme Court. And our Court correctly considered that, in such exceptional circumstances, a "State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of

that policy for democracy is sufficiently established and imminent" (ibid., § 102).

The question is whether we are confronted in the present case with a situation bearing (even remote) similarities with that in *Refah Partisi*, which would justify treating the case in the same way. My answer is categorically negative, for the following reasons.

First, the applicant was not allowed to take part in the elections, not because of the imminent threat that she posed to the democratic governance of Latvia at the time when the 1995 Act came into force, but because of her past attitude, and mainly her participation in the 1991 events. Leaving aside the argument of the belated emergence of the 1995 Act, and the gap between the events and its enactment, there was no indication in 1995 that the subversive tendencies of her political milieu which had been present in 1991 were still the same in 1995, or that she herself in 1995 would propagate ideas similar to the ones which had been at the forefront of the 1991 events.

But even if we accept – and this is my second observation – that in the circumstances of Latvia's transition to democracy and its efforts to be disentangled from its recent past, such a harsh measure could have been justified during the first difficult years of adapting to the new regime and for the sake of democratic consolidation, the restrictions have nevertheless not been abolished to date, and this despite the fact that in the meantime Latvia has become a member State of NATO and, more importantly, of the European Union. We are now eleven years away from the date of the Act prohibiting the applicant from standing for election, fifteen years from the events which led to the belated promulgation of the Act, five years from the Constitutional Court's decision, and almost two years from the election of the applicant to the European Parliament.

Last, but not least, the situation of a single candidate for a seat in Parliament differs radically from the situation of a whole political party aspiring to become the government of a country. It is undoubtedly clear from the facts of the case that the applicant was not only an isolated candidate representing ideas shared by only part of the pro-Russian electorate, but also that she belonged to an ideological current which was, in any event, a minority strand within the political spectrum of Latvia. In these circumstances, it is difficult to contend that the election of the applicant to the Latvian parliament would have had adverse effects on the democratic stability of the country.

For all these reasons, I consider that the applicant – together with, implicitly, her followers – was unduly deprived of her rights under Article 3 of Protocol No. 1, and that, consequently, there has been a violation of this Article.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I regret that I cannot join the majority opinion in this case. Clearly, the majority decision hinges on accurate assessment of the real threat posed by the applicant's political activities at the material time. Yet these activities, even at the time critical for Latvian independence, were not subversive or even secretive. If at any time Mrs Ždanoka truly represented a danger[1] to the emerging Latvian sovereignty, this was a corollary of her real prospects of being elected.

Consequently, the issue in this as in all similar cases concerns the relationship between democracy and the rule of law.

However, from a historical viewpoint, when the Latvian constitutional order was still *in statu nascendi*, one could not have simply said – not even in terms of the Molotov-Ribbentrop Pact and international law! – that Mrs Ždanoka's and others' concurrent political activities opposing Latvian independence, the disintegration of the Soviet Union and so on were *per se* politically illegitimate or even illegal. Even international law does not have the power to wipe away a historical period of some fifty years. Consequently, if the applicant's activity were to be *a priori* declared illegitimate or illegal, much of what had been happening in the Soviet Union ought to have been *a posteriori* declared illegitimate or illegal. *Ex factis ius oritur*; history may have the power to make that judgment, but not the law. The law's attention span is limited by the established State power. History, on the other hand, is written by the victor; Mrs Ždanoka found herself on the wrong side of that history.

The majority's opinion thus derives from a rather narrow time perspective. Since timing is at the heart of this decision, I beg to differ.

Ždanoka v. Latvia is a case in which the historical and ideological significance of transition from Soviet communism as a failed socio-political experiment back to capitalism, democracy and the rule of law is inescapably the central issue. I say "inescapably", because the case concerns the political rights of the sizeable Russian-speaking minority.

To the Latvians the continuation of communist rule was synonymous with the continuation of Russian occupation. To the Russian-speaking minority, representing some 30%[2] of the population, the imminent self-determination of Latvians foreshadowed the certain loss of privileged status and a possibility of discrimination. To the Latvian majority, as was made clear in the case of *Slivenko v. Latvia* ([GC], no. 48321/99, ECHR 2003-X), the granting of particular human rights to the large Russian-speaking

1. During the public hearing the Agent of the Government compared Mrs Ždanoka to Mr Milošević in ex-Yugoslavia.

2. Ethnic groups in 2002: Latvians 57.7%, Russians 29.6%, Belarusians 4.1%, Ukrainians 2.7%, Poles 2.5%, Lithuanians 1.4%, other 2%. (Demographics of Latvia at http://en.wikipedia.org/wiki/Demographics_of_Latvia)

minority, a consequence of the fifty years of Russian occupation, was and is absurd[1]. It smacks of the inverse logic of Article 17 of the Convention[2]. Suddenly, the former occupiers whose very existence on Latvian territory had originated in illegal occupation, claimed to be victims of human rights violations. Had the very rule of law and democracy for which the Latvians had fought and which for decades had been denied them by the communist rulers of the Soviet Union now become the weapon to be turned against the Latvians themselves? The historical paradox they faced is an existentially absurd one, reflecting an internal *clivage* to which there can be no immediate solution.

Nevertheless, the travesty of former oppressors subsequently appealing to and profiting from democracy and the rule of law is not specific to Latvia or even only to all three Baltic countries. Specific cases reaching this Court make this evident[3]. In central and eastern Europe we now find many aging individuals who have blood on their hands. Some of them have become vociferous proponents of human rights. If anybody should propose retribution towards, for example, all those who in the not so distant past avidly collaborated with the secret police, they raise their voices with the accustomed arrogance derived from their past and established authoritarian position. They barefacedly claim the very human rights which they spent their life denying to others, nay, often cold-bloodedly violating them in the most brutal fashion.

This Court must take a clear position on this matter.

The logic underlying Article 17 is clear. The legal weapon of claiming human rights must not be perverted. It must not be used to serve those who would in turn violate human rights themselves. The genius of Karl Popper formulated this clearly. He maintained that democracy is for everybody except for those who would destroy it. We are to be tolerant of everything except acts of intolerance.

Two questions derive from this general principle. Firstly, are those who were intolerant in the past subsequently entitled to tolerance? This is a question of Biblical proportions. Should the talionic[4] tooth-for-tooth retributive logic of the Old Testament apply, or should human rights be universal not just in space but also in time? In turn, does this mean turning the other cheek to those who slapped us?

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1. See, for example, paragraph 4 of the joint dissenting opinion of Judges Wildhaber, Bratza, Cabral Barreto, Greve and Maruste in the case of *Slivenko v. Latvia*.

2. Article 17 – Prohibition of abuse of rights: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

3. See, for example, *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II.

4. "*Si membrum rupsit, ni cum eo pacit, talio esto!*" Leges XII Tabularum, Tabula VII, Fragmentum 2.

Secondly, what kind of (simultaneous) intolerance should be directed at those who are themselves intolerant? Does the Constitutional Court of Austria, for example, have the right and indeed the duty to proscribe the activities of Mr Haider's proto-Nazi party that feeds on "*Urangst*" and ethnic intolerance against Slovenians in Carinthia? How clear and present should be the danger established by the famous *Brandenburg v. Ohio* test recently adopted by Turkish domestic legislation?[1]

These used to be "political questions". Thanks to the colossal progress of constitutional law in the second half of the twentieth century it is now clear that they go to the essence of the rule of law.

In international law, the Nuremberg trial is a historic representation of how the rule of law responds to barbarity, of how the power of legal logic *ex post facto* prevails over the Hobbesian logic of power. In *Streletz, Kessler and Krenz* (cited above) it became clear, on narrower grounds, that the systemic practice of impunity, despite the purely formal existence of precise punitive norms to the contrary, cannot afterwards be grounds for the affirmative defence based on an excusable mistake of law. Once the rule of law is re-established, the positive norm, even if previously dormant, will apply. Ever since 1764 when Cesare Beccaria wrote his decisive "*Dei delitti e delle pene*" the retrospective validity of the punitive rule of law has been an integral part of the principle of legality. Later it was reformulated by Anselm Feuerbach into the famous formula "*nullum crimen, nulla poena sine lege praevia*". The doctrine is now reiterated in the first paragraph of Article 7 of the European Convention on Human Rights[2]. Thus, the temporal scope of the rule of law – at least in its *negative*, punitive aspect – is subject to strict restraints. *Streletz, Kessler and Krenz*, however, also proves that this doctrine cannot be reduced, as it mostly is in our own case-law, to the simple notion of advance notice. It proves that the punitive norm, even if dormant and subject to selective but systemic denial, that is, the generalised practice of impunity, and thus liable to make the actors reasonably assume it will not be applied, is, years afterwards, still in *positive* existence. At least in so far as the circles of law and morality overlap, in other words, the selective non-application of a penal norm (the systemic practice of selective impunity) is no bar to subsequent prosecution. I maintain here what I said in my concurring opinion in *Streletz, Kessler and Krenz* – that it is not a case of the retroactive application of criminal law but of an inexcusable mistake of law.

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1. *Brandenburg v. Ohio*, 395 US 444 (1969) This test was used in *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, ECHR 2001-IX.

2. In truth this doctrine goes back to Roman law. "*Poena non irrogatur nisi quae quaque vel quo alio iure specialiter, huic delicto imposita est.*" Dig.50.16.131.1, Ulpianus 3 ad l. iul. et pap.

In the present case, however, we do have to deal with the *positive* element of retrospectivity. Here we are concerned with positive rights (the right to be elected) and not with negative-punitive norms. Restrictions as to the temporal scope of the application of the norm, such as derive from the principle of legality, do not apply. For example, the extensive interpretation of the presumption of innocence precludes discrimination against former collaborators (lustration) unless, of course, their criminal liability has been finally established. It is relevant that Mrs Ždanoka has never been convicted of anything.

Furthermore, people cannot be prevented from actively participating in the democratic process simply because they are likely to be elected. The alleged political subversiveness of Mrs Ždanoka does not derive from any illegal activity on her part established by a Latvian criminal court. Moreover, she would be politically irrelevant were it not for the *real odds*, past, present or future, that she *would* be elected. By whom? By members of the Russian-speaking minority?[1] When she *was* permitted to stand (successfully) for election to the European Parliament this *was* tolerated because her political impact in the European Parliament is diluted and does not threaten the autonomist rule in Latvia. The fact, incidentally, that she was elected proves the real odds mentioned above.

In other words, I do not believe for a moment that the Latvian authorities would have prevented Mrs Ždanoka from standing in national elections in Latvia were it only for her communist *past*. Neither is the true reason her *present* unwillingness to recant and repudiate her communist views. The domestic Latvian point of view concerns no more (and no less) than Mrs Ždanoka's *future* political dangerousness. This has to do with the demographic *fact* that thirty per cent of the existing Latvian population speaks Russian. Presumably, this puts in jeopardy the pro-autonomy rule of the autochthonous majority in whose name the separation of Latvia (and the other two Baltic States) from the Soviet Union was carried out in the first place.

Now that we have reached the stage where we can, without legalistic smokescreens, call a spade a spade, we can finally address the real question. The large Russian-speaking minority in Latvia is a demographic by-product of the long-term illegal occupation by the Soviet Union. Does the historical fact that the occupation *was* illegal – and it is probably not an accident that the majority opinion emphasises the early illegality of the Molotov-Ribbentrop pact – imply that the residence of the Russian-speaking population in Latvia is itself illegal?[2]

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1. In my view, this is the only "*clear and present danger*" in this case.
2. It is not difficult to imagine that this population might be over 50%. Despite everything, the legitimate democratic process would then yield the kind of political leaders such as Mrs Ždanoka who would tend towards reunion with the Russian Federation. The independence of Latvia would then hardly amount to something stable. Yet this would not

In different terms the same issue arose in *Slivenko* (cited above). The critical distinction when an individual's human right is at stake is precisely between an individual's *personal* situation on the one hand, and the larger historical and *collective* situation of the group to which he or she happens to belong on the other[1]. In principle, human rights are strictly individual rights. Historical and collective aspects of the situation are beyond the scope of our jurisdiction.

Yet the majority opinion, like the domestic decisions concerning Mrs Ždanoka, rightly treats her situation as representative not merely of her private predicament. Obviously, the right to stand for election – for this reason considered in a separate Protocol – affects the individual (Mrs Ždanoka) *and* the collectivity (the Russian-speaking minority) he or she has the ambition to represent politically. The majority opinion, however, *implicitly* amalgamates the two aspects. The consequence of this mingling of issues is *explicit* endorsement of the denial of the right to stand for election. The reason for this denial was that Mrs Ždanoka had a real chance of being elected[2]. So much for democracy.

Admittedly, this result is a consequence of the narrow scope of our jurisdiction. Yet, are we here to correct the historical wrongs? Are we to say that 30% of the Latvian population is there illegally? Even if these people were regarded as aliens, their collective expulsion would be explicitly

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be so unusual. This is made clear by the example of Slovene-populated territories now in Italy and Austria. In both countries the Slovenian population was subject to intense Fascist-Nazi colonisation and fierce assimilation as evidenced even today by the efforts of Mr Haider. The result is ethnic intolerance. Such intolerance broke out – likewise for demographic reasons – in the war between Albanians and Serbians in Kosovo. Such intolerance is the precursor of ethnic cleansing. The historic situation in *Broniowski v. Poland* ([GC], no. 31443/96, ECHR 2004-V), for example, was the consequence of such an attempt amounting to the across-the-board displacement of the population resident in the so-called "territories beyond the Bug River".

1. "[P]luralism, tolerance and broadmindedness are hallmarks of a 'democratic society' (p. 23, § 49). Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants' standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court." Such was the position of the old Court in *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 63, Series A no. 44. The problem in the case at hand is precisely the reverse: Mrs Ždanoka's views would have been embraced by too many for this to be "politically safe".

2. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993). Article 3, para 1: "Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination."

forbidden by Article 4 of Protocol No. 4[1]. The prohibition of the collective expulsion of aliens indicates a clear *legal* answer to this question, if indeed there is a need for one. This answer is tolerance in the passage of time.

The dilemma is not specific to the Baltic States. In fact the whole of European history, not to speak of its horrific colonial cruelties, is replete with the recurrent "movement of nations" – usually by means of wars and violent takeovers. Needless to say, in terms of international law – in so far as its criteria applied at all – most of these takeovers were utterly "illegal". It is for the historians to assess the end results of this mixing of populations, determining who in any particular case were the victors and who the vanquished.

The issue, however, has always been the preservation of national identity *versus* assimilation. In terms of international law, Woodrow Wilson's formula concerning "self-determination of nations" implies, as he had been warned by his advisers at the time, a wide-ranging particularisation and ethnic intolerance[2].

Parallel to this process of particularisation, however, we have today an intense global process of universalisation. It goes under the name of "globalisation". Some legal theorists, among them Roberto Mangabeira Unger of Harvard, even maintain that the current intense reversion to "the preservation of national identity", or the pandemonium of nationalism, is a regressive and over-compensatory reaction not to interstate conquests but to the process of globalisation. This is happening through commercial ties and through the means of global communications that insistently and gradually obliterate residual value hierarchies, ethnic attributes, and distinctive cultural productivity. In international-law circles there is talk of legal and cultural imperialism[3].

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1. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no. 46, came into force on 2 May 1968. Article 4: "Collective expulsion of aliens is prohibited."

2. See Daniel Patrick Moynihan's Oxford Lectures on this question entitled "Pandaemonium: Ethnicity in International Politics" (1993). The title refers to the resulting outbreak of nationalism. "Every spot on this earth – well, nearly every one – is inhabited nowadays by two, three, or more peoples that differ in race, religion, or ethnic background. For each of these disparate groups, the same spot is their inalienable land, their rightful home, their patrimony. The origins of this multi-tribal cohabitation vary greatly. Sometimes one tribe conquered the territory inhabited by another tribe without expelling or killing all the 'natives'. In other cases, racially or ethnically disparate people were imported as slaves or indentured labour, or welcomed as voluntary immigrants." "Pandaemonium: Ethnicity in International Politics", review by Fred C. Ikle (http://www.findarticles.com/p/articles/mi_m2751/is_n32/ai_14182726/print).

3. The growing literature on the doctrine of international law now unveils how international legal scholars such as Vitoria, Grotius, de Vattel, Westlake and others bent their legal reasoning, be it through natural law or positivistic approaches, to serve their sovereigns in justifying expansionist interests. (See Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge,

The two processes (of particularisation and universalisation) run in parallel and dialectically condition one another. The process of particularisation implies, as if the breakdown into a number of pocket States in Europe were not enough, regression to ever smaller units of ethnic defensiveness.

Parallel to this, the inevitable universalisation (economically: "globalisation") makes these defensive postures both more and more irrelevant but also more aggressive. As usual, this aggression is then displaced to the target that is closest and most at hand. In *Nachova and Others v. Bulgaria*[1] it was the Roma people, in *Blečić v. Croatia*[2] it was Serbians, in Serbia it was Albanians, in Germany and France it may be immigrant workers and their children, and so on. In many of these realms we detect the unhealthy trend from patriotism on the one hand to nationalism, chauvinism and racism on the other.

This intolerance is the European scourge. Because European history is replete with instances of aggression deriving from regressive nationalism, the European Court of Human Rights must take an unambiguous and unshakable *moral* stand on this predicament. Inter-ethnic tolerance is a categorical imperative of modernity. From intolerance derive too many violations of human dignity and human rights.

Protocol No.12 will bring discrimination *as such* into play. There can be absolutely no doubt that discrimination on the basis of the suspect class of national origin is *par excellence* an issue of constitutional and human rights. In my opinion the future of the European Union, too, depends on such moral leadership and on the ability of united Europe to rise above the petty nationalistic prejudices that have hitherto been the cause of so many wars and of so much human suffering.

Here, above all, the Court will be tested as to its wished-for historical role.

2005; Koskenniemi, Marti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, Cambridge, 2002; Tuck, Richard, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford University Press, Oxford, 1999.) For an account of how imperialism has impregnated culture to the point that we take it for granted, see the works of Edward W. Said (*Orientalism*, Pantheon Books, New York, 1978; *Culture and Imperialism*, Vintage, London, 1994). For an overview of imperialism-influenced theories across the spectrum of social thought, see Curtin, Philip D. (ed.), *Imperialism*, MacMillan, London and Basingstoke, 1972.

1. [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII.
2. [GC], no. 59532/00, ECHR 2006-III.

JOINT DISSENTING OPINION OF JUDGES MIJOVIĆ AND GYULUMYAN

In the present case, which concerns the right to free elections, the majority of the judges have found no violation of Article 3 of Protocol No. 1. Having gone through the facts of this case, we, to our regret, were unable to follow the majority of the judges for the following reasons.

In the present case a Latvian politician was disqualified from standing for election on account of her former membership of the Communist Party of Latvia (CPL), which during the Soviet period was a regional branch of the Communist Party of the Soviet Union.

In March 1990, as a member of that political party, Tatjana Ždanoka went on to become a member of the Supreme Council of the Soviet Socialist Republic of Latvia. After the restoration of Latvia's independence, on 23 August 1991 the CPL was declared unconstitutional, with a stipulation that persons who had participated in the activities of the CPL after 13 January 1991 would be ineligible to stand for political office.

By a decision of the Central Electoral Commission, the applicant was ruled ineligible to stand as a candidate in the parliamentary elections. Her exclusion was based on her former membership of the Communist Party of Latvia.

She complained that her right to stand for election had been infringed as a result of her disqualification.

Although we are aware that this case concerns very sensitive circumstances, we consider that it was not the Court's task to take sides in the historical and political controversies, but rather to examine the legality of the applicant's ineligibility in the context of punitive measures – in other words, to assess whether the lack of a fixed duration for the applicant's ineligibility was appropriate in view of the (temporary) nature of punitive measures.

The Court reiterated that States Parties to the Convention had a wide margin of appreciation in their internal legal orders in subjecting the right to vote and to stand for election to prescribed conditions, and that is something we completely agree with.

We have no difficulty in accepting the legitimacy of a punitive measure, since we cannot exclude the possibility that the restriction in issue could have been justified and proportionate during the first few years after the restoration of Latvia's independence. It is commonly accepted that certain restrictions may be necessary in newly established and vulnerable democratic regimes (just as the requirement of proportionality is), and this approach has been developed by the Court in addressing a number of clearly defined questions. Additionally, it has been established that the law of each and every State Party to the Convention should be sufficiently clear to allow individuals to foresee such restrictions and to be aware of the way in which

their rights will be limited (see *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V).

On the other hand, we strongly believe that such restrictive measures should be temporary in order to be proportionate. In this case the restriction imposed on the applicant seems permanent in that it is of indefinite duration and will continue until legislation putting an end to it is adopted. More than ten years after its initial concerns, we cannot accept that the Latvian parliament still believes that former CPL members are a threat to democracy. And if this is so, if former members of the CPL were and still are a real threat and danger to democracy, why has the parliament failed to enact legislation providing for their permanent ineligibility?

We consider that the Latvian parliament should have decided to impose a time-limit on these restrictions since such limitations on the right to free elections, as we have already mentioned, should exist only for a specific period, a period of vulnerability for a newly established regime. On that basis, we believe that the ineligibility procedure introduced as a result of the Constitutional Court's interpretation was not sufficient, since it did not allow the courts to assess whether a person represented a real threat and danger to democracy. On the other hand, the very same Constitutional Court in its judgment of 30 August 2000 urged the legislature to periodically re-examine the need to maintain the disputed measure.

Furthermore, the applicant had never been convicted of a criminal offence, she was not one of the fifteen members of parliament who were removed from their seats and there was no evidence that she herself had committed any acts aimed at undermining the new regime.

Having regard to all the above, we strongly believe that the permanent restrictions on standing for election to the Latvian parliament imposed on the applicant on account of her former membership of the Communist Party of Latvia violated her right to free elections.