
MARCIN GÓRSKI,

Ph.D. in law, Associate professor of the Department of European Constitutional Law of the University of Łódź, attorney at law, member of the Human Rights Committee of the National Council of Attorneys at Law, head of the Legal Department of the City of Łódź Office

Protocol No. 15 to the ECHR in the Context of Structural Deficits of the European Mechanism of Protection of Fundamental Rights

Protocol No. 15 amending the ECHR shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol. To date 41 states signed the Protocol out of which 27 states already ratified it. In case of 6 states it is still awaiting signature¹.

1. The Protocol

Protocol No. 15 for the first time inserts the reference to the principle of subsidiarity in the text of the Convention. It does not mean of course that the principle was unfamiliar to the Convention or to the practice of the ECtHR. The principle is enshrined in Article 1 ECHR². There is the impression though that the re-invented word of the Strasbourg language has re-

cently become «subsidiarity»³. Although present for decades in the Court's case-law⁴ in recent years it has been pronounced on many occasions. Before the year 2000 the term «subsidiarity» was employed in the Court's judgments on 7 occasions only and the adjective «subsidiary» – in 52 judgments (including those instances where the adjective in question was not employed to define the characteristics of the Convention

³ Signified by the Interlaken Conference declaration in 2010 and proposed as an insertion (alongside the «margin of appreciation») to the preamble of the Convention (see: Protocol No. 15 to the ECHR).

⁴ See e.g. for the first time: judgment in case *Handyside v. the United Kingdom* of 7th December 1976, § 48: «the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights». See also: judgment in case *Eckle v. Germany* of 15th July 1982, appl. no. 8130/78, in § 66: «to duplicate the domestic process with proceedings before the Commission and the Court would appear hardly compatible with the subsidiary character of the machinery of protection established by the Convention. The Convention leaves to each Contracting State, in the first place, the task of securing the enjoyment of the rights and freedoms it enshrines (...). This subsidiary character is all the more pronounced in the case of States which have incorporated the Convention into their domestic legal order and which treat the rules of the Convention as directly applicable».

¹ All numbers are as of 1st May 2016.

² M. E. Villiger, *The Principle of Subsidiarity in the European Convention on Human Rights* [in:] M. G. Kohen [ed.], *Promoting Justice, Human Rights and Conflict Resolution Through International Law. Liber Amicorum Lucius Caflisch*, Leiden 2007, p. 624.

mechanism¹). More recently, since 2000, the term «subsidiarity» has been employed 208 times². The motivation to employ the «subsidiarity» argument frequently seems to be of a political provenience. For example, Judge Wojtyczek from Poland employed this term in his concurring opinion in the Romanian case concerning the (denied) right of the clergy to establish trade unions³. One can raise that traditionally Roman catholic Poland is very much interested in preventing the Church from claims based on the clergy's labour rights.

The re-worded preamble to the ECHR shall refer both to, on one hand, the primary responsibility of the High Contracting Parties to secure the rights and freedoms guaranteed by the Convention and their «margin of appreciation», on the other hand though, to the supervisory jurisdiction of the ECtHR.

The Explanatory Report makes note that the new wording of the preamble referring to the subsidiarity principle and the doctrine of margin of appreciation «is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of apprecia-

tion as developed by the Court in its case law»⁴, stressing at the same time that «the Court authoritatively interprets the Convention». The Court assessed that «the wording used in this respect, and in the explanatory report, reflects the Court's pronouncements on the principle»⁵.

2. The intention of the Protocol

The intention laying foundations under the adoption of Protocol No. 15 was to restrain the «activist» tendency of the Court. For example, the note developed by the UK House of Commons' Library makes clear that «the UK's emphasis on the role of national authorities was in part a response to European Court decisions such as *Hirst* and *Abu Qatada (Othman)*»⁶. Protocol No. 15 responded to some of the proposals for changes to the Convention included in the Brighton Declaration⁷, balancing between tendency to restrain the ECtHR (by attaching special importance to the doctrine of margin of appreciation) and to maintain the *status quo* (by emphasising the supervisory role of the Court). However, if one analyses the activist vs. restrained tendencies in the case-law of the (GC) ECtHR the diagram presents as follows⁸:

⁴ Explanatory note on the Draft Protocol No. 15, CETS No. 213, p. 2.

⁵ Opinion of the Court on Draft Protocol No. 15 to the European Convention on Human Rights adopted on 6 February 2013, p. 2.

⁶ House of Commons' Library note no. SN/IA/7053 of 4th December 2014, p. 3.

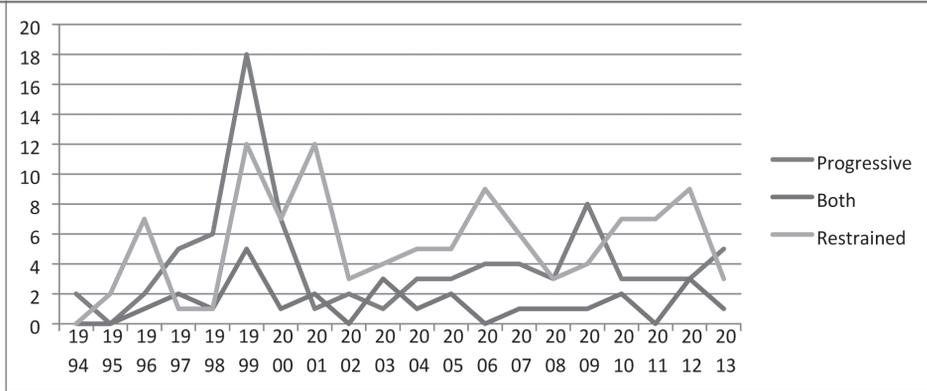
⁷ W. A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford 2015, p. 31. The Brighton Declaration was adopted by the High Level Conference meeting at Brighton on 19 and 20 April 2012 at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe.

⁸ See for greater details in: M. Górski, *Polityczna rola sądów międzynarodowych i jurydyzacja polityki* [in:] A. Wyrozumska [ed.], *Granice swobody orzekania sądów międzynarodowych*,

¹ For example in cases: *Golder v. the United Kingdom* of 21st February 1975, appl. no. 4451/70 or *de Becker v. Belgium* of 27th March 1962, appl. no. 214/5.

² It went so far that some «traditional» judges (rightly – in my opinion) expressed their fears of it being abused – see e.g. joint dissenting opinion of judges Rozakis, Jebens and Spielmann in case *Kharin v. Russia*, judgment of 3rd February 2011, appl. no. 37345/03, where they included the following passage: «this judgment opens the door to a relaxed approach in so far as justification for detention is concerned and reverses the spirit of subsidiarity».

³ ECtHR judgment (GC) of 9th July 2013 in case *Sindicatul Păstorul cel Bun v. Romania*, appl. no. 2330/09.



Source: M. Górski, *Polityczna rola sądów międzynarodowych i jurydyzacja polityki* [in:] A. Wyrozumska [ed.], *Granice swobody orzekania sądów międzynarodowych*, Łódź 2014.

The criticism of the doctrine of margin of appreciation (which can be treated as a form of legal *laissez-faire à rebours*: this time to the benefit of states instead of individuals) raised several arguments¹ out of which we shall mention here one: it creates a «threat to the universality of human rights and creation of matrix for moral relativism – the doctrine allows for double

standards which may undermine the credibility of the Court»².

3. The initial intentions of the State Parties of the ECHR

The Convention was aimed at development of human rights in a spirit of unity. As the preamble of the ECHR proclaims, «the aim of the Council of Europe is the achievement of **greater unity**³ between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms», and the fundamental freedoms guaranteed by the Convention are best maintained «by a **common understanding**⁴ and observance of the human rights» and the belief that European states «**are likeminded**⁵ and

Łódź 2014, pp. 148–224. The diagram shows that (criticised as) progressive judgments dominated over the restrained ones in 1994, between 1997 and 1999 and again in 2009 and 2013. The general tendency seems to be that the progressive approach, after reaching the peak in 1999 and the bottom between 2001 and 2003, has a slow but visible tendency to increase. The restrained approach seems to be generally stable (after reaching the peak in 1999 and 2001) but rather losing its force in a long-term perspective. Another interesting conclusion can be that (although losing their dynamics in a long-term perspective) the «restrained» decisions, with almost no exceptions, dominated over the «progressive» judgments after 2000, while the progressive approach was normally dominating in the 1990's.

¹ See the catalogue of them in M. Kopa, *The Algorithm of the Margin of Appreciation Doctrine in Light of the Protocol No. 15 Amending the European Convention on Human Rights*, ICLR 2014, Vol. 14, No. 1, pp. 38–39.

² E. Benvenisti, *Margin of appreciation, Consensus and Universal standards*, New York University International Law And Politics, Vol. 31, No. 1999, p. 844.

³ In the French version «une union plus étroite».

⁴ In the French version «une conception commune».

⁵ In the French version «un même esprit».

have a **common heritage**¹ of political traditions, ideals, freedom and the rule of law». In the conception of the ECHR there was both the experience of the Second World War's human rights horrors and a «great anxiety and uncertainty» which made the states of Western believe that they «had to unite together to survive and [...] to protect what they stood for»². As for the ECtHR, it was created as playing the «supervisory role» in controlling the compliance of the State Parties' practices with the Convention (without substituting domestic courts with their task i.e. to assure the effective application of the ECHR)³ and in controlling the compatibility of domestic legislation with the standards of the Convention⁴.

The elements of unity of understanding human rights (harmonising approach), as well as the activist element in the interpretation of the ECHR seem to be inherent in the foundations of the Convention system.

4. The questions

The question is whether nowadays the interpretation of the ECHR should depart from these initial assumptions? The Convention is a «living instrument». As the

¹ In the French version «un patrimoine commun».

² Both quotations from E. Bates, *The Birth of the European Convention on Human Rights – and the European Court of Human Rights* [in:] J. Christoffersen, M. R. Madsen [eds.], *The European Court of Human Rights Between Law and Politics*, Oxford 2013, pp. 18–19.

³ See recently, among many other authorities, e.g. judgment of the ECtHR in *Acatrinei v. Romania*, 25th June 2013, application no. 18540/04, in § 69.

⁴ See recently, among many other authorities, e.g. judgment of the ECtHR in *Scoppola v. Italy* (No.), 22nd May 2012, [GC] application no. 126/05, in § 102.

Court explained for the first time in *Tyrer*⁵, «the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions». It went on to say in *Loizidou*⁶ that «these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago». Should we abandon the harmonising approach built in the ECHR mechanism by its drafters and turn to a more «subsidiary» direction? Let us try to make a short pros-and-cons calculation.

If we do so – what do we gain? Certainly, we get more acceptance to the case-law of the Court and thus the jurisprudence may become more authoritative. But are we really facing the problem of sudden disobedience to the authority of the Court resulting from general nonacceptance of the alleged activist tendency in the Court's case-law? According to D. Forst, «the execution of judgments by states has proved to be unsatisfactory, either because the adopted measures are not adequate, or because some states are openly unwilling to abide by the Court's judgments. Thus, on 31 December 2011, among the more than 10 000 cases pending before the Committee of Ministers for the supervision of the execution, 278 were leading cases, i.e. cases which have been identified as revealing a new systemic/general problem in a respondent state, which had been pending for more than five years. Moreover, 1354 of the 1696 new cases which became

⁵ Judgment of ECtHR of 25th April 1978 *Tyrer v. the United Kingdom*, appl. no. 5856/72, § 31.

⁶ Judgment of ECtHR of 23rd March 1995 *Loizidou v. Turkey (preliminary objections)*, appl. /89, § 71.

final between 1 January and 31 December 2011, were repetitive ones»¹. One can clearly see that the problem of non-enforcement lays in the quantity of (a multitude of) non-executed decisions rather than in rejection of the ostensible Court's activism. Perhaps we need a more efficient enforcement mechanism than the assumed strengthening of the Court's authority through a more nuanced approach to the States' ways of implementing the Convention standard?

What do we lose then? Legal certainty seems to be the first victim. Individuals in the State parties are exposed to the risk that instead of applying the well-developed standard resulting from the case-law, the Court would be eager to accept some domestic deviations and all of that in the name of «subsidiarity». Secondly, equality before the law seems to be impaired if the Court tends to tolerate certain irregularities occurring on the jagged and uneven verges of the common interpretative standard of the Convention: comparable situations may not be treated in the same way due to application of the margin of appreciation. One may ask: do we need the ECtHR which accepts instead of upbraiding? For legal practitioners it is already difficult to explain the meanders of the Court's reasoning, even without Protocol No. 15. For example, it is hard to explain why did the Court decide in *Janowiec et al.*² that it did

¹ D. Forst, *The Execution of Judgments of the European Court of Human Rights. Limits and Ways ahead*, https://www.icljournal.com/download/f1527ce403500a9ec58b8269a9a91471/ICL_Thesis_Vol_7_3_13.pdf, viewed 8th May 2016.

² Judgment of ECtHR of 16th April 2012, *Janowiec et al. v. Russia*, appl. nos. 55508/07 i 29520/09. See in particular the dissenting opinion of Judges Spielmann, Villiger and Nussberger.

not find a «genuine connection»³ constituting grounds to extend the temporal jurisdiction of the Court so as to rule on the plea concerning the violation of Article 2 ECHR and consequently did not decide to apply the factual assumption which can be used where the State Party fails to cooperate with the Court⁴.

One may reasonably fear that meandering aimed at the protection of «margin of appreciation» and the principle of subsidiarity can delegitimize the Court in the eyes of the most important and vulnerable «clients» of the Convention system, namely individuals. We are living in the age of growing extremisms in Europe: as noted by M. Goodwin, «in recent years, populist extremist parties have achieved notable breakthroughs in national and local elections across the European Union. Their rise poses a growing challenge to European societies, to mainstream political parties and to the process of European integration itself»⁵. In this era of turbulence and discord in Europe individuals certainly need a Court whose speech is «Yea, yea; Nay, nay: and whatsoever is more than these is of the evil one»⁶.

Of course, one may say that if the Court disregards national differences of approach to certain interpretative heterogeneities

³ See judgment of ECtHR of 9th April 2007, *Šilih v. Slovenia*, appl. no 71463/01.

⁴ This interpretation was applied on many occasions e.g. *Shuvalov v. Russia*, 18th October 2011, appl. No. 38047/04, *Filatov v. Russia*, 8th November 2011, appl. No. 22485/05, *Akhmadov v. Russia*, 14th November 2008, appl. No. 21586/02, *Dzhambekova et al. v. Russia*, 12th March 2009, app. Nos. 27238/03 and 35078/04, *Dzhabrailova v. Russia*, 9th April 2009, appl. No. 1586/05, *Tekin v. Turkey*, 9th June 1998, appl. No. 22496/93.

⁵ R. Niblett, *Preface* [in:] M. Goodwin, *Right Response Understanding and Countering Populist Extremism in Europe*, London 2011, p. V.

⁶ The Holy Bible, Matthew 5:37.

concerning the Convention, its authority can be challenged by States, as it happened¹ to a certain extent after the Chamber's *Lautsi* judgment² or even similarly to

¹ Surprisingly enough, the Socialists and Democrats Group in the European Parliament motioned on 15th December 2009 for a resolution – in reaction to the ECtHR Section ruling in *Lautsi* case – calling for the recognition of the principle of subsidiarity by international organisations. Also, the judgment was criticised among others by the Greek Orthodox Church (<http://www.christiantoday.com/article/greek.orthodox.church.opposes.eu.crucifix.ban/24623.htm>) or the Episcopal Council of the Polish Catholic Church, as well as some governments (e.g. Lithuanian: <http://balticreports.com/2010/01/13/when-a-cross-isnt-a-cross/>) and national parliaments (see e.g. Polish Upper Chamber's resolution of 18th December 2010). The Italian minister of Defence, Mr. Ignazio La Russa, was allegedly supposed to say on television broadcast: «*Anyway, we won't take away the crucifix! They can die! The crucifix will remain in all school's rooms, in all public rooms! They can die! They can die! Them and those fake international organization that count for nothing!*». For more elaborative overview of reactions to the Section judgment in *Lautsi* – see: G.. Puppinc, *The Case of Lautsi v. Italy: A Synthesis*, Brigham Young University Law Review 2012, pp. 886–888.

² Judgment of ECtHR of 3rd November 2009, *Lautsi v. Italy*, appl. no. 30814/06. As a matter of fact though, the Court did nothing more but drew conclusions from existing jurisprudence and stated that “in countries where the great majority of the population owe allegiance to one particular religion the manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion” which was a direct quotation from the Commission decision in case *Karaduman v. Turkey* (Decision of the Human Rights Commission of 3rd May 1993 in case *Karaduman v. Turkey*, appl. no. 16278/90, p. 108 in § 4. The decision was commented in: I. Pardo, *Morals of Legitimacy. Between Agency and System*, New Directions in Anthropology, vol. 12 [2000], pp. 215-220). Moreover, the Court already found before that prohibiting to wear Islamic headscarves by teachers was not inconsistent with the Convention (judgment of ECtHR of 15th February 2001, *Dahlab v. Switzerland*, appl. no. 42393/98).

the reaction of USA³ to the *Avena*⁴ decision of the ICJ. In fact these challenges already occurred, with the notable example of the Russian Federation⁵. However, maybe it is still better to have a truly common understanding of human rights in at least some European states than to have a pretence of such common stand throughout the whole Europe?

5. Possible consequences – the answers?

Polish lesson can serve well here: for quite some time the general public had the

³ See e.g. C. A. Bradley, *Enforcing the Avena Decision in U. S. Courts*, Harvard Journal of Law and Public Policy vol. 30, No. 1, 2006, pp. 119-125, J. Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: reasons and consequences*, Duke Journal of International and Comparative Law vol. 19, 2009, pp. 263–205.

⁴ Judgment of ICJ of 31st March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports 2004, p. 12

⁵ In December 2015 the Russian Federation adopted the new law (Federal Constitutional Law of 14th December 2015, N 7-FKZ, on Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, Rus.: Федеральный конституционный закон от 14.12.2015 N 7ФКЗ «О внесении изменений в Федеральный конституционный закон “О Конституционном Суде Российской Федерации”») concerning the implementation of ECtHR rulings in the Russia. According to this new law the Russian Federal Constitutional Court shall be competent to hear the applications of the government or the President of the Russian Federation concerning the implementation of the ECtHR decisions. See also Decision 12-П/2016 of the Constitutional Court of the Russian Federation of 19th April 2016 «по делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 4 июля 2013 года по делу “Анчугов и Гладков против России” в связи с запросом Министерства юстиции Российской Федерации».

impression (be it justified or not) that the Polish Constitutional Court was more concerned with general interest than individuals' rights. Some decisions of Polish CC indeed increased that impression. Let us mention here a few examples.

Perhaps the most debated one was the ruling concerning the savings collected on accounts in the so-called Open Pensions' Funds (*Otwarte Fundusze Emerytalne*)¹ in which the Constitutional Court held that savings resulting from insurance premiums collected in (private) Open Pensions' Funds are – from the constitutional point of view – public funds and not private funds and that is why the State may decide on transfer of these saving from individual accounts to the state-owned and state-managed insurance system. The Constitutional Court ruled that one must not assume the immutability of norms which define the acquiring of the right to a pension especially in the context of ever-changing socioeconomic circumstances.

Another widely criticised decision was the one dismissing as unfounded the constitutional complaint of Dorota Rabczevska², a famous Polish pop singer sentenced for a minor criminal penalty for saying publicly that the Holy Bible was «something which had been written by somebody boozed with wine and smoking some weed». She challenged the constitutionality of Article 196 of the Penal Code³ (penalisation of blasphemy) raising that it

violates the constitutional guarantees of freedom of speech and conscience. In the reasoning, the Constitutional Court held among others that «the notion of an *object of religious worship* is normally defined precisely in a given cultural context, at least in reference to religions which are commonly shared in a given place and time. Of course, the alleged definitional

‘liquidity’ of the notion of *object of religious worship* may concern religions or denominations which are not widespread in a given society. The requirement of proving the intentional guilt would ‘protect’ the perpetrator from possible criminal sanction in this case»⁴. In other words, the State decided to protect the religious beliefs from blasphemy consciously choosing one of the religions as deserving special protection.

In 2012 the Constitutional Court held that the change of the method of valorisation of pensions in 2012 from a percentile one to a quota-rate one is not incompatible with the Constitution⁵. In the reasoning the Court found that the Constitution leaves a wide margin of appreciation to the legislature in the area of social rights, which must be utilized in accordance with the present condition of public finance. It also stressed that the violation of the right to social insurance, guaranteed in Article 67

⁴ *Idem*, in § 4.3.5. In Polish «pojęcie “przedmiot czci religijnej” jest z reguły rzeczy dookreślone w danym kontekście kulturowym przynajmniej w odniesieniu do religii powszechnie wyznawanych w danym miejscu i czasie. Zarzucana “płynność” znaczeniowa pojęcia “przedmiot czci religijnej” może oczywiście dotyczyć takich religii czy kultów, które nie są w danym społeczeństwie rozpowszechnione. W takiej sytuacji przed ewentualną odpowiedzialnością karną sprawcę “chronić” będzie wymóg przypisania mu winy umyślnej».

⁵ Judgment of the Constitutional Court of 19th December 2012, case K 9/12.

¹ Judgment of the Constitutional Court of 4th November 2015, case K 1/14.

² Judgment of the Constitutional Court of 6th October 2015, case SK 54/13.

³ Pursuant to this provision, it is penalised to offend religious «feelings» of other persons by publicly insulting an object of religious worship or a place devoted to public religious rituals.

§ 1 of the Constitution is violated when the legislature decides not to valorise the pensions or to valorise them in such a way that the pensioners' living conditions are situated below the «level of survival»¹.

Without going into details one can also mention here other decisions such as the *ritual slaughter case*², the *insult offending the President case*³, the *Gambling Law cases*⁴, the *delay of civil proceedings case*⁵, the *conscientious objection case*⁶, the *public demonstration of contempt to the Republic case*⁷. All of them were hugely criticised and left the general public with a subtle impression of certain «leniency» (or «margin of appreciation») with which the Court treated the legislature and the government.

The result of the foregoing, regardless of whether one's perception of the Constitutional Court's case-law, is a major constitutional crisis ongoing in Poland since Autumn 2015. Although it is covered with dust of political commotion, the origins of

this crisis can also be seen as rooted in certain disappointment with a some «lenient» decisions of the Constitutional

Court, leaving the legislature a relatively wide «margin of appreciation».

Viewed against this background, Protocol No. 15 highlighting the principle of subsidiarity and the duty to observe the State Parties' «margin of appreciation», can be perceived as creating the potential threat to the consistency of the Convention system. It all depends on the interpretation, though. If the Protocol is to be construed as restraining the Court's interpretation of the Convention (hampering the activist tendency of the case-law), it is likely to put into question the credibility of the Court since the Convention was aimed at «achieving greater unity» among the State Parties as regards their approach to human rights protection and at «development» of fundamental rights and freedoms and it is expected by the individuals in Europe to have that impact. If this turns out to be the case, the Convention and the Court will lose their credibility and legitimacy since – like in the Polish example – the disappointment with the case-law of the Court will grow inevitably and gradually. If however the Protocol is to be interpreted – to the extent that it amends the recitals of the preamble – as mere confirmation of the predeceasing jurisprudence of the Court which already employed the subsidiarity principle and the «margin of appreciation» doctrine to demarcate the boundaries of the States' obligation stemming from the ECHR, it will not meet expectations of drafters and this may result in further political challenges to the authority of the Court. It is likely that the ECtHR will face the *tertium non datur* alternative.

¹ It is perhaps interesting to compare the reasoning of the Polish Constitutional Court with the findings of the Latvian Constitutional Court in the judgment of 21st December 2009, case 2009-43-01, on the compliance of Article 2, Paragraph One of the Law «On State Pension and State Allowance Disbursement in the Period from 2009 to 2012» with Articles 1 and 109 of the Constitution of the Republic of Latvia and on the compliance of Article 3, Paragraph One of the above Law with Articles 1, 91, 105 and 109 of the Constitution of the Republic of Latvia.

² Judgment of the Constitutional Court of 10th December 2014, case K 52/13.

³ Judgment of the Constitutional Court of 6th July 2011, case P 12/09.

⁴ Judgments of the Constitutional Court of 11th March 2015, case P 4/14 and of 21st October 2015, case P 32/12.

⁵ Judgment of the Constitutional Court of 22nd October 2015, case SK 28/14.

⁶ Judgment of the Constitutional Court of 7th October 2015, case K 12/14.

⁷ Judgment of the Constitutional Court of 21st September 2015, case K 28/13.