



A provision that envisages the right to a child’s father to a leave in relation to the birth of a child is incompatible with the first sentence of Article 110 of the *Satversme*, insofar it does not envisage protection and support to a female partner of the child’s mother in relation to the birth of the child

On 12 November 2020, the Constitutional Court delivered the judgement in case No. 2019-33-01 “**On the Compliance of Article 155(1) of the Labour Law with the First Sentence of Article 110 of the Constitution of the Republic of Latvia**”.

The contested provision

Article 155(1) of the Labour Law: “The father of a child is entitled to a leave of 10 calendar days. Leave shall be granted to the father of a child immediately after the birth of the child, but not later than within two months from the birth of the child”.

The provision of a higher legal force

The first sentence of Article 110 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*): “The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child.”

The facts of the case

The case was initiated on the basis of an application by Person C (hereafter – the Applicant). The Applicant is in a stable same-sex relationship and has been cohabiting with her partner already for several years. After they began cohabiting, two children have been born to the Applicant’s partner, and the Applicant and her partner had jointly planned their birth. Both children live in a common household with the Applicant and her partner.

Immediately after the birth of the youngest child, the Applicant had wanted to take the leave of 10 calendar days to be together with the new-born child in the first moments of his life and to provide support to her partner and her children. However, the contested legal provision envisages the right to a leave of 10 calendar days following the birth of a child only to the father of the child but does not envisage this right to the partner of the child's mother, who in fact should be considered as being one of the new-born child's parents.

The Applicant is of the opinion that the legislator has not fulfilled its positive duty that follows from the first sentence of Article 110 of the *Satversme* to ensure legal protection as well as economic and social protection and support also to a family of same-sex partners. The legislator has not established adequate legal regulation of family relations of same-sex partners and has not envisaged measures of social and economic protection and support for such families. Even if it could be considered that the legislator had ensured protection for families of same-sex partners, the contested norm is alleged to be incompatible with the principle of equality and the principle of the priority of the child's best interests.

The conclusions of the Court

On reviewing the constitutionality of the contested provision

The Constitutional Court concluded that pursuant to the contested provision an employee who had become the father of a child was entitled to the leave. The legal regulation of the Civil Law provides exhaustively which person in a certain situation is to be recognised as the father of a child. In accordance with the Civil Law, a man is to be recognised as the father of the child having the right to receive the leave envisaged in the contested norm who 1) is to be recognised as the father of a child on the basis of the

presumption of paternity; 2) has acknowledged the paternity voluntarily; 3) has been recognised as the father of the child by a judgment of a court. [11.1.]

By interpreting the contested provision and the legal provisions systemically linked to it, the Constitutional Court concluded that the purpose of the leave established in the contested provision was to give to the child's father the opportunity to be with his family immediately after the birth of the child, in order to provide support to the child's mother. At the same time, this leave allows the child's father to develop an emotional link with the child and to provide support to the child's mother, *inter alia*, by assuming care for the child. Whereas the paternity benefit which is granted to the child's father who has taken the leave envisaged in the contested provision partially substitutes the unearned income from work during this leave, thus ensuring economic protection to the father and, indirectly, also to his family. The paternity benefit is envisaged to promote the father's involvement in caring for the new-born child. [11.2.]

The Constitutional Court found that the Applicant did not contest the constitutionality of the leave for the child's father established in the contested provision or of the procedure for granting it but rather was of the opinion that the state had not fulfilled its positive obligation that followed from the first sentence of Article 110 of the *Satversme* to ensure protection also to the families of same-sex partners. Even if it could be considered that the protection of such families has been ensured, in the Applicant's opinion the contested provision should be recognised as being incompatible with the principle of legal equality and the principle of protection of the child's best interests. [11.3.]

Therefore, in the present case, the Constitutional Court assessed the constitutionality of the contested provision insofar as the contested provision did not envisage protection and support to the partner of the child's mother in relation to the birth of a child. [11.3]

On the content and scope of the first sentence of Article 110 of the *Satversme*

The Constitutional Court noted that, first and foremost, the state's obligation to protect marriage as a union between a man and woman was defined in the first sentence of Article 110 of the *Satversme*. Marriage is a form of family relationships that has developed historically, the protection of which is envisaged in the first sentence of Article 110 of the *Satversme* in the awareness of, *inter alia*, the natural potential of a family established through marriage to create new life and, thus, foster the sustainability of the society. A different content of the concept of marriage may only be established by amending the first sentence of Article 110 of the *Satversme*. [12.1.]

Alongside the state's obligation to protect and support marriage as a union between a man and a woman, the first sentence of Article 110 of the *Satversme* establishes an obligation of the state to protect and support also family, parents, and children. The positive obligation of the state to protect and support family which is included in the first sentence of Article 110 of the *Satversme* does not apply only and solely to a family established through marriage. [12.1.]

The Constitutional Court concluded that a family was a social institution founded on close personal ties that could be identified in the social reality, and based on understanding and respect. Even in the absence of a biological link or legally recognised child-parent relationship, *de facto* family relationships can exist between a child and the person who has taken care of the child, depending on whether they live together, on the duration and quality of their relationship as well as the adult's role in the relationship with the child. The existence of close personal ties follows from a concluded marriage or the fact of kinship; however, in the social reality close personal ties develop also in other ways, for instance, as the result of *de facto* cohabitation. The first sentence of Article 110 of the *Satversme* defines a positive obligation of the state to protect and support all families, also, *inter alia*, *de facto* families. [12.1.]

The concept of marriage has been defined in the first sentence of Article 110 of the *Satversme* – a union between a man and a woman; however, the concept of family used in the same article has not been specified and does not advance gender as a criterion for determining the persons who should be recognised as being a family. [12.1.]

It follows from the basic norm of Latvia as an independent, democratic state governed by the rule of law that human dignity is a constitutional value of the state. Human dignity characterises a human being as the supreme value of a democratic state governed by the rule of law. Human dignity is vested in all human beings, unconditionally. [12.2.]

The view that the dignity of one human being could be of a lesser value than the dignity of another human being is incompatible with the principle of human dignity. The principle of human dignity does not allow the state to derogate from ensuring fundamental rights to a certain person or a group of persons. The stereotypes prevailing in the society may not serve as constitutionally justifiable grounds for denying or restricting the fundamental rights of a certain person or groups of persons in a democratic state governed by the rule of law. [12.2.]

The first sentence of Article 110 of the *Satversme* is closely linked to a person's right to the inviolability of private life, established in Article 96 of the *Satversme*. Sexual behaviour is one of the elements in a person's private life. A person's right to freedom of sexual behaviour requires protection, irrespectively of the way it is manifested and irrespectively of a person's sexual orientation. Article 96 of the *Satversme* includes, *inter alia*, every person's right to inviolability of family life. [12.2.]

Society consists not only of such persons who, as to their nature, form close personal and family ties with the representatives of the opposite sex, but also of persons who, as to their nature, form such relationships with the representatives of their own sex. In accordance with the principle of human dignity the state must equally respect also those

members of society, who, as to their nature, establish personal relationships with representatives of their own sex, and also should respect the fact that a family may evolve on the basis of such relationship. Accordingly, the first sentence of Article 110 of the *Satversme*, in conjunction with the principle of human dignity and a the right to inviolability of private life, determines the state's obligation to protect and support also families of same-sex partners. [12.2.]

The Constitutional Court underscored: the fact alone that the European Convention for the Protection of Human Rights and Fundamental Freedoms or legal provisions of the European Union law do not envisage the state's obligation to ensure certain rights to a person or to ensure a person's rights in a certain way does not mean that this obligation of the state could not follow from general principles of law and other provisions of the *Satversme*. [12.2.]

The first sentence of Article 110 of the *Satversme* includes two obligations of the legislator: 1) to ensure legal protection for families; 2) to ensure social and economic protection and support of families. Both obligations of the legislator that follow from the first sentence of Article 110 of the *Satversme* are closely interconnected. If the state does not ensure legal protection for families, i.e., does not establish legal regulation on family relationships, then it is impossible to ensure for the participants of these relationships also the social and economic rights included in Article 110 of the *Satversme*. [12.3.]

Although the legislator has discretion in determining the form and the content of the legal regulation on family relations and measures of social and economic protection and support for families, this discretion is not unlimited. The legislator has the right to establish such legal regulation on family relationships which is based on objective and substantiated criteria. It is the legislator's duty to take into account the particularity of these relationships, among others, the different participants of these relationships and the different situations which require ensuring appropriate legal regulation of family

relationships and measures of social and economic protection and support for the family. Moreover, in establishing the legal regulation on family relationships and the measures of social and economic protection and support, the legislator must take into account general principles of law and other provision of the *Satversme*, international and the European Union law, and also, in accordance with the second sentence in the fifth paragraph of the preamble to the *Satversme*, must ensure that the respective legal regulation is aimed at creating a cohesive society. [12.3.]

Pursuant to the first sentence of Article 110 of the *Satversme* the legislator has the duty to ensure, *inter alia*, legal protection also for the families of same-sex partners and envisage measures of social and economic protection and support appropriate also for such families, complying with general principles of law and other provisions of the *Satversme*. Although the legislator enjoys certain discretion in determining the form and content of the legal regulation on the family relationships of same-sex partners and of the measures for the social and economic protection of the family, it does not have the discretion to choose whether legal protection as well as economic and social protection and support should be ensured to such families at all. [12.3.]

Hence, the Constitutional Court concluded that the first sentence of Article 110 of the *Satversme* required the legislator to ensure legal protection and measures of social and economic protection and support to all families, including families of same-sex partners.

On the methodology of the constitutionality review

In verifying whether the contested provision, insofar as it did not envisage protection and support in relation to the birth of a child to the partner of the child's mother, complied with the first sentence of Article 110 of the *Satversme*, the Constitutional Court had to ascertain:

- 1) whether the legislator has established legal regulation on the family relationships of same-sex partners and has envisaged measures of social and economic protection and support for the family of same-sex partners in relation to the birth of a child;
- 2) whether the established legal regulation on family relationships and the envisaged measures of social and economic protection and support allow to ensure, at least in the minimum amount, the social and economic protection and support for families of same-sex partners in relation to the birth of a child;
- 3) whether the established legal regulation on family relationships and the envisaged measures of social and economic protection and support comply with general principles of law. [13.]

On the legal regulation applicable to families of same-sex partners in relation to the birth of a child

The Constitutional Court concluded that the legal mechanisms pointed out by the *Saeima* and the Ministry of Justice as a proof that the legislator had respected families of same-sex partners, covered a totality of different situations and, *inter alia*, could be applied to same-sex partners who came within the scope of this regulation. However, the rights of same-sex partners to use some of the mechanisms envisaged in the regulatory enactments, which, moreover, are applicable in specific situations, cannot be considered to be legal regulation on the family relationships of same-sex partners. Furthermore, the mechanisms indicated by the *Saeima* and the Ministry of Justice do not ensure social and economic protection of families of same-sex partners in relation to the birth of a child. [14.1.]

The Constitutional Court found that the legislator had established the legal regulation of family relationships based on marriage and ensured economic and social protection for spouses in certain situations, as well as had established the legal regulation of family

relationships and measures of social and economic protection and support for families of partners of opposite sexes in which a child is born irrespective of the fact whether the mother and the father have concluded a marriage. [14.2.]

The Constitutional Court concluded that the legal regulation on family relationships established in the Civil Law was equally applicable to the relationship between the child and his mother in a family of same-sex partners. Thus, the legal regulation that provides for measures of social and economic protection for a child's mother is applicable also to families of same-sex partners. However, the legal regulation of family relationship between a child and a father that is established in the Civil Law, as well as the regulation that grants to the child's father the right to use the measures for the social and economic protection of family cannot be applied to the partner of the child's mother. [14.2.]

In accordance with the legal regulation, in a family of same-sex partners, legal protection and the measures of social and economic protection are accessible only to the mother and her child. Thus, substantially, the protection and support accessible to the family of same-sex partners does not differ from the protection and support that is accessible to the family consisting only of a mother and her child. Thus, the existing legal regulation of family relationships does not ensure protection and support to same-sex partners and the children born in their families as a united families. [14.2.]

The Constitutional Court concluded that the legislator had not established legal regulation of family relationships of same-sex partners and had not envisaged for families of same-sex partners measures of social and economic protection and support in relation to the birth of a child. Thus, the legislator has not fulfilled its positive obligation deriving from the first sentence of Article 110 of the *Satversme* to ensure legal, social and economic protection also to families of same-sex partners. [14.2.]

Hence, the Constitutional Court recognised that the contested provision, insofar as it did not envisage protection and support for the partner of the child's mother in relation to the birth of a child, was incompatible with the first sentence of Article 110 of the *Satversme*. [14.2.]

On the temporal validity of the contested provision

The Constitutional Court found: to establish the legal regulation of family relationships of same-sex partners and measures for the social and economic protection and support with appropriate form and content the legislator needs to conduct in-depth and complex research. Moreover, the legal regulation of family relationships of same-sex partners could significantly impact the whole legal system. Therefore, the legislator needs reasonable time for drafting and establishing this legal regulation and measures of social and economic protection. [15.]

The Constitutional Court found that the Applicant had requested that the contested provision be declared void as of the date of the birth of her partner's second child. The Constitutional Court noted: to eliminate the infringement of the Applicant's fundamental rights, with respect to her the contested provision should be declared void as of the date of birth of her partner's second child, which should be regarded as the moment when the infringement on her fundamental rights arose. [15.]

The Constitutional Court held:

- 1. To recognise Article 155(1) of the Labour Law, insofar as it does envisage protection and support to the partner of the child's mother in relation to a birth of the child to be incompatible with the first sentence of Article 110 of the *Satversme* of the Republic of Latvia and void as of 1 June 2022.**

- 2. With respect to Person C to recognise Article 155(1) of the Labour Law, insofar as it does envisage protection and support to the partner of the child's mother in relation to a birth of the child to be incompatible with the first sentence of Article 110 of the *Satversme* of the Republic of Latvia and void as of the moment when the infringement on her fundamental rights occurred.**

The judgement is not subject to appeal.

The text of the judgement is available on the Constitutional Court's homepage:

https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Spriedums.pdf

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