



# JUDGE OF THE CONSTITUTIONAL COURT

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**Judge of the Constitutional Court  
Jānis Neimanis**

## **SEPARATE OPINION**

**Riga, 5 January 2023**

**Case No. 2022-09-01**

**"On compliance Section 23(1) of the Punishment Register Law in so far as it relates to information on acquitted persons, to Section 96 of the Constitution of the Republic of Latvia".**

The Constitutional Court ruled to declare Section 23(1) of the Punishment Register Law, in so far as it relates to information on acquitted persons, as incompatible with Section 96 of the Constitution of the Republic of Latvia. I fully agree with parts of the judgements.

I do not agree with the arguments in Paragraph 14.4 of the Conclusions of the Constitutional Court's judgement that the legitimate aim of the restriction of fundamental rights created by the contested norm could be the protection of the rights of the person himself. The Court has subordinated it both to the protection of the democratic order and to the protection of the rights *of others* (my emphasis). However, Paragraph 14.4 of the Conclusions is not just full of reasoning errors, but is rooted in the position of the majority of the Court that the State could process (*i.e. interfere with the fundamental rights of an individual*) in order to make it convenient for the individual to obtain them from the State at some point. The Court has confused a restriction of a right with a service.

Fundamental rights are based on the principle of human dignity and the freedom of self-determination (autonomy). These two elements are of the highest value in a democratic

state governed by the rule of law. The freedom of self-determination covers any human choice, regardless of whether it should be recognised as valuable from the socio-ethical point of view or whether it should be merely an expression of a person's personal will, insofar as it does not threaten the rights of other persons, the constitutional order or other interests essential for society (*cf. Paragraph 21.1 of the judgement of the Constitutional Court of 11 December 2020 in Case No 2020-26-0106*). Human rights are, in many cases, the means and forms of expression of this freedom of self-determination; on the other hand, the fundamental rights of others, among others, determine the limits of personal autonomy. In general, any action or activity can only be characterised as autonomous if the person himself prefers the action, the decision is independent and consistent with his plan of action. In other words, autonomy can only be said to exist if the individual is guaranteed freedom of choice and ethical decision-making. Accordingly, respect for personal autonomy implies recognition of a person's right to hold opinions, make choices and take actions based on personal values and beliefs. The legislator must trust the ability of a person to assess the manifestations of such freedom, as long as they affect only the person himself, but the individual must assume responsibility for the consequences of exercising his freedom (*cf. Paragraph 21.1 of the judgement of the Constitutional Court of 11 December 2020 in Case No 2020-26-0106*).

Restrictions on fundamental rights and, consequently, on a person's freedom of self-determination are only possible in the interests of a society of general interest. In certain cases, these interests may be specified in relation to a narrower range of persons, but they will always have an objective and unrelated meaning. In other words, restrictions on fundamental rights are possible when the interests of at least two persons are at stake and the best compromise between them is sought. Accepting the possibility of restrictions implies an individual's consent to be part of society. The State cannot paternalistically restrict a person's fundamental rights by balancing the harm done to the person itself and making choices on the person's behalf. A person cannot be both an end and a means within the same framework.

It also follows that the individual has the right to make decisions about his or her own data, even if these decisions subsequently make it more difficult for him or her to exercise his or her rights, but that the State must respect the principles of data minimisation and the rule of law.

The fact that a person's fundamental rights cannot be restricted on the grounds that this is necessary for the exercise of his or her other rights is also illustrated by the possibility, based on the person's self-autonomy, not to exercise these specifically guaranteed rights

or to waive them outright (*Epping V. Grundrechte*. 8.Aufl., Berlin: Springer, 2019, S. 59, Rn 112). In such a case, the processing of personal data would be even more unjustified - the legitimate purpose would no longer exist. That is, there is no reason for a State to keep a volume of relevant data about a person forever, with the caveat that the person might at some point find the data useful. Such processing can only take place on the basis of the individual's consent, which is accordingly no longer regarded as a restriction of a fundamental right.

In addition, while Article 6 of the General Data Protection Regulation contains six different legal grounds for lawful processing of personal data, covering (informed) consent and situations where processing is necessary, such as the need to perform a contract, the Police Directive contains only one legal ground for processing personal data: the need to process data for the performance of tasks by competent authorities in a criminal law context. In other words, neither the consent of the individual nor his/her interests are in themselves a potential legal basis for the processing of personal data carried out under the Police Directive; this could in any case only be done separately and in accordance with the requirements of the General Data Protection Regulation .

Consequently, ensuring the rights of a person himself, hiding behind the words "protection of the democratic order" and "protection of the rights of other persons", could not be recognised as a legitimate aim of the restriction of the contested norm.

Judge\*

J. Neimanis

*\*The document is signed with a secure electronic signature and contains a time stamp.*