



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## JUDGMENT ON BEHALF OF THE REPUBLIC OF LATVIA Riga, 29 September 2009 in Case No 2008-48-01

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 Roberts Mutulis,

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

on 8 September 2009 in writing examined the case

**“On Compliance of the Second Part of Section 74 of the Latvian Penalty Execution Code with Article 111 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. 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 25 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 Second part of Section 74 of the Code in the present wording provides the following: “Convicted persons who are held in punishment isolation cells shall be prohibited from having walks” (hereinafter – the Contested Norm).

On 30 April 2009, the Saeima (Parliament) of the Republic of Latvia (hereinafter – the Saeima) adopted the Law “Amendments to the Penalty Execution Code”. The following wording of the second part of Section 74 of the Code was provided in this Law: “Convicted persons who are held in punishment isolation cells shall be allowed daily walks of one hour.” At the same time, the Transitional Provisions of the Code were supplemented by Section 10 that establishes the following: “Amendments to the second part of Section 74 of the Code that provide for allowing daily walks of one hour for convicted persons who are held in punishment isolation cells shall come into force on 1 January 2011.”

**2. The applicant Roberts Mutulis** (hereinafter – the Applicant) holds that the Contested Norm does not comply with Article 111 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The Applicant indicates that daily walks of at least one hour should be ensured for all prisoners, including convicted persons who are held in punishment isolation cells because long staying in an isolation cell without the possibility of having a walk constitutes threat to health. Daylight and fresh air are the basic elements of person’s life, whilst lack of it may cause different illnesses. To punish a convicted person for violations, it is enough to apply other restrictions established in Section 74 of the Code. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter – the Committee for the Prevention of Torture) has indicated that all imprisoned persons should be permitted to have daily walks of at least one hour.

The Applicant holds that the right established in Article 111 of the Satversme is absolute and it cannot be restricted. To observe the freedoms of a person in custody, the State should undertake additional care for health of such person because the possibilities of the person to take care of himself or herself are limited.

**3. The institution that passed the contested act – the Saeima**, on 5 February 2009 submitted a letter “On the Reply in Case No 2008-48-01” addressed to the Constitutional Court. It is indicated in the letter that at the meeting of 5 February 2009, the Defence, Internal Affairs and Corruption Prevention Committee were sent the draft law “Amendments to the Latvian Penalty Execution Code” (reg. No. 1099/Lp9). The draft law provided for amending the Contested Norm and providing that convicted persons who are held in punishment isolation cells shall be permitted walks of one hour once per two days.

In the letter of 7 May 2009, the Saeima indicates that the draft law “Amendments to the Latvian Penalty Execution Code” (reg. Nr. 1005/Lp9), which also included the draft law No. 1099/Lp9 was approved in the final reading at the meeting of the Saeima of 30 April 2009. The new wording of the Contested Norm provides that the convicted persons who are held in punishment isolation cells shall be permitted daily walks of one hour. The amendments would come into force on 1 January 2011 because before that date it is necessary to substantially improve the present technical and organizational possibilities of places of imprisonment to ensure such walks, and this requires financial resources. Since the Contested norm has been amended within the frameworks of legislative procedure, the Saeima asks to assess whether it is useful to continue proceedings in the case under review.

**4. The summoned person – the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) – points out that health is an essential precondition of a person’s welfare and dignity. The State cannot guarantee good health for each person; however it is responsible for creating such conditions that would protect or even improve person’s health. The right to health as human rights is established in the UN

Universal Declaration of Human Rights, as well as in the UN International Pact on Economic, Social and Cultural Rights.

According to the Ombudsman, the right to health shall be understood as the right to such conditions, services and goods that are indispensable to reach the best possible level of health protection. Not only the duty of the State to carry out, in certain cases and at a certain level, measures that are closely related with economic possibilities of the State to take measures to protect people's health, but also the duty of the State to restrain from such actions that restrict the possibilities of a person to independently take care of his or her health follow from the words "the State shall protect human health" enshrined in Article 111 of the Satversme.

The Ombudsman holds that in the case under consideration the right to health shall be considered in conjunction with the prohibition of inhuman treatment established in Article 95 of the Satversme, Article 5 of the UN Universal Declaration of Human Rights, Article 7 of the UN International Pact on Economic, Social and Cultural Rights and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the European Convention on Human Rights). By referring to the judgment of the European Court of Human Rights in the case *Poltoratsky v. Ukraine*, the Ombudsman indicates that 24 hour stay in an isolation cell without fresh air and daylight, as well as restricted area per one prisoner and lack of possibility to have a walk in fresh air shall be regarded as an inhuman treatment and infringement of Article 3 of the European Convention on Human Rights.

The Committee for the Prevention of Torture founded by the Council of Europe already during its first visit to Latvia has drawn attention to the duty of the State to ensure at least one hour walk in fresh air for persons who are held in punishment isolation cells. This recommendation was repeated during all further visits; however Latvia has not taken it into consideration. Employees of the Ombudsman's office have established that places of imprisonment have not eliminated all violations indicated in the above mentioned recommendations.

The Ombudsman concludes that the rights guaranteed in Article 111 in conjunction with Article 95 of the Satversme are being infringed if the convicted persons who are held in punishment isolation cells are not ensured with daily walks of

one hour. The State cannot substantiate it by lack of financial resources or other resources if it does not ensure the exercise of the rights that include elements of prohibition of inhuman treatment.

5. The summoned person – **the State agency „Public Health Agency”** (hereinafter – the Public Health Agency) – in its letter draws attention to a possibility of causing harm to health for a person placed in premises without natural light and air circulation for a long time. As the air quality in the premises deteriorates, a person might feel uncomfortably and his or her working capacity decreases; a person starts feeling tired, he or she has headache, disorders on action of the heart, as well as the risk to get respiratory disease and infection increases. When inhaling dirty air, the disease resistance of human body deteriorates, immunity becomes weaker and the possibility to catch infections increases.

6. The summoned person – **the Ministry of Justice** – has provided an answer to the following question: why the date of coming into force of the new wording of the second part of Section 74 of the Code is 1 January 2011.

On 28 January 2009, the Minister of Justice has submitted a proposition of the third reading of the draft law “Amendments to the Latvian Penalty Execution Code” (reg. No. 1005/Lp9) by suggesting the following wording of the second part of Section 74 of the Code: “Convicted persons who are held in punishment isolation cells shall be permitted walks of one hour once per two days.” However, the Latvian Prison Administration objected to this suggestion. On 18 March 2009, the above mentioned suggestion was reviewed at the meeting of the Saeima Defence, Internal Affairs and Corruption Prevention Committee and the Director of the Latvian Prison Administration indicated that the suggestion cannot be implemented because prisons do not have enough walking grounds, whilst organization of new walking grounds requires considerable resources of State budget. Representatives of Ombudsman have indicated during the meeting that convicted persons who are held in punishment isolation cells should be ensured with daily walks of one hour.

Taking into account the opinions expressed at the meeting of 18 March 2009 and the letter No 9/6-2-n/113-(9/09) of 18 March 2009 of the Saeima Committee addressed to the Minister of Justice, the Minister has revoked his suggestion regarding amendments to the second part of Section 74 of the Code. The Minister, however, has submitted another suggestion – to provide the following wording of the second part of Section 74 of the Code: “Convicted persons who are held in punishment isolation cells shall be permitted daily walks of one hour”, as well as the proposed to supplement the Transitional Provisions with Para 10 with the following wording: “Amendments to the second part of Section 74 of the Code shall come into force on 1 January 2011.”

The transitional period up to 1 January 2011 has been established with a view to accumulate budgeted resources to ensure possibilities of organizing such walks and for the Latvian Prison Administration to be able to carry out necessary organizational measures.

**7. The Latvian Prison Administration** has provided the Constitutional Court with information on possibilities to ensure walks for convicted persons who are held in punishment isolation cells. The information provided also includes data on the possible number of persons held at the same time in punishment isolation cells in each place of imprisonment, as well as data on the number of walking grounds and load of each place of imprisonment.

The Latvian Prison Administration draws attention to particular measures that should be implemented to ensure walks for convicted person. For instance, the Riga Central Prison, the Jelgava Prison, the Jēkabpils Prison and the Šķīrotava Prison need their walking grounds to be repaired. However, the Brasa Prison needs two more positions of supervisor to ensure walks for prisoners. In the Iļģuciems Prison, the punishment isolation cell is never use because it is in bad technical condition, whilst the Daugavgrīva Prison five walking grounds are never used due to their bad condition.

## **The Constitutional Court has concluded:**

8. The new wording of the second part of Section 74 of the Code, the term of coming into force of these amendments being 1 January 2011, provides the following: “Convicted persons who are held in punishment isolation cells shall be permitted daily walks of one hour.” The Saeima asks assessing whether it is useful to continue proceedings in the case under review provided that the Contested Norm has been amended during the legislative procedure. Thus the legal question indicated in the application is resolved.

8.1. Item 2 of the first part of Article 29 of the Constitutional Court Law provides that proceedings in the case may be closed before the judgment is announced by a decision of the Constitutional Court if the disputed legal norm (act) is no longer in effect. The abovementioned provision has been established in order to ensure economy of the Constitutional Court process and that the Constitutional Court would not render judgment in cases where a dispute no more exists (*see: Judgment of 12 February 2008 by the Constitutional Court in the case No. 2007-15-01, Para 4*). The Constitutional Court has concluded that the application field of Item 2 of the first part of Article 29 of the Constitutional Court Law is broader than its actual wording. The above mentioned norm can also be applied in cases when at the moment of decision-taking it has not become void factually, whilst the institution that has passed the contested act has prevented dispute, i.e. it has provide that the norm would become void (*see: Decision of 23 May 2005 on termination of proceedings of the Constitutional Court in the case No. 2005-01-01, Para 7 and decision of 5 November 2008 on termination of proceedings of the Constitutional Court in the case No. 2008-06-01, Para 7.2*).

The Saeima has amended the Contested Norm with a view to solve the present dispute. However, in such cases the first part of Article 29 of the Constitutional Court Law provides for the right of the Constitutional Court to terminate proceedings but not the duty to do so (*see: Decision of 12 June 2007 on termination of proceedings of the Constitutional Court in the case No. 2007-06-03, Para 11*). Consequently, the Constitutional Court has to assess whether there exist any considerations that require continuation of proceedings.

**8.2.** In the case under review, it is important that the Contested Norm becomes void on 1 January 2011 when, according to Para 10 of the Transitional Provisions of the Code, the new wording of the second part of Article 74 of the Code would take effect.

Based on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter – the Convention for the Prevention of Torture), there was the Committee for the Prevention of Corruption established. According to Article 1 of the Convention for the Prevention of Torture, the Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. The Convention on the Prevention of Torture became binding to Latvia as from 1 June 1998.

It was indicated in the Second General Report on the activities of the Committee for the Prevention of Torture from 1 January to 31 December 1991 that all imprisoned persons without exception should be permitted daily physical activities in fresh air, and this is regarded as the minimum requirement (*see: case materials, pp. 27 and 29, <http://www.cpt.coe.int/en/annual/rep-02.htm>*).

From 5 May to 12 May 2004, the Committee for the Prevention of Torture visited Latvia for the third time, and on 13 March 2008 it published a report on this visit addressed to the Latvian government. In this report, there is concern expressed regarding the fact that Latvian public institutions have not implemented many instructions given after the visit of 1999 and again after that of 2002. According to the Committee for the Prevention of Torture, adult prisoners held in punishment isolation cells are still denied the possibility to have physical activities in fresh air. The following opinion of Latvian public institutions is mentioned in the report: it is not possible to ensure walks in fresh air for those prisoners who are held in punishment isolation cells due to the fact that walking grounds are located outside the premises of the place of imprisonment; it means that it is necessary to build additional walking grounds, which depends on resources available. When commenting the situation, the Committee for the Prevention of Torture indicated that the above mentioned reasons for non-fulfilment of instructions by the Latvian public institutions are ungrounded. It

requested Latvia to take immediate measures to implement all recommendations (*see: case materials, Vol. 33 – 36, <http://www.cpt.coe.int/documents/lva/2008-15-inf-eng.htm>*).

**8.3.** It can be concluded from the aforesaid that the Latvian government and the legislator knew for more than ten years already that convicted persons who are held in punishment isolation cells should be ensured with daily walks of at least one hour in fresh air in order to prevent breach of the torture prohibition included in Article 3 of the European Convention on Human Rights. As it follows from the report, the Committee for the Prevention of Torture has drawn attention to this problem several times already. Latvian public institutions, however, have not reacted to these reprimands.

The Constitutional Court holds that the Latvian government and the legislator had had a sufficient time to implement international liabilities of the State and ensure convicted persons that are held in punishment isolation cells with daily walks of at least one hour. Taking into account international liabilities of the Republic of Latvia and conclusions made by the Committee for the Prevention of Torture, as well as the fact that according to the amendments to the Code adopted by the Saeima the Contested Norm would become void as on 1 January 2011, the Constitutional Court holds that it is necessary to assess compliance of the Contested Norm with Article 111 of the Satversme. In case if the Constitutional Court concludes that the Contested Norm does not comply with the Satversme, the continuous breach of the fundamental rights of persons will not be admissible before coming into force of the new wording of the second part of Section 74 of the Code.

**Consequently, it is necessary to continue proceedings in the case under review.**

**9.** Article 111 of the Satversme provides: „The State shall protect human health and guarantee a basic level of medical assistance for everyone.”

The right to health shall be regarded as social right. As it has already been concluded by the Constitutional Court, when interpreting the norms, incorporated into Article 111 as read together with international liabilities and the practice of their

application, the obligation of the State to undertake measures, in certain cases and at a certain extent, to protect health of the people follows from Article 111 of the Satversme (*see: Judgment of 22 October 2002 by the Constitutional Court in the case No. 2002-04-03, Para 1 of the Concluding Part*).

Person's health is influenced by different factors, including air quality because air is indispensable for maintaining vital functions of body. According to the Public Health Agency, as the air quality in the premises deteriorates, a person might feel uncomfortably and his or her working capacity decreases; a person starts feeling tired, he or she has headache, disorders on action of the heart, as well as the risk to get respiratory disease and infection increases. Walks in fresh air ensure the benevolent influence of sunlight on the body, it makes a person feel better, strengthens immunity and ensures protection against infection diseases (*see: case materials, pp. 89, 90*).

According to Item 6 of the first part of Section 70 of the Penalty Execution Code, convicted persons can be placed in punishment isolation cell for a term up to 15 days. According to the Ombudsman, a convicted person can be held in punishment isolation cell for more than 15 days. For instance, refusal to leave the punishment isolation cell for the ordinary cell is regarded as breach of the regime of serving one's sentence, and in such a case the person can again be placed in punishment isolation cell for 15 days more. Moreover, results of examinations performed by the Ombudsman show that conditions in punishment isolation cells are not fit for persons to be held there for a long period. Punishment isolation cells are small cells with non-confined toilet facilities, without daylight and natural ventilation, as well as insufficient artificial light (*see: case materials, pp. 88*).

It can be concluded from the aforesaid that long-term presence in such premises without having the possibility to have a walk in fresh air may cause considerable harm to person's health.

**Consequently, the Contested Norm that prohibits the possibility to have walks for convicted persons who are held in punishment isolation cells infringes the right to health of the Applicant as guaranteed in Article 111 of the Satversme.**

10. Although Article 116 of the Satversme that provides for cases when the rights of a person can be restricted does not mention Article 111, the Constitutional Court has concluded that the fundamental rights established in Article 111 of the Satversme can be restricted with a view to protect other rights guaranteed in the Satversme (*see: Judgment of 22 October 2002 by the Constitutional Court in the case No. 2002-04-03, Para 2 of the Concluding Part and judgment of 23 April 2004 in the case No. 2003-15-01, Para 7*).

Consequently, even in the case if the rights guaranteed in Article 111 of the Satversme are restricted, the Constitutional Court must investigate whether the restriction has been established by law, whether it has a legitimate objective and whether it is proportionate with the objective.

**In the case, there is no dispute whether the Contested Norm has been established by a law adopted and proclaimed according to proper procedure.**

11. Placing in punishment isolation cell is one of disciplinary punishments. A person is placed in punishment isolation cell only in the case if he or she has committed grave or systematic breaches of the regime of serving one's sentence. The Constitutional Court has concluded that the restrictions of the rights of a convicted person, including restrictions of the rights established for a person that is held in punishment isolation cell, shall only be such, which are aimed at guaranteeing execution of penalty and regime of execution of penalty (*see: Judgment of 6 February 2006 by the Constitutional Court in the case No. 2005-17-01, Para 7*).

Placing of a person in a punishment isolation cell has a legitimate objective, which is ensuring that a person would no more breach the regime of serving one's sentence. Restrictions of rights, however, that are established for a person held in a punishment isolation cell should be oriented towards reaching of the legitimate objective.

Article 74 of the Code provides for the regime in punishment and disciplinary isolation cells and establishes different prohibitions for confined persons who are held in such isolation cells. Since the prohibition to have walks is one of the many, it should

also be oriented towards execution of penalty and ensuring of the regime for executing penalty.

According to the Constitutional Court, a total prohibition of having walks, which implies long-term stay indoors and constitutes threat to person's health, is not restriction of rights that is oriented towards execution of penalty or ensuring the regime for executing penalty. The Saeima has not indicated any legitimate objective of the restriction established in the Contested Norm.

**Consequently, the restriction of the rights established in the Contested Norm has no legitimate objective and therefore it does not comply with Article 111 of the Satversme.**

**12.** When taking the decision on the moment from which the impugned norm loses effect, the Constitutional Court shall as much as possible take care that the situation, which might arise from the above moment, does not harm the interests of other persons (*see: Judgment of 6 June 2006 by the Constitutional Court in the case No. 2005-25-01, Para 23*). The Constitutional Court also has to take into account the factual circumstances and consider the fact that public institutions might need certain period of time to ensure observance of the fundamental rights of a person.

**12.1.** The Applicant has asked the Constitutional Court to recognize the Contested Norm as void since the date of adopting it because this is the only way how to prevent negative consequences caused to him in the result of application of the Contested Norm.

In the case under review, the Constitutional Court finds no reasonable grounds for retroactive repealing of the Contested Norm. The Applicant has neither indicated how retroactive repealing of the Contested Norm would eliminate the infringement of rights caused to him.

**12.2.** When determining the date when the Contested Norm will become void, the Constitutional Court must take into account the fact that harm could be done to persons' health in the case if the time period from the date of announcing the judgment till such date is too long. However, places of imprisonment need a certain time period

to carry out all necessary measures and ensure the possibility to have walks also for convicted persons who are held in punishment isolation cells.

When substantiating why the Contested Norm would become void on 1 January 2011, the Saeima indicates that it is necessary to substantially improve technical and organizational possibilities of places of imprisonment to ensure the possibility to have walks, as well as this requires financial resources (*see: case materials, pp. 95*). The Ministry of Justice explains that it is not possible to ensure the possibility to have walks until a walking ground is constructed for each punishment isolation cell, which at present is impossible due to unsuitable infrastructure. It is neither possible to involve more personnel that would be responsible for transfer and supervision of the convicted persons or to pay for extra working hours for the present personnel (*see: case materials, pp. 107*).

The Constitutional Court emphasizes once more that public institutions had more than ten years at their disposal to carry out measures indispensable for ensuring the possibility to have walks for convicted persons that are held in punishment isolation cells. During this time, it was possible to introduce appropriate amendments into normative acts and to find the necessary funding.

The Latvian Prison Administration indicates that it is possible to carry out repair works in current walking grounds and to employ additional supervisors. The Jēkabpils Prison only needs construction of a walking ground (*see: case materials, pp.108 – 111*). It follows from the information provided by the Latvian Prison Administration that the number of convicted persons held at the same time in punishment isolation cells, the number of walking grounds and working hours provide the possibility to ensure walks for the convicted persons held in punishment isolation cells. Since the present technical condition of walking grounds allows ensuring the possibility of having a walk for the rest of convicted persons, this could not serve as an obstacle for the failure to ensure the possibility of having walks for persons held in punishment isolation cells. Other data provided by the Latvian Prison Administration also show that it is possible to implement all measures that are necessary to ensure the possibility to have walks for persons held in punishment isolation cells, this being done within a short time frame, which is before 1 January 2011.

**The Constitutional Court:**

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

**h o l d s :**

**The second part of Section 74 of the Latvian Penalty Execution Code does not comply with Article 111 of the Satversme of the Republic of Latvia and shall be void as from May 2010.**

The Judgment is final and not subject to appeal.

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

Presiding Judge

G. Kūtris