



LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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SEPARATE OPINION of the Justice of the Constitutional Court

Aldis Laviņš

in Riga, on 25 May 2016,

in Case No. 2015–14–0103

“On Compliance of Para 2 and Para 6 of Section 1, Section 4, Section 10, Section 18(1) of Law on Development and Use of the National DNA Database, as well as Para 2 and Para 13 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 “The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace”, insofar as these apply to persons suspected, with Article 96 of the Satversme of the Republic of Latvia.”

1. On 12 May 2016, the Constitutional Court passed a judgement in Case No. 2015–14–0103 “On Compliance of Para 2 and Para 6 of Section 1, Section 4, Section 10, Section 18(1) of Law on Development and Use of the National DNA Database, as well as Para 2 and Para 13 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 “The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace”, insofar as these apply to persons suspected, with Article 96 of the *Satversme* of the Republic of Latvia” (hereinafter – the Judgement) and held:

- 1) to terminate legal proceedings in the case in the part regarding compliance of Para 2 of Section 1 of Law on Development and Use of the National DNA Database and Para 13 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 “The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace”, insofar as these apply to persons suspected, with Article 96 of the *Satversme* of the Republic of Latvia;
- 2) to recognise Para 6 of Section 1, Section 4, Section 10 of Law on Development and Use of the National DNA Database, as well as Para 2 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 “The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace”, insofar as these apply to persons suspected, as being compatible with Article 96 of the *Satversme* of the Republic of Latvia;
- 3) to recognise Section 18(1) of Law on Development and Use of the National DNA Database, insofar as it applies to persons suspected, as being incompatible with Article 96 of the *Satversme* of the Republic of Latvia and invalid as of 1 January 2017.

2. I disagree with a number of arguments included in the Judgement and findings that were made – that the Applicant had exhausted all effective and real general legal remedies and also with respect to the scope of Para 6 of Section 1, Section 4 and Section 10 of Law on Development and Use of the National DNA Database, as well as Para 2 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 “The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace” and the compliance thereof with Article 96 of the *Satversme* of the Republic of Latvia.

In substantiating my opinion, I shall use the abbreviations used in the Judgement.

3. The opinions of the participants in the case substantially differ, therefore, in this case, the issue of the content of the contested norms and the obligations and rights of persons and institutions of public administration that follow from them were of principal importance.

3.1. The institutions, which issued the contested acts, – the *Saeima* and the Cabinet of Ministers – at the court hearing upheld the opinion that the taking of biological material from persons suspected was regulated by Article 207 – 209 of the Criminal Procedure Law. Allegedly, the persons suspected had the obligation to give samples for comparative research or allow taking of these, as provided in Section 67 (1) of the Criminal Procedure Law. It is allowed to commission the expert examinations and to take the samples for comparison required to perform it, only if the person in charge of the proceedings or a member of an investigatory team has recognised the need to establish facts and circumstances important for the criminal proceedings. None of the contested norms of DNA Law or the Regulation No. 620 could be the grounds for taking biological material. Thus, in each particular case, the decision on taking the biological material of a person suspected for determining the DNA profile and for storing it in the National DNA Database is taken by the official directing the criminal proceedings. The opinions provided by two summoned persons – the Ministry of Justice and the Ombudsman – regarding the interpretation of the contested norms were similar.

3.2. However, those summoned persons, whose competence comprises application of the contested norms – the State Police and the Prosecutor's General Office – upheld the opinion that the contested norms should be interpreted broader. I.e., allegedly, the regulatory enactments envisage two independent grounds for taking biological material from persons suspected.

First, the Criminal Procedure Law provides for taking biological material from persons suspected. If particular circumstances need to be clarified in a criminal case, the person in charge of the proceedings, on the basis of Section 193 – 209 of the Criminal Procedure Law, has the right to demand expert examination and request the persons suspected to provide samples of biological

material or allow taking them for comparative research and determining the DNA profile to reach the aims defined in the Criminal Procedure Law.

Secondly, biological material is taken from persons suspected also outside the regulation of the Criminal Procedure Law. On the basis of DNA Law and the Regulation No. 620, biological material is said to be taken from all persons suspected with the aim of including the DNA profiles of these persons in the National DNA Database, even if expert examination has not been required in the particular case. The pre-requisite for applying DNA Law and Regulation No. 620, allegedly, is only the fact the respective person has been granted the status of a suspected person in criminal proceedings. Aldis Lieljuksis, a summoned person, also upheld this interpretation of the contested norms.

3.3. The Constitutional Court, in the Judgement, by referring to the purpose defined in Section 2 of DAN Law, recognised as being valid such interpretation of the contested norms that allows subjects defined in Section 14 of DNA Law to take the biological material necessary for establishing the DNA profile from all those persons, who have been given the status of a persons suspected in criminal proceedings. Essentially, the Constitutional Court upheld the interpretation of the contested norms that was provided by parties applying the law – the State Police and the Prosecutor’s General Office..

4. By recognising such interpretation as being valid, the Constitutional Court in its Judgement has not provided counter-arguments to a number of arguments expressed by the *Saeima* and the Cabinet of Ministers regarding the content and scope of the contested norms.

4.1. The court in its judgement must respond to those arguments of the participants of the case, which are significant for correct adjudication of the case (*see, for example, Judgement of 16 November 2010 by the Grand Chamber of ECHR in case “Taxquet v. Belgium”, application No. 926/05, Para 91*). Only insignificant arguments can be left without response. (*see: Bārdiņš G. Dialoga loma tiesas spriešanā. Rīga: Tiesu namu aģentūra, 2016, 226., 275. lpp.*). In the Constitutional Court, in deciding the issue of the scope of the contested norms, the arguments of the *Saeima*, as the legislator, and of the Cabinet of Ministers, as

the issuer of the regulatory enactment subordinated to this law, are of essential importance, because these institutions, first and foremost, have the obligation to explain what kind of legal relationships they had wished to be regulated by the contested norms.

4.2. Both the *Saeima* and the Cabinet of Ministers, in explaining the content and scope of the contested norms, referred to the documents from the process of drafting DNA Law.

In order to use an annotation to a draft law as a source, which reveals the aim of the regulatory enactment and the legislator's will, first of all it must be verified, whether the draft law was not significantly changed in the course of discussing it in the *Saeima*. If there are no changes or they are not significant, there are grounds for concluding that the purpose indicated in the annotation to the draft law complies with the one that the legislator had wanted to reach. Comparison of the wording of the contested norms in the initial draft law No. 736 submitted to the *Saeima* on 25 March 2004 "Law on Development and Use of the National DNA Database" (hereinafter – the Draft DNA Law) with DNA Law that was adopted on 17 June 2004 shows that the wording of the contested norms was not changed. Thus, in establishing the scope of the contested norms, the information included in the annotation to the Draft DNA Law not only could, but should be taken into consideration.

4.3. The annotation to the Draft DNA Law shows that it, first of all, provides a description of the situation at the time when the law was drafted: "In performing biological expert examinations, in 1999 the Forensic Examination Centre of the State Police started using the deoxyribonucleic acid (DNA) method to identify precisely the suspected persons according to traces of biological nature in connection with committing of a criminal offence. This expert examination is conducted on the basis of norms of the Latvian Criminal Procedure Code" (my emphasis). Further in the annotation, the purpose of the law is clearly defined: "For effective use of the results obtained in biological expert examinations using the DNA method in detecting criminal offences and in accordance with the requirements set by the European Union to the Member States to set up and accordingly maintain a DNA database, it is necessary to

establish in the Expert Examination Centre of the State Police a DNA database, entering into it information obtained in biological expert examination [which is conducted on the basis of criminal procedural regulation]” (my emphasis). It is noted in the part of the annotation “Substance of the draft regulatory enactment”: “The draft regulatory enactment provides that a national DNA database will be established and also defines, which information regarding the DNA profile will be collected and stored in the aforementioned database; the procedure for issuing information from the DNA database and terms of storing the information”.

The text of the annotation provided a confirmation that the legislator, as explained during the court hearing, had intended to establish a DNA database of scope that would store information obtained in biological expert examinations. Likewise, the note that the legal grounds for taking biological material are determined by the criminal procedural regulation confirms that the legislator did not intend to establish new grounds for taking biological material in DNA Law. That is why it is clearly indicated both in the annotation to the Draft DNA Law and in Section 4 of DNA Law that information about DNA profiles and information about persons suspected is collected and stored in the National DNA Database (my emphasis).

4.4. It is indicated in the annotation to the Draft DNA Law that this draft law had been made on the basis of the concept document on establishing and using the national deoxyribonucleic acid (DNA) database, approved at the sitting of the Cabinet of Ministers on 27 August 2002. Section II of the aforementioned concept document “Legal acts that are linked to solving the respective problem”, in Para 5, refers to the Council of Europe Committee of Ministers Recommendation of 10 February 1992 No. R(92)1 “On the Use of Analyses of DNA within the framework of the Criminal Justice System”. It is provided in the second part of Para 4 of this Recommendation: where the domestic laws admit that samples may be taken without the consent of the suspect, then that should only be done if the circumstances of the case warrant such actions.

The interpretation of the contested norms, which was provided by the issuers thereof, complies with the provision included in Para 4 of the aforementioned Recommendation, i.e., that, irrespectively of the suspects’ wish,

the biological material is taken from them only in those cases, where the person in charge of the criminal proceedings has deemed it necessary for establishing facts and circumstances important in the criminal proceedings. Whereas the interpretation of the contested norms offered by those applying the law – the State Police and the Prosecutor’s General Office, according to which biological material should be taken from all persons suspected, without examining other circumstances, is incompatible with Para 4 of the aforementioned recommendation.

4.5. In concluding the analysis of the scope and content of the contested norms, attention should be paid to the fact that the explanation included in Section VII of the Draft DNA Law “How the enforcement of the regulatory enactment will be ensured” makes no reference whatsoever regarding establishing a new state institution or broadening the functions of the existing institutions, it is only noted that the functions of the State Police Expert Examination Centre will be expanded, i.e., this institution will be granted the right to establish a DAN database and use it in detecting criminal offences. This section contains no references to granting additional competence to investigators to take biological material from all persons suspected with the purpose of establishing a DNA database, even if it is not necessary for conducting investigatory activities provided for in the Criminal Procedure Law. Neither does the annotation to the draft law provide explanations on the field, to which such activity (action) of the investigator belongs to, - is it an investigatory activity, activity in the field of public administration or it is of other nature.

If in a democratic state governed by the rule of law the legislator plans to establish by a regulatory enactment a restriction on a person’s fundamental rights, then procedure must be introduced, in which a person may defend his right that has been infringed upon (such requirement clearly follows also from Article 13 of the Convention and Article 92 of the *Satversme*). In the particular situation legal remedies should be envisaged, because, in the case of taking biological material, a person’s right to inviolability of private life is significantly restricted. The fact that DNA Law does not provide for the procedure, in which a person suspected could defend his rights that have been infringed upon, and the

Draft DNA Law does not comprise information on legal remedies, could serve as the grounds for concluding that the legislator had envisaged neither granting additional competence to investigators, nor additional restrictions on suspects fundamental rights.

4.6. No substantiation is provided in the Judgement as to why the arguments and considerations expressed above were of no significance in determining the scope of the contested norms.

The Constitutional Court, on the basis of the purpose of DNA Law, defined in Section 2 of this Law, has recognised that in the case, if DNA profiles of suspects were to be determined only with the aim of investigating a concrete criminal offence, on the basis of decision adopted in criminal proceedings by a person in charge of the proceedings, the purpose of DNA Law would be met only partially, i.e., DNA profiles could not be used as effectively in detecting other criminal offences.

I fully uphold the opinion that crime prevention and detecting criminal offences are important purposes, which can justify processing of sensitive personal data and that the data stored in the National DNA Database are of particular significance in investigating and detecting criminal offences. However, the principle of separation of powers may not be ignored. Uncontestably, the purpose of DNA Law – establishing the National DNA Database, which, *inter alia*, is to be used for detecting criminal offences – would be reached also in the case, if, as indicated in the annotation to the Draft DNA Law, if only information obtained in biological expert examination were included in it. Undeniably, the amount of information collected in such a database would be smaller, however, it, nevertheless, would be important in investigating and detecting criminal offences and would serve for reaching the purposes defined in Section 2 of DNA Law.

If practice would confirm that a database of such scope, in the particular social and economic circumstances, no longer allows reaching the purposes that had been set, then, abiding by the principle of separation of powers, the legislator and not those applying the law would have the competence to increase the amount of information to be included into the database. By increasing the amount

of information to be stored in the database, persons' right to inviolability of private life would be restricted even more, therefore the legislator would have to analyse in a very detailed way the compliance of the respective restrictions with the *Satversme*.

5. The Constitutional Court, recognising the interpretation referred to in Para 3.3. of this Separate Opinion as being valid, has not reflected in the Judgement considerations, due to which, if various interpretations of the contested norms exist, the interpretation that does not ensures higher level of protection of fundamental rights was preferred.

Pursuant to the finding, expressed in Para 11 of the Decision of 8 March 2011 by the Constitutional Court on terminating legal proceedings in case No. 2010-52-03, if various interpretations of a legal norm are possible, the interpretation that provides higher level of protection of fundamental rights must be chosen. This finding follows from the principle of a democratic state governed by the rule of law, which requires ensuring possibilities for exercising human rights and freedoms in the broadest scope possible. Therefore all legal norms, from which a restriction on fundamental rights follows, should be interpreted as narrowly as possible.

Pursuant to the interpretation of the contested norms, on which the *Saeima* and the Cabinet of Ministers insisted, the right to inviolability of private life would be restricted only to those persons, with respect to whom, in view of the circumstances of the particular criminal case, the person in charge of the proceedings had recognised the need to conduct expert examination and request these persons to give samples of biological material for comparative analysis or to allow taking these, whereas the rights of other suspected persons, defined in Article 96 of the *Satversme*, would not be restricted.

Whereas the interpretation offered by institutions applying the law – the State Police and the Prosecutor's General Office – restrict the fundamental rights, established in Article 96 of the *Satversme*, of all persons suspected, because as soon as a person is recognised as being a suspect, he must satisfy the request

made the competent official to provide biological material for determining the DNA profile and inclusion in the National DNA Database.

As noted in Para 4 of this Separate Opinion, sufficient number of arguments is in favour of the interpretation of the contested norms provided by the *Saeima* and the Cabinet of Ministers. Therefore it should have been examined in the Judgement, which of the possible interpretations of the contested norms should be preferred, taking into account the principle of a state governed by the rule of law, which demands guaranteeing the possibilities for exercising human rights and freedoms in the broadest scope possible, and interpreting all restrictions on human rights and freedoms as narrowly as possible.

6. I also do not uphold the argumentation included in the Judgement on whether the Applicant has exhausted all effective and real legal remedies.

As already noted in Para 3 of this Separate Opinion, the Constitutional Court upheld the interpretation of the contested norms provided by institutions applying the law, pursuant to which regulatory enactments envisage two independent and unconnected grounds for taking biological material from persons suspected. Thus, to provide an accurate response to the question regarding the use of legal remedies, it had to be established, which general legal remedies correspond to each of the two types of taking biological material.

6.1. In the case, where particular circumstances must be established in a criminal case and the person in charge of the criminal proceedings, on the basis of Section 193–209 of the Criminal Procedure Law, requests expert opinion and requests the suspect's biological material for researching it and for determining the DNA profile, to reach the purposes defined in the Criminal Procedure Law, legal remedies available to a person are clearly defined in the Criminal Procedure Law itself. I.e., pursuant to Section 337 of the Criminal Procedure Law, a complaint regarding an action or decisions taken by an investigator may be submitted to the prosecutor who supervises the criminal proceedings and who has the right to examine the validity of a decision or an action taken by the person in charge of the proceedings and, if necessary, to revoke a decision, thus preventing a possible violation of fundamental rights.

In the adjudicated case, the Constitutional Court established that in the criminal proceedings, in which the Applicant had been recognised as being a suspect, traces of biological nature had not been obtained and in the respective case a decision on requesting expert examination for determining the source of the traces of biological origin for the purposes of investigation was not adopted. Therefore the actions of the person in charge of the proceedings was not targeted at reaching the purposes defined in the Criminal Procedure Law, and therefore it cannot be recognised as being an investigatory activity. Thus, as the Constitutional Court has validly recognised, the actions of the person in charge of the proceedings, i.e., requesting the Applicant to provide biological material, should not have been appealed in the procedure established in Section 337 of the Criminal Procedure Law.

6.2. The Constitutional Court recognised that the contested norms should be interpreted to mean that, on the basis of DNA Law and the Regulation No. 620, biological material is taken from all persons suspected with the purpose of including the DNA profiles of these persons in the National DNA Database. It must be noted that neither the participants in the case, nor the summoned persons were of the same opinion regarding the legal remedies that would be available to persons suspected in such cases.

The Applicant, as well as several summoned persons – the State Police, the Prosecutor’s General Office and Aldis Lieljuksis – noted that an administrative record keeping had been initiated with respect to the Applicant for his refusal to provide biological material and that he had had the possibility to defend his rights in the framework of it. The Constitutional Court also recognised that in the Applicant’s situation it had been possible to examine the legality of the actions taken by the person in charge of the proceedings on their merits in the framework of record keeping regarding an administrative violation.

I do not uphold this opinion, because I believe that making a person administratively liable cannot be regarded as a legal remedy for this person. Quite to the contrary, record keeping regarding an administrative violation is one of the coercive measures at the State’s disposal. Moreover, essentially, cases of administrative violation can be equalled to criminal cases. In both instances, a

public law sanction is applied to a person for committing a violation that is harmful for society. The fact that a person has appealed in court a decision adopted in a case of administrative violation does not mean that he has used legal remedies that are available in the case, where a person in charge of the proceedings has requested provision of biological material for the purpose of establishing a DNA database.

6.2.1.In my opinion, first of all it had to be established, to which field actions of the person in charge of the proceedings is attributable in those cases, when he demands the suspect to provide biological material exactly for the purpose of creating the DNA database.

Neither DNA Law, nor the annotation to the Draft DNA Law comprises references to legal remedies that are envisaged for persons suspected in those case, where an official requests provision of biological material on the basis of DNA Law and the Regulation No.620. In my opinion, the actions by the person in charge of the proceedings, i.e., requesting biological material on the basis of DNA Law and Regulation No. 620, most probably is action in the field of public administration and is to be qualified as actual action in the meaning of the Administrative Procedure Law. In fact, it corresponds to all features that the Department of Administrative Cases of the Supreme Court in its practice has recognised as such that characterise an actual action, i.e., whether the actual actions by an institution have the following mandatory features: 1) it is an action (action or failure to act), 2) taken by an institution 3) in the field of public administration of the public law, 4) it is addressed to an individual person, 5) it has actual consequences, 6) it causes and infringement upon a person's rights or lawful interests, 7) it is not a legal act, 8) it is externally targeted, 9) it has the nature of completeness (final regulation) (*see: Latvijas Republikas Augstākās tiesas tiesu prakses vispārīgums. Faktiskās rīcības jēdziens – pazīmes un to interpretācija, 2006, 29. lpp.*).

Also at the court hearing, a number of persons summoned in the case presumed that the actions of the person in charge of the proceedings, i.e., requesting the suspect's biological material, on the basis of DNA Law and the Regulation No. 620, corresponded to actions in the field of public administration.

6.2.2. The Constitutional Court has not indicated in the Judgement, how such an action by the person in charge of the proceedings should be qualified. However, the Judgement contains a statement that the contested norms do not provide for the possibility to interrupt the procedure of establishing the DNA profile in any of its stages and, thus, effective legal remedies are unavailable to a person in the stage of taking biological material, determining the DNA profile, and also in the stage of storing.

I cannot uphold this conclusion. The contested norms, indeed, do not envisage a possibility to interrupt the procedure of determining the DNA profile in any of its stages; however, this does not mean that provisions of other regulatory enactments cannot be applied to the legal relationship under scrutiny. Actions by the person in charge of the proceedings – requesting the a suspect’s biological material, on the basis of DNA Law and the Regulation No. 620, correspond to actions in the field of public administration and should be qualified as an actual action in the meaning of the Administrative Procedure Law, therefore, in the particular case, provisions of Section 91 of the Administrative Procedure Law were applicable.

The first part of this Section provides: a person, who holds that the planned or commended actual action infringes upon or could infringe upon the rights and lawful interests of this person, may submitted an application to the institution regarding changing the institution’s intent with respect to this actual action. The second part of this Section, in turn, provides that the institution must examine and assess the application prior to taking the actual action or, if possible, prior to completing it. The institution informs about its decision in the general procedure, but a private person may contest and appeal against this decision by the institution as an administrative act.

It is important to note that Section 80 of the Administrative Procedure Law, which regulates suspending the operation of a disputed administrative act, provides that an application on contesting an administrative act suspends is operation as of the day when the institution receives the application, except for the cases, which are envisaged in the second and third part of Section 360 of this Law, as well as in those cases, when the application has been submitted by an

addressee of a favourable administrative act to achieve issuance of an even more favourable administrative act, or if the application with respect to a general administrative act has been submitted. If a higher-level institution leaves the administrative act unchanged, its operation is resumed on the day, when the term for appealing against the administrative act ends and the act has not been appealed against.

The exceptions defined in this norm are not applicable to the Applicant's situation. Thus, pursuant to Section 91 of the Administrative Procedure Law, the Applicant had the right to submit an application to the Security Police with respect to the request made by the person in charge of the proceedings to provide biological material on changing the institution's intent with respect to this actual action. If the Applicant's application had been rejected, he would have had the right to appeal against the answer provided, as an administrative act, in the administrative court. The most important thing, however, is the fact that upon receiving the contesting application the actual action would have been suspended in accordance with the rules set out in Section 91 and Section 80 of the Administrative Procedure Law. If the Applicant had contested the action by the person in charge of the proceedings, i.e., requesting biological material, he would have had legal grounds for not providing biological material until his application had been examined in the institution. If the institution's decisions had been unfavourable for the Applicant and he had appealed against it in the administrative court, then the Applicant would have the right to not provide biological material until the court's ruling in the administrative case had entered into legal force. Thus, the Applicant had at its disposal effective and real legal remedies that he could have used to protect his rights that had been infringed upon. It has been recognised in the case law of the Constitutional Court that a person submitting a constitutional complaint must exhaust all effective and real legal remedies (*see Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010-71-01, Para 14*). In the particular case the Applicant had not exhausted all legal remedies, moreover, he had not used the legal remedy envisaged exactly for his situation.

In a democratic state governed by the rule of law a situation, in which no legal remedies have been envisaged for a person or there is no clarity about them, is inadmissible. In the adjudicated case, this lack of clarity, most probably can be explained by the fact that the opinion about the content and scope of the contested norms held by the institutions applying the law differed significantly from the interpretation by the authors of these norms. The institutions applying the law, being of the opinion that the contested norms constituted independent grounds for taking biological samples from all persons suspected, had to explain immediately to each such person what legal remedies were available to him in the particular case.

7. The Constitutional Court in its case law, in establishing the scope of contested norms, has repeatedly underscored that the opinion of the participants in the case and of the summoned persons regarding the content of legal norms *per se* was not decisive in establishing the legal consequences of the respective norm, because a legal norm could not be understood outside the practice of application thereof and the legal system, within which it functions (*see Judgement of 28 November 2014 by the Constitutional Court in Case No. 2014-09-01, Para 20.2.2.*). Thus, the Constitutional Court confirms that it respects the understanding of the contested norms of parties applying the law.

In the particular case, I cannot uphold the understanding of the contested norms by the institutions applying the law – the State Police and the Prosecutor’s General Office, because a restriction on a person’s right to inviolability of private life that is as extensive as this is not necessary in a democratic society and, thus, is disproportional.

I agree to the findings made in the Judgement that both the biological material of a suspect and the DNA profile are data of a natural person that fall within the scope of Article 96 of the *Satversme* and, in view of their sensitive nature, require special protection.

I also uphold the findings made in the Judgement regarding the legitimate aim of the restriction upon the Applicant’s fundamental rights and that the

contested norms, in the interpretation that was recognised in the Judgment as being correct, have been applied in order to reach this legitimate aim.

However, I do not uphold the conclusion made in Para 23.2. of the Judgment that no more lenient measures existed that would have allowed reaching the legitimate aim in the same quality. This paragraph of the Judgment refers to two more lenient measures indicated by the Applicant. I believe that they have not been duly examined in accordance with the methodology developed in the case law of the Constitutional Court. This, in particular, applies to the second alternative proposed by the Applicant, i.e., that additional requirements should be set for determining the DNA profile, for example, such as an order by the head of the investigatory institution, a reasoned decision by the official directing the proceedings or the severity of probable sanctions applicable for the respective offence. It is noted in the Judgment that, if restrictions were imposed on taking biological material and determining the DNA profile by introducing such additional requirements, then the legitimate aim would not be reached in the same quality, because the quality of reaching the legitimate aim was directly proportional to the number of DNA profiles included in the National DNA Database. I believe that this statement is too simplistic, because the inclusion in the database the DNA profiles of such persons, with respect to which it is not clearly known that they have committed or are going to commit criminal offences, does not promote public safety and protection of other persons' interests. Therefore, the direct mathematical proportionality between the number of DNA profiles found in the database and the quality of reaching the legitimate aim is not the correct assessment criterion.

DNA profiles of persons suspected are included in the National DNA Database on the basis of an assumption that a person, who once has been suspected of having committed a criminal offence, might have committed criminal offences in the past or will commit such in the future. The institutions issuing the contested norms had to assess, first, whether such presumption was valid and, secondly, whether it was equally valid with respect to all suspects, notwithstanding the type, severity, nature of the criminal offence, the age of the respective person and the possible form of guilt. The mandatory nature of such

assessment follows also from the principle of minimality, referred to in Para 23.3.1. of the Judgement, which must be complied with in processing personal data, as well as from the provision included in the second part of Article 4 of the Council of Europe Committee of Ministers Recommendation of 10 February 1992 No. R(92)1 that collection of biological material without a person's consent was admissible only if the circumstances of the particular case warranted it.

The approach taken by the United Kingdom, which is similar to the Latvian system, its comprehensive and undifferentiated approach to collecting DNA data has been harshly criticised also by ECHR. Moreover, in the majority of the Council of Europe Member States (for example, Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxemburg, the Netherlands, Norway, Poland, Spain, and Sweden) collection of DNA data in the framework of criminal proceedings is not systematic, but is restricted by various specific criteria or limited to more serious criminal offences (*see Judgement of 4 December 2008 by the Grand Chamber of ECHR in case "S. and Marper v. the United Kingdom", applications No. 30562/04 and No. 30566/04, Para 46 and Para 119*). The application of such criteria to collection of DNA data in such an extensive circle of the Council of Europe Member States clearly indicates that criminal offences are effectively detected even if a person's right to inviolability of private life is respected.

Para 23.3. of the Judgement comprises only a reference to a subjective assessment made by the summoned person Aldis Lieljuksis of the instability of the Latvian penal policy. I believe that the aforementioned paragraph of the Judgement does not provide a due assessment of whether the quality of reaching the legitimate aim of a restriction on fundamental rights would be significantly affected by not taking biological materials from persons, who are suspected of committing a criminal offence or a less serious crime. The Constitutional Court had to assess itself, whether, indeed, the Latvian penal policy was so instable as to allow such differential approach turn into an obstacle for reaching the legitimate aim of the restriction on fundamental rights. Separate changes in the penal policy are not a proof of its instability.

Justice of the Constitutional Court

A. Laviņš