# THE CONSTITUTIONAL COURT
# OF THE REPUBLIC OF LATVIA

**JUDGMENT**

**ON BEHALF OF THE REPUBLIC OF LATVIA**

**Riga, 7 October 2009-12-17**

**in Case No. 2009-05-01**

The Constitutional Court of the Republic of Latvia, composed of the Chairman of the Court hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma and Viktors Skudra,

having regard to the application of Mārtiņš Ēcis (hereinafter – the Applicant),

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia, Article 16 1st indent, Article 17 (1), 11th indent, Article $19^2$ and Article $28.^1$ of the Constitutional Court Law,

on 15 September 2009 in writing examined the case

**"On Compliance of the Words "Two" and "per Month" of Item 4 of Part 8 of Section 50.4 of the Penalty Execution Code of Latvia with Article 96 of the Satversme (Constitution) of the Republic of Latvia".**

## The Facts

**1.** On 23 December 1970, the Supreme Council of the Latvian SSR (*Latvijas PSR Augstākā padome*) adopted the Corrective Labour Code and it came into force on 1 April 1971. The Decision "On Application of the Latvian SSR Legislative Acts" of the Supreme Council of the Republic of Latvia adopted on 29 August 1991 provided that The Latvian SSR Corrective Labour Code shall be regarded as the Latvian

Corrective Labour Code until a new code is elaborated. On 30 December 1994, the Law "Amendments to the Latvian Corrective Labour Code" adopted on 15 December 1994 came into force. This Law provided for a new wording of the title of the Law, namely, the Latvian Penalty Execution Code (hereinafter – the Code), which is its current title.

The Law of 15 December 1994 supplemented the Code with Section 50.4 "Regime of Penalty Execution in Closed Prisons", and initially this Section did not regulate the rights of persons to have telephone conversations.

On 14 October 21998, the Saeima (Parliament) of the Republic of Latvia (hereinafter – the Saeima) adopted the Law "Amendments to the Penalty Execution Code". This Law, among the rest things, supplemented Part 8 of Section 50.4 of the Code with Item 4 and provided that convicted persons serving sentence at the average level of the sentence serving regime in a closed prison have the right to have two telephone conversations per month. Item 4 of Part 8 of Section 50.4 of the Code has never been amended again.

**2. The Applicant** indicates that the words "two" and "per month" of Item 4 of Part 8 of Section 50.4 of the Code (hereinafter – Contested Norms) do not comply with the fundamental rights established in Article 96 of the Satversme (Constitution) of the Republic of Latvia (hereinafter – the Satversme). The Applicant serves sentence at the average level of sentence serving regime and therefore has the right to have two telephone conversations per month. Such number of telephone conversations is not sufficient to maintain normal relations with the relatives, acquaintances and the society in general. The restriction included in the Contested Norm prevents fast acquisition of information that could be used for the exercise of rights of the Applicant.

The Applicant several times already had to breach the rules and use a cell phone instead. He has received disciplinary punishment for having used a cell phone. The Applicant insists that further on he would also use a cell phone in the case of necessity.

It was indicated in the application that persons serving their sentence in places of imprisonment, are guaranteed the fundamental rights and all fundamental rights

established in the Satversme are applicable to them insofar as they are not restricted and are compatible with the objective and regime of imprisonment.

When assessing the legitimate objective of the Contested Norms, the Applicant indicates that there exists difference between persons who are not confined and those who have been confined and already serve their sentence. Restrictions established for the sake of investigation, and, for instance, to protect victims, are essential in each democratic State and shall be regarded as established in the interest of the society. After a person is convicted, however, it is no more necessary to protect the interest of investigation procedure. Therefore only those restrictions that are provided by law or in a court judgment are applied to the convicts. The Applicant, however, does not contest the right to have telephone conversations as such; he rather objects to the insufficient number of telephone conversations, and therefore it is necessary to pay a particular attention to the legitimate objective of the restriction.

It follows from the Code that there exist other measures that can also be applied to reach the legitimate objective, like, regime of serving one's sentence, community work, educational work, general and professional training. However, when assessing compliance of the restriction, it is necessary to take into account the fact that restriction of the number of telephone conversations causes harm not only to by the prisoner, but also his or her relatives, which is a part of the society. It can also be concluded form Section 24.1 of the Recommendation Rec (2006) 2 of the Committee of Ministers to the member states on the European Prison Rules (hereinafter – European Prison Rules) that prisoners shall be allowed to communicate as often as possible by telephone or other forms of communication with other persons.

The Applicant admits that there exist other forms of communication with persons in freedom, which is, for instance, letters. Number of letters is not restricted, however the speed of information exchange is of importance. Taking into account similar functions of telephone conversations and letters, there is no reason to restrict number of telephone conversations. Moreover, telephone conversations apart from those with a lawyer, are performed at presence of an official of the place of deprivation of liberty. In the case if the convicted person breaches provisions of law, the above mentioned official has the rights to interrupt the telephone conversation.

Taking into account the aforesaid, the Applicant asks the Constitutional court to recognize the Contested Norms as non-compliant with Article 96 of the Satversme.

**3. The institution that passed the contested act, the Saeima –** does not agree with the argumentation of the Applicant and asks the Constitutional Court to recognize the application as ungrounded and to reject it.

Restrictions of private life of a person that also apply to his or her communication with family members and other persons follow from the fact that the person is imprisoned. The rights of imprisoned persons to private life are not and cannot be the same as those of persons living in freedom.

By referring to the judgment of the European Court of Human Rights (hereinafter – ECHR) of 29 January 2002 in the case *A.B. v. the Netherlands,* the Saeima concludes that the rights to private life cannot be interpreted in such a way that it is necessary to ensure convicted persons with the rights to have telephone conversations. If prison administration provides the possibility to have telephone conversations, then these can be subject to different restrictions in accordance with ordinary and reasonable provisions of prison life, which can be related, for instance, with the necessity to ensure availability of the respective equipment for all convicted persons and the necessity to prevent breaches of order and crimes. Section 24.1 and 24.2 of the European Prison Rules provide that prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families and other persons and to receive visits from these persons. The provisions also provide for restriction and possibilities of control.

The Saeima draws attention to the fact that the restriction included in the contested norm shall be assessed in conjunction with other forms of communication that are guaranteed for prisoners in places of imprisonment, and with the possibilities of the place of imprisonment to ensure telephone conversations. Moreover, in case if information that prisoners need an extra telephone conversation disregarding the schedule or what has been established by law (for example, illness of a relative or other problematic situation in the family) is obtained, then they are provided with the possibility to have the conversation.

It is also necessary to take into account the possibilities of places of imprisonment to ensure telephone conversations. First, frequency and duration of telephone conversations is restricted by the necessity to control the content of such conversations. Second, number of taxophones is also limited. Third, it is necessary to observe the regime of the place of imprisonment and to ensure storage of telephones.

Consequently, the restriction has a legitimate objective, which is, security of the society and protection of the rights of other persons. In order to reach this objective, it is necessary to prevent a situation when convicted persons would commit breaches of rules of a prison, to escape the place of imprisonment, commit new crimes and influence victims of the crime. Moreover, it is necessary to respect and balance the rights of all convicted persons to have controlled telephone conversations.

When answering questions set by the Constitutional Court, the Saeima indicates that the Contested Norms do not provide for any number of telephone conversations to be permitted in extraordinary cases; therefore it depends on the officials of the place of imprisonment. There can also be a situation when officials of the place of imprisonment exercise freedom of actions granted to them differently. Incorrect use of the freedom of action, however, may not serve as the reason why the constitutionality of the Contested Norms was contested because it is possible to submit a complaint regarding activities of officials of places of imprisonment, and this is the head of the place of imprisonment that is responsible for uniform exercise of freedom of action.

The Contested Norms not provide for duration of a telephone conversation because this would not be useful. Establishment of limits for the telephone conversation would restrict the rights of convicted person at a greater extent. Duration of a telephone conversation depends on such different and objective circumstances as number of convicted persons, number of taxophones, regime of serving one's sentence, the possibilities to ensure accompanying of a convicted person to the taxophone and the duty of employees of the prison to control the content of telephone conversations.

It is also necessary to take into account the fact that the State does not pay for telephone conversations of prisoners and does not provide telephones. This is done by

an enterprise. The more convicted persons have telephone conversations, the better it is for the enterprise.

Taking into account the aforesaid, the Saeima asks the Constitutional Court to recognize the Contested Norms as compliant with Article 96 of the Satversme.

**4.** The summoned person – **the Ministry of Justice** – holds that the Contested Norms are compliant with Article 96 of the Satversme. Argumentation provided by the Ministry of Justice to justify such opinion is similar to those of the Saeima.

The Ministry of Justice indicates in addition to the aforesaid that Article 96 of the Satversme and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter –Convention) provide for the right to communicate for persons located in places of imprisonment, and these rights can be ensured differently. It is necessary to assess the restriction included in the Contested Norms in the context of other forms of communication that are available for prisoners, as well as the possibilities of the place of imprisonment to ensure telephone conversations.

The Ministry of Justice draws attention of the Constitutional Court to the fact that in extraordinary cases prisoners are given the possibility to have an extra telephone conversation disregarding the schedule and what has been established by law.

The majority of places of imprisonment have taxophones of limited liability company "Lattelecom". A decision regarding installation of the necessary number of taxophones is made by the above mentioned company by assessing its possibility to gain profit.

Consequently, the Ministry of Justice holds that the restriction included in the Contested Norms is socially indispensible and compatible, and the Norms comply with Article 96 of the Satversme.

**5.** The summoned person – **the Ombudsman of the Republic of Latvia** (hereinafter - Ombudsman) – holds that the Contested Norms comply with Article 96

of the Satversme. Argumentation of the Ombudsman to justify such opinion is similar to those of the Saeima.

In addition to what has already been said, the Ombudsman indicates that the number of telephone conversations established in the Contested Norms shall be regarded as a proportionate restriction of the right to private life. The necessity to observe the regime of the place of imprisonment and the necessity to control telephone conversations of convicted persons may serve as justification for establishing the restriction enshrined in the Contested Norms.

The Ombudsman emphasizes that convicted persons are also provided with other forms of communication with persons in freedom, for instance, the right to have a visit by the latter or the right to send letters or telegrams. When establishing the permitted number of telephone conversations within a certain period, the right of all convicted persons to use telephone as communication measure and the fact that the total time devoted to this in accordance with the level of serving one's sentence is proportionally distributed among the convicted persons is taken into account.

**6.** The summoned person – **associated professor of the Police Academy of Latvia Dr. iur. Vitolds Zahars** – indicates that the Contested Norms provide for a restriction of the right to private life. This restriction is related with material possibilities and human resource availability of the place of imprisonment, as well as the aspects of security of the society and protection of the rights of other persons.

The particular form of communication established in the Contested Norms is only one of the ways how prisoners can communicate with persons in freedom. As to other forms of communication, one could mention, for instance, the right of a prisoner to receive 12 consignments and parcels per year, to send and receive letters and telegrams without any limit, to submit applications to public institutions, social organizations and officials, to use personal TV set and radio, to have four long visits per year and to attend public warships lead by a prison chaplain.

Practice of places of imprisonment regarding granting extra telephone conversations show that personnel of places of deprivation of liberty do their best to reduce the negative influence of imprisonment on the convicted persons.

Mr. Zahars concludes that the Contested Norms comply with Article 96 of the Satversme.

**7.** The summoned person – **the Latvian Prison Administration** – informs the Court that prisons permit exceed the number of telephone conversations established in the Code in case if the prisoner receives information about death, accident or illness of a relative. Administration of the place of imprisonment can also be the initiator when providing for extra telephone conversations to inform relatives of the prisoner in case if the prison is quarantined and long visits are prohibited, or if proceedings regarding early release of the prisoner are initiated. Extra telephone conversations can also granted as an encouragement.

The number of cases when extra telephone conversations are granted at prisons is the following: in the Central Prison – four to five times, the Iļģuciems Prison – ninety-six to hundred and twelve times, the Liepāja prison – twelve to twenty-four times and the Jēkabpils prison – two to four times per year.

Telephones are located in premises that prisoners cannot access when alone. This means that all telephone conversations take place at the presence of an official of the place of deprivation of liberty. Such presence is related with performing of supervisory function, for example, to prevent damaging of telephones, rather than with control of the content of telephone conversations.

Location of taxophones and number thereof depends on peculiarities of infrastructure of places of imprisonment. Moreover, places of deprivation of liberty have the duty to ensure fulfilment of all requirements of operators for instalment and maintenance of telephones. Observance of these requirements is related with the necessity of an official to accompany the prisoner to the taxophone. In order to ensure prisoners with the possibility to have telephone conversations more often, it would be necessary to increase number of officials employed in places of imprisonment in average by three persons in each prison.

The Latvian Prison Administration also indicates that before installation of communication network, the operator assesses all risks related with deriving profit.

Consequently it is possible that the operator might conclude that profit from a place of deprivation is insufficient.

**The Constitutional Court holds:**

**8.** Article 96 of the Satversme provides: „Everyone has the right to inviolability of his or her private life, home and correspondence." It follows from the application that the Applicant asks assessing constitutionality of the Contested Norms insofar as they apply the fundamental right to inviolability of private life established in Article 96 of the Satversme. In the case under review, constitutionality of norms with the right of a person to inviolability of home or correspondence is not contested. Consequently, the Constitutional Court has no reason to assess the Contested Norms in this aspect.

When interpreting the right to private life guaranteed in Article 96 of the Satversme, the Constitutional Court has concluded that these rights are applied to different aspects. It protects the physical and moral integrity, honor and reputation, use of person's name and identity, and personal data. The right to private life means that the individual has the right to its private home, the right to live as he likes, in accordance with his nature and wish to develop and improve the personality, tolerating minimum interference of the state or other persons. The right includes the right of an individual to be different, retain and develop virtues and abilities, which distinguish him from other persons and individualizes him. The State has to observe and protect to maximum the right of an individual to inviolability of private life and interference is allowed only in strictly determined cases, when it is important for protecting public interests (*see: Judgment of 26 January 2005 by the Constitutional Court in the case No. 2004-17-10, Para 10 and 14.3*).

**9.** The Applicant holds that the Contested Norms include restriction of the fundamental rights established in the Satversme. It also follows from the reply of the Saeima that the Norms restrict the fundamental rights.

It has already been concluded in the case-law of the Constitutional Court that the State has triple duty – to observe, to protect and to ensure rights of a person. For

the State to act in accordance with the human rights, it has to fulfil a range of duties, which are both, passive, like non-interference with the rights of a person, and active, like ensuring of meeting the individual needs of persons (*see: Judgment of 3 April 2008 by the Constitutional Court in case No. 2007-23, Para 7*). In this case, taking into account the different nature of each fundamental right, it must be assessed whether the State is able to ensure, by means of its positive action, meeting of individual needs of a person that follow from the particular fundamental rights. Consequently, taking into account the different duties of the State in the context of each particular fundamental right, the freedom of action to be conferred to the State and thus the amount of control rights of the Constitutional Court differs.

The duty of the State to help a prisoner maintain relations with relatives follows from the right to private life. Since the possibilities of a person, due to custody, to maintain contacts and relations with other persons are restricted and thus an imprisoned person may get alienated from his or her family members, the State should prevent these negative consequences of the place of imprisonment as much as possible. Moreover, not only the duty of the State to refrain from intervention into private life, but also the duty of the State to carry out necessary activities to secure these rights follows from Article 96 of the Satversme (*see: Judgment of 23 April 2009 by the Constitutional Court in the case No. 2008-42-01, Para 10*).

**10.** When establishing the content of the basic rights provided for in the Satversme, it is necessary to take into account the international liabilities of Latvia in the field of human rights. International norms of human rights and the practice of their application serve as means of interpretation on the level of constitutional law to determine the contents and scope of fundamental rights and the principle of the law-governed state, as far as it does not lead to decrease or limitation of fundamental rights included in the Satversme. The duty of the State is to take into consideration the international liabilities in the field of human rights that follow from Article 89 of the Satversme, which provides that the State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia. From this Article it can be seen that the aim of the legislator was

not to oppose norms of human rights, included in the Satversme to the international ones (*see: Judgment of 9 May 2008 by the Constitutional Court in the case No. 2007-24-01, Para 11*).

**10.1.** The right to inviolability of private and family life are also guaranteed in Article 8 of the Convention. The objective of this international norm binding on Latvia is, first of all, to protect a person against ungrounded inference by the State. This Article, however, obligates the State not only to restrain from interference with private life of a person. In addition to this negative duty of the State, it also has a positive duty to perform all necessary activities to ensure these rights (*see: Judgment of the ECHR in the case: Biriuk v. Lithuania, judgment of 25 November 2008, application no. 23373/03, Para 35).*

Likewise, the first part of Section 17 of the International Pact on Civil and Political Rights provide that arbitrary and unlawful interference with private and family life, threatening of inviolability of the dwelling place, his or her correspondence secrets, dignity or reputation shall be forbidden. The norm of international law binding on Latvia not only provides for a negative duty of the State but also obligates it to ensure exercise of rights. The State has a special duty regarding imprisoned persons in ensuring the respective rights. To provide a classical example, a positive duty of the State is to ensure prisoners with the right to correspondence, as well as the right to contact with other persons (*see: Nowak M. U.N. Covenant of Civil and Political Rights. CCPR Commentary. 2nd revised edition: Norbert Paul Engel Verlag, e.K., 2005, p.380*).

However, when deciding on its positive duties, the State shall be conferred a certain freedom of action, namely, these positive duties shall be assessed in the context of the objectives established in the second part of Article 8 of the Convention, and by means of these it is necessary to achieve a fair balance that has to be struck between the competing interests of the individual and of the community as a whole (*see, e.g.: Judgment of the ECHR in the cases: Lopez Ostra v. Spain, judgment of 9 December 1994, Series A no. 303-C, p. 54, Para 51 un Giacomelli v. Itally, judgments of 2 November 2006, Para 78*).

It is also necessary to take into consideration that the fact whether what has been established in the norms shall be regarded as restriction or, on contrary, a positive duty of the State, is of no importance. The decisive factor in any case is the fact whether a fair balance between the interests of the society, on the one hand, and those of a particular person, on the other is reached in the particular situation (*see: Judgment of the ECHR in the case Dickson v. the United Kingdom, judgment of 4 December 2007, application no. 44362, Para 71).*

As to the right of prisoners to have telephone conversations, the ECHR has concluded that Article 8 of the Convention cannot be interpreted in a way to guarantee prisoners the rights to have telephone conversations, especially in cases when other forms of communication are available, for instance, written correspondence. On the other hand, if prison administration has ensured the possibility to have telephone conversations, it has the right to follow reasonable regulations of prison live and to submit telephone conversations to lawful restrictions, for example, by ensuring availability of telephones to all prisoners or preventing disorders or crimes (*see: Judgment of the ECHR in the case A.B. v. the Netherlands, application no. 37328/97, judgment of 29 January 2002, Paras 92, 93*).

**10.2.** The Constitutional Court has recognized that European prison Rules have been adopted for the Council Member States to guide themselves, in their legislation and practice, by principles included therein. Although the status of these regulations are not the conclusions of the above documents shall be assessed not only as recommendatory but also as an authoritative enough viewpoint, which recommends every state to choose the optimal model of activity for the solution of a concrete problem (*see: Judgment of 19 December 2001 by the Constitutional Court in the case No. 2001-05-03, Para 6 of the Concluding Part, Judgment of 14 September 2005 in the case No. 2005-02-0106, Para 16 and Judgment of 6 June 2006 in the case No. 2005-25-01, Para 22*).

Section 24.1 of the European Prison rules provides that prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organizations and to receive visits from these persons.

At the same time Section 24.2 of the European Prison Rules provide for limits of implementation of such duty of the State by providing that communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptance minimum level of contact.

Consequently, the Constitutional Court must assess whether the State, when providing for the rights of the Applicant established in the Contested Norms, has fulfilled its positive duty established in Article 96 of the Satversme and has not, for instance, arbitrarily established number of telephone conversations. Namely, the Constitutional Court has to assess whether such number of telephone conversations established in the Contested Norms has a reasonable justification and whether the established number of telephone conversations is such that can be regarded as adequate for the State to be able to fulfil its positive duty.

**11.** The Saeima indicates that the restriction included in the Contested Norms should be assessed in the context of other forms of communication available for prisoners in places of imprisonment. According to Section 44, Section 47, Section 49, Section 50 and Section 50.4 of the Code, convicted persons serving sentence at the average level of the sentence serving regime in a closed prison have the right to receive 12 consignments and parcels per year, to send and receive letters and telegrams without any limit, to submit applications to public institutions, social organizations and officials, to use personal TV set and transistor radio receiver, to use four long visits per year. A similar opinion is expressed by other summoned parties – the Ministry of Justice, the Ombudsman and Mr. Zahars (*see: case materials, pp. 41, 42, 45 and 46*).

As to the rights of prisoners to have telephone conversations, the ECHR has recognized that their rights to have telephone conversations shall be assessed in conjunction with other forms of communication available insofar as these are available and applicable (*see: Judgment of the ECHR in the case A.B. v. the Netherlands, application Nr. 37328/97, judgment of 29 January 2002, Para 92).*

It can also been concluded from what has been established in Section 17 of the International Pact on Civil and Political rights that the possibilities given to imprisoned persons to communicate with the outer world, like telephone conversations, shall be assessed in conjunction with other forms of communication available, and this communication can be implemented by observing the necessary supervision (*see: Nowak, p.401; Views of the Human Rights Committee, Angel Estrella v. Uruguay, Communication No. 74/1980, Para 9.2*).

In general, the Constitutional Court agrees with the argumentation of the Saeima that the number of telephone conversations established in the Contested Norms shall be assessed in conjunction with other forms of communication available for prisoners in places of deprivation of liberty. The Constitutional Court, however, cannot agree with enumeration of forms of communication available, in the context of which the number of telephone conversations established in the Contested Norms should be assessed. Not all rights of a convicted person that are enumerated in Section 44, Section 47, Section 49, Section 50 and Section 50.4 of the Code can be compared with a telephone conversation. Although these also ensure, at a certain extent, the possibilities of a convicted person to communicate with the outer world, only the right of prisoners to receive and send letters without any limit, as established in the first part of Section 49 of the Code and the right to have four long visits (eight to sixteen hours) and six short visits (one to two hours) per year established in item 1 of Part 8 of Section 50.4 of the Code fulfil the function of a telephone conversation. As to the rights of prisoners to receive necessary information that is at the disposal of state and municipal institutions, there is a separate rights established in Section 50 of the Code. Consequently, the above mentioned rights shall be assessed differently if compared with the rights of a prisoner established in Section 44, Section 47 and Section 50.4 of the Code. It also has to be indicated that sending of telegrams established in the first part of Section 49 of the Code can no more be ensured due to technical reasons.

The Constitutional Court holds that, when assessing the rights established in the first part of Section 49 and Item 2 of Part 8 of Section 50.4 of the Code in conjunction with what has been established in the Contested Norms, there is no reason to conclude that the State has not fulfilled its positive duty. In addition to telephone conversations,

the Code provides convicted persons with other forms of communication with persons in freedom. It cannot be proved by the application or the materials of the case that the Applicant would not have had the possibility to use other forms of communication established in the Law, apart from the right to send telegrams, or that these forms of communications were hampered. Moreover, imprisoned persons have the possibility to request extra telephone conversations in case of death, health problems of a relative or other similar cases (*see: Opinion of the Latvian Prison Administration and the Ministry of Justice, case materials, Vol. 35, 42 and 43*).

It should also be taken into consideration that the information provided by the Ministry of Justice and the Latvian Prison Administration regarding the fact that in exceptional cases convicted person are granted with extra telephone conversations, which can be initiated either by the prisoner or, in separate cases, by administration of the place of deprivation of liberty. Such practice allows ensuring communication possibilities even if a convicted person has already had the number of telephone conversations established by law. The Applicant also admits that he has been granted the right to extra telephone conversations as an alternative for sending telegrams (*see: case materials, pp. 75*).

It is also important that a convicted person, under Item 2 of the first part of Section 68 of the Code, can be granted, for the sake of inducement, extra telephone conversations, the number of which cannot exceed six telephone conversations per year. It can be concluded from the public report of the Latvian Prison Administration of 2008 that in the previous year there were 501 telephone conversations granted as inducement (*see: Public Report of the Latvian Prison Administration of 2008, pp. 17. http://www.ievp.gov.lv/?sadala=92*).

Taking into account the aforesaid, the Constitutional Court must investigate whether the legislator, in the Contested Norms, has provided for the right of a convicted person who has fulfilled his or her duties established by law to have a sufficient number of telephone conversations.

**12.** The Code differently regulates the issue on the right of convicted persons to have telephone conversations. The above mentioned right depend on the regime of

serving one's sentence and the level thereof. For instance, under Item 4 of the seventh part of Section 54.4 of the Code, convicted persons serving sentence at the highest level of the sentence serving regime in a closed prison have the right to have three telephone conversations per month. According to Item 4 of Part 8 of Section 54.4 of the Code, convicted persons serving sentence at the average level of the sentence serving regime in a closed prison have the right to have two telephone conversations per month. On the other part, under Item 9 of Part 9 of Section 54.4 of the Code, convicted persons serving sentence at the lowest level of the sentence serving regime in a closed prison have the right to have one telephone conversation per month.

Consequently, the different rights to have a certain number of telephone conversations per month reflect progressive execution of penalty. Under Section 50.1 of the Code, progressive execution of penalty is based on differentiation of convicted persons depending on the kind and regime of each place of deprivation of liberty, as well as transfer of convicted persons from one kind of prison to another taking into account the served part of the sentence and behaviour of the prisoner. The objective of progressive execution of penalty is to achieve compliance of the regime of serving one's sentence with behaviour of the convicted person and level of re-socialization, as well as his or her optimal integration into the society after the release. The system of progressive penalty execution is applied to all convicted persons placed in closed or partially closed prisons disregarding the tem of penalty. Consequently, the Constitutional Court, when assessing constitutionality of the Contested Norms, must take into consideration consistency of the legal regulation.

**13.** The Saeima justifies the number of telephone conversations established in the Contested Norms with the necessity to control the content of telephone conversations, the limited number of taxophones, as well as the duty to preserve the regime of the place of imprisonment and the technical condition of taxophones.

**13.1.** The necessity to control content of telephone conversations is enshrined in the seventh part of Section 49 of the Code, which provides that telephone conversations, apart from those with a lawyer, shall be subject to control. Section 24.2 of the European Prison Rules also *expressis verbis* permit restrictions of the rights of

imprisoned persons insofar as they are necessary to continue investigation in a criminal case, ensure order, security and protection of the place of imprisonment, prevent other criminal delinquencies and protect victims of the crime. The Ombudsman also indicates in its opinion that such control is indispensible to ensure order and prevent planned criminal activities (*see: case materials, pp. 45*).

The Constitutional Court admits that the duty to control content of telephone conversations established by law insofar as its execution is individually grounded and necessary also provide for the necessity of certain resources, for instance, ensuring of respective infrastructure. However, according to what has been indicated by the Ministry of Justice and the Latvian Prison Administration, a person accompanying the convicted person to a taxophone does not, in fact, control the content of telephone conversations but mainly provides supervision and ensuring of order in the place of imprisonment.

**13.2.** It follows from the information provided by the Saeima and the case materials that the decision regarding installation of taxophones is made by the operation of telecommunication in accordance with the possibilities to gain profit.

The Constitutional Court indicates that this is the duty of the legislator to elaborate, assess and adopt legal regulation regarding exercise of the fundamental rights of a person. Considerations of a private person should not have an impact on the right and duty of the Saeima to decide on such legal regulation that deal with protection, exercise and ensuring of the fundamental rights of other private persons.

It can be concluded from the information provided by the Ministry of Justice and the Latvian Prison Administration that one of the main considerations that helped deciding on the number of telephone conversations established in the Contested Norms is the fact that prison officials must accompany convicted persons to a taxophone. Moreover, an official of the place of imprisonment has the duty to ensure during a telephone conversation that the inventory of the place of imprisonment, for instance a taxophone is not damaged.

The Constitutional Court does not have the reason to question the effective rules of order regarding the duty of an official of the place of imprisonment to accompany the convicted person to a taxophone. This duty can be justified by consideration of

order and security that should be taken into account in places of imprisonment. The Ombudsman also admits validity of such requirement by indicating that the objective of such supervision is to ensure order in places of imprisonment (*see: case materials, pp. 45*).

The Latvian Prison Administration has provided information that in one of the prisons taxophones were located in the cells as an experiment. However, the convicted persons had objections to this because conversations with relatives were carried out at the presence of other imprisoned persons. Therefore the prison refused from such alternative solution (*see: case materials, Vo., 36*).

When providing for a greater number of telephone conversations, it is necessary to take into account the fact that resources necessary for ensuring the above mentioned supervisory function would increase proportionally. The Latvia Prison Administration has indicated that such increase of telephone numbers would also imply the necessity for more personnel.

The consideration regarding the necessity of additional resources can be regarded as grounded taking into account the consideration that in this case the State fulfils its positive duty of exercising the fundamental rights. The Constitutional Court has already concluded that the legal regulation regarding duration of short visits of convicted persons taking into account the necessity to ensure the control of the visits may be justified by the amount of resources at the disposal of the place of imprisonment (*see: Judgment of 23 April 2009 by the Constitutional Court in the case No. 2008-42-01, Para 17.2*).

**14.** The Applicant indicates that in the case if the contested norms are not repealed, he would further on have to unlawfully use cell phone, which means that the objective of the execution of criminal penalty, which is to observe requirements of Law, would not be reached.

Section 70 of the Code provide for the kinds of disciplinary punishments for confined persons. Item 9 of the fourth part of this Section provides that use and storage of a cell phone, its parts or a SIM card shall be regarded as a grave violation of the regime of serving one’s sentence in closed and partially closed prisons.

It can be concluded from the public report of 2008 that 2557 cell phones and 3007 parts of cell phones (SIM cards) have been expropriated from confined persons. Unlawful usage of the above mentioned means of communication is one of the most popular breaches of the regime of imprisonment (*see: Public Report of the Latvian Prison Administration of the Ministry of Justice of 2008, pp. 15. http://www.ievp.gov.lv/?sadala=92*).

The Constitutional Court has already concluded that convicted persons, in the frameworks of the regime of penalty execution, are provided with restrictions established in the Code and other normative acts. Deprivation of liberty – forced keeping of a person in imprisonment – is a kind of punishment, which is connected with the restriction of the fundamental rights, mainly – the right to liberty. The convicted person is isolated from the habitual environment and mode of life. Restrictions, which are determined in accordance with execution of penalty of deprivation of liberty, create to the convicted person physical and psychological burden and difficulties. If during serving the sentence the convicted person violates the internal rules of the place of deprivation of liberty, he/she may be inflicted a disciplinary punishment. The most severe of the punishments is placement of the convicted person in the solitary confinement cell. The restrictions of rights, connected with the disciplinary punishment can also be justified if they are proportionate. The aim of such additional restrictions is the necessity of guaranteeing discipline and order at the institutions of deprivation of liberty (*see: Judgment of 6 February 2006 by the Constitutional Court in the case No. 2005-17-01, Para 6*).

The right of a convicted person to private life no doubt differs from that of a person in freedom. For instance, as to imprisoned persons, the Constitutional Court has recognized that these person shall not enjoy rights to private life at the same extent as persons in freedom (*see: Judgment of 23 April 2009 by the Constitutional Court in the case No. 2008-42-01, Para 11*).

The Constitutional Court admits that the number of telephone conversations included in the Contested Norms, though being insufficient according to the Applicant, may not serve as justification of breaching the regime of serving one's sentence. However, the infringement mentioned may not serve as the grounds for the

Constitutional Court to repeal the Contested Norms. Considerations for ensuring order and security of the place of imprisonment are of greater importance that the wish of imprisoned persons to have more telephone conversations according to their subjective opinion. Consequently, administration of a place of imprisonment has the right to react to such breaches of the regime of penalty execution according to the procedures established by law.

**15.** The Constitutional Court has recognized that legal regulation of other states, when solving separate issues of the Latvian legal system, can not be directly applied, apart from the cases established by law. In the analysis of comparative rights, one has to take into account the functional context. It follows from essential judicial, social, political, historical and systemic differences of legal systems of different states. However, for solution of the particular legal issue, functionally resembling legal regulations of other states can be indirectly applied, e.g. as an indicator of a guideline or solution of a particular problem by bearing in mind potentially different context (*see: Judgment of 8 June 2007 by the Constitutional Court in the case No. 2007-01-01, Para 24.1*).

As to legal regulations of other European states of the right of imprisoned persons to have telephone conversations, it can be concluded that basically all persons are prohibited using cell phones, and expenses for telephone conversations, apart from some exceptions, are covered by the convicted persons themselves. In some states, like Check Republic, Croatia, Estonia, Poland and Slovenia the right of convicted persons to have telephone conversations are regulated in a general manner without providing for the permitted number and duration of such conversations (*see, e.g.: Section 18 of the Penalty Execution Law of the Check Republic, Section 125 of Liberty Deprivation Penalty Execution Law of Croatia, Section 28 and Section 29 of the Estonian Imprisonment Law, Sections 90, 91, 105 and 247 of the Penalty Execution Code of Poland and Section 75 of the Criminal Penalty Execution Law of Slovenia*). Legal acts of other states provide for concrete restrictions regarding the number of duration of telephone conversations (*see, e.g.: Sections 73, 74, 75 and 102 of the Lithuanian Penalty Execution Code and Section 27 of the Criminal Penalty Execution Provision*

*law of Slovakia*). There is no uniform regulation in this respect. Therefore it can be concluded that the European States do not recognize the right of imprisoned persons to an unlimited number of telephone conversations.

**Taking into account the aforesaid, the Constitutional Court holds that the State has not infringed its duty that follows from Article 96 of the Satversme when establishing the permitted number of telephone conversations for convicted persons.**

**The Constitutional Court**

based on Articles 30 – 32 of the Constitutional Court Law,

**h o l d s :**

The words "two" and "per month" of Item 4 of Part 8 of Section 50.4 of the Penalty Execution Code of Latvia complies with Article 96 of the Satversme (Constitution) of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgment comes into force on the date of publishing it.

Presiding Judge G. Kūtri