



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

in the name of the Republic of Latvia

Riga, 12 November 2020

in case No. 2019-33-01

The Constitutional Court, in the following composition: chairperson of the court hearing: Sanita Osipova, judges Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis and Artūrs Kučs,

with the participation of Matīss Šķinkis, the authorised representative of the applicant – person C (hereinafter, the Applicant),

authorised representatives of the institution that has issued the contested act – the *Saeima* (Parliament) – Daina Ose and Mārtiņš Birģelis,

with the secretary of the court hearing Anna Elizabete Šakare,

on the basis of Article 85 of the Constitution of the Republic of Latvia, as well as Articles 16(1), 17(1)(11), 19² and 28 of the Constitutional Court Law,

in an open court hearing held on 6 October, 7 October and 13 October 2020 in presence of the participants of the case, examined the case

“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”

Facts

1. On 20 June 2001 the *Saeima* adopted the Labour Law that took effect on 1 June 2002. Article 155 of the Labour Law governs the issue of leave to a father of a new-born child, adopters of a child and other persons who, under certain circumstances, actually ensure care for a child.

Article 155(1) of the Labour Law (hereinafter, the contested provision), which has not been amended since the moment of adoption thereof, states:

“The father of a child is entitled to a leave of 10 calendar days. The leave shall be granted to the father of a child immediately after the birth of the child, but no later

than within two months after the birth of the child.”

2. The Applicant is of the opinion that the contested norm does not comply with the first sentence of Article 110 of the Constitution of the Republic of Latvia (hereinafter, the Constitution).

Allegedly, the Applicant is in a stable same-sex relationship and has been cohabiting with her partner for several years already. 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 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 provision only envisages the right to leave of 10 calendar days following the birth of a child 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 one of the new-born child’s parents

In the case under examination, the positive obligation of the state contained in the first sentence of Article 110 of the Constitution to protect and support family, parents and children is of relevance, and not the protection and scope of the institution of marriage specified in this provision of the Constitution. In accordance with the case-law of the European Court of Human Rights the notion of “family” contained in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the Convention), *inter alia*, is alleged to also entail same-sex partners in stable cohabitation and biological children of one such partner, living in a common household with both partners. The notion of “family” used in the first sentence of Article 110 of the Constitution cannot be interpreted in a narrower sense. Hence, this provision of the Constitution is alleged to prescribe the obligation of the state to also protect and support families created by same-sex partners.

The duty of the state to protect each and every family by creating and maintaining a system of social and economic protection of the family allegedly follows from the first sentence of Article 110 of the Constitution. To fulfil this duty, the legislator has to provide in more detail for rights of families to protection in normative acts, and to prescribe different family protection mechanisms, which allegedly become the rights of a person arising out of the first sentence of Article 110 of the Constitution, whose protection a person is entitled to claim from the state. The legislator has a duty to also ensure social and economic protection to families formed by same-sex partners, by applying the family protection mechanisms provided for in normative acts to them. In the case under examination, the constitutionality of legal regulation is to be assessed, whereby families of same-sex partners are left outside the system of social and economic protection of families established by the state.

The Constitutional Court has allegedly recognised that in accordance with the first sentence of Article 110 of the Constitution the state must take such family support measures that would be sufficiently effective and, as far as possible, would correspond to the needs of the beneficiaries. The support to be ensured to families is intended to reduce the stress of the parents of a child and to allow the preservation of a healthy environment in the family. Besides, families with children under the age of two require special support. The leave provided for in the contested provision due to the birth of a child is directed towards ensuring physical and emotional support to the mother of a child and the new-born child itself, as well as to give the possibility for the family to spend time together, in order to get used to the new circumstances and to strengthen family ties.

European Court of Human Rights has recognised that same-sex partners need legal recognition and protection that would be ensured by the state. In turn, the system of social and economic protection of the family established in Latvia does not protect families founded by same-sex partners, because it is intended for the protection of opposite-sex partners and their children only. Latvian national legal regulation does not provide for the right to register a same-sex partnership and to adopt children of her partner of the same sex or to legally corroborate the existence of such family in any other way. Thus, the fundamental rights arising out of the first sentence of Article 110 of the Constitution are not ensured for such families. The contested provision also only refers to a father of a new-born child, and, therefore, it is alleged to be incompatible with the first sentence of Article 110 of the Constitution.

The contested provision is alleged to be contrary to the principle of the priority of the child's best interests. The Constitutional Court has recognised that in accordance with this principle the legislator must ensure that normative acts protect the interests of a child in the best possible way, and this principle is to be observed not only when the issue refers directly to a child, but also when it affects a child only indirectly. The Constitutional Court has also recognised that, when interpreting the notion "family life", biological and social reality is to be considered, and not the assumptions contained in the law. The assumption that only a father of child is a person providing support to a mother of a child and taking care of and bringing up a child does not correspond to the biological and social reality. The contested norm does not protect the interests of a child in the best possible way in all families, because it does not allow a person to provide physical and emotional support to her partner of the same sex and her child.

The contested norm also allegedly violates the principle of prohibition of discrimination contained in the second sentence of Article 91 of the Constitution, which does not allow for the differential treatment on the basis of any prohibited criterion of persons under circumstances that are equal and comparable with respect to certain criteria. Discrimination can also be indirect, if a provision justified by an

apparently neutral criterion is in fact affecting only a certain group of persons, whom such criterion usually refers to. In accordance with the contested provision, only a father of a child is entitled to a leave, while only a man can be the father of a child. In accordance with normative acts the paternity of a child can be detected on the basis of a presumption of paternity, voluntary recognition of paternity or a court judgment. Thus, not only a biological father of a child, but also another man, who under the procedure laid down by normative acts has been recognised to be a father of a child, is entitled to exercise the rights provided for in the contested provision. By the contested provision, a differential, less favourable treatment is foreseen with respect to persons with homosexual orientation. Sexual orientation of a person is one of the prohibited criteria and cannot form the basis for the differential treatment of a person.

The differential treatment stipulated by the contested provision is alleged not to be justifiable, because there are no grounds to consider that exactly the partner of a woman – a man – would be the most suitable person to provide support to a woman and a new-born child. Cases, where the biological father of a child is not known or is not willing to be a family member are also possible. There is not a single rational reason to only grant the rights provided for in the contested norm to families where children are raised by opposite-sex partners. The only reason for such a differential treatment could be historically entrenched beliefs about the social roles of genders, but they can no longer justify the differential treatment. Even if such a differential treatment were to have any rational basis, it could not be recognised as legitimate, because the contested provision is contrary to the principle of priority of the best interests of a child.

At the court hearing, the representative of the Applicant Matīss Šķiņķis explained the arguments specified in the application. Additionally, Matīss Šķiņķis specified that as a democratic state based on the rule of law Latvia is based upon human dignity and freedom. Non-recognition of a family of same-sex partners as a family for the purposes of the first sentence of Article 110 of the Constitution is contrary to the principle of human dignity. Therefore, in accordance with the first sentence of Article 110 of the Constitution the state has an obligation to also ensure protection and support to the family of same-sex partners. To fulfil this obligation, the legislator has to ensure legal protection for a family of same-sex partners, namely, to prescribe the regulation of personal and property relations of the members of such a family. Such regulation in accordance with the case-law of the Constitutional Court is necessary, so that it would be possible to ensure social and economic rights for a family provided for in Article 110 of the Constitution.

The legislator has not adopted legal regulation of family relations that would reflect a social reality and would also ensure legal protection for a family of same-sex partners. Therefore it is also not possible to provide families of same-sex partners with the social and economic rights contained in Article 110 of the Constitution. In turn,

the contested provision could be regarded as a consequence arising out of the circumstances that the legislator has not fulfilled its positive obligation. Thus, the legislator has violated not only the principle of priority of the best interests of a child and the principle of legal equality, but also the principle of human dignity.

The first sentence of Article 110 of the Constitution prescribes a higher level of protection of fundamental rights of a person than the Convention. The first sentence of Article 110 of the Constitution prescribes the obligation of the state to protect and support all families. The legislator is entitled to provide for a different regulation of family protection and support for different families; however, such differences should be justified by a legitimate aim and be proportionate.

3. The institution that has issued the contested act – the *Saeima* – is of the opinion that the contested provision complies with the first sentence of Article 110 of the Constitution.

Allegedly, the contested norm governs legal employment relationships. It falls within the field of private law, where the principle of private autonomy is characteristic. Normative acts restrict the private autonomy of participants of legal employment relationships in order to protect the employee as the weakest participant of legal employment relationships and determine the minimum employee protection requirements. Nevertheless, the employer is entitled, upon its own initiative or pursuant to an agreement with an employee, to prescribe the provisions of legal employment relationships that are more favourable to the employee. Also the contested provision determines the minimum requirements for legal protection of employees and does not prohibit the employer, upon its own initiative or pursuant to an agreement with the employee, to grant him/her a longer leave due to the birth of a child or to also grant such a leave when the employee is not a father of a child. In the case under examination case, it is to be assessed whether the first sentence of Article 110 of the Constitution imposes an obligation upon the legislator to interfere with the private legal relationships between the employee and the employer and to provide for an employee, who is in a same-sex relationship, the right to a leave of 10 calendar days due to the fact that a child is born to her partner.

From the application it allegedly derives that, in the opinion of the Applicant, the violation of the first sentence of Article 110 of the Constitution has occurred because the legislator has not adopted legal regulation that would allow same-sex couples to legally corroborate their relationship and to adopt children. These issues, as well as the issue regarding the disbursement of paternity benefits to such an employee as the Applicant, do not fall under the scope of the case under examination.

The contested norm allegedly also provides for the rights of a father of a child to a leave if he has not entered into marriage with the mother of a child. The norms of the Civil Law prescribe the criteria for the identification of a person who is to be

regarded as a father of a child, as well as prescribe the custody of parents over a child, namely, the rights and obligation of a father and a mother to take care of a child and its property and to represent a child in its personal and property relationships. Such rights and obligations are not prescribed for other persons with whom a child might have formed emotional or kinship bonds. Therefore, it is reasonable that the rights to use the leave due to the birth of a child are granted exactly to the father of a child. The leave provided for in the contested provision ensures the protection of the best interests of a child, as provided for in Article 3 of the United Nations Convention on the Rights of the Child and Article 6(1) and (2) of the Law on the Protection of Children's Rights. Besides, the aim of the contested provision is to promote the equality between men and women and a well-balanced family and work life in accordance with the requirements of several international documents.

International legal acts binding on Latvia do not prescribe an obligation for the state to provide for a leave to an employee due to fact that a child was born to his/her same-sex partner. The sole international legal act binding on Latvia that governs the granting of a leave due to the birth of child is Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (hereinafter, Directive 2019/1158). In accordance with Directive 2019/1158 the state has an obligation to ensure a leave of 10 days due to the birth of a child exactly to the father of a child. Directive 2019/1158 does not impose an obligation on the state to also ensure such a leave to employees such as the Applicant, but allows the state itself to decide whether such a leave would have to be granted not only to the father of a child but also to other persons.

Allegedly, the application does not substantiate the assertion that the first sentence of Article 110 of the Constitution would impose the same obligations on the state with respect to a family of same-sex partners as the ones with respect to a family formed by a heterosexual couple with children. The first sentence of Article 110 of the Constitution does not prescribe the obligation of the legislator to ensure the same protection and support to a family of same-sex partners than the one ensured to a traditional family. The legislator has broad discretion with regard to decisions on the protection of a family formed by same-sex partners and the support to be provided to such a family, because it is an essential issue of morals and ethics. Moreover, the legislator must also consider the interests of the employer and balance them with the interests of the employee.

An employee to whose same-sex partner a child is born is not under circumstances that are equal and comparable with respect to certain criteria with an employee who is the father of a child, because the father of a child has legal bonds with the child, encompassing certain rights and obligations, while the partner of the mother of child does not have such bonds with a child. If the Constitutional Court

would, nevertheless, consider that the referred to persons are under circumstances that are equal and comparable with respect to certain criteria, then it should be taken into account that a man who lives in a common household with a mother and her child but is not a father of a child is not entitled to the leave provided for in the contested provision, either. Therefore, there are no grounds to consider that differential treatment against the comparable groups of persons, if it exists, would be based on the sexual orientation or gender of a person.

At the court hearing, the representatives of the *Saeima* Daina Ose and Mārtiņš Birģelis emphasised the meaning of the leave provided for in the contested provision in the involvement of a father in family life and the process of formation of a mutual family relationship between a child and a father, as well as the purpose of this leave to promote gender equality. The representatives of the *Saeima* additionally pointed out that this leave is specifically intended for a father of a child and not for any other person. Directive 2019/1158 stipulates the rights, but not the obligation, of the Member States to also grant such leave to another person. According to the findings of the European Court of Human Rights the obligation to ensure such a leave to a person other than the father of a child does not arise from Article 8 of the Convention, either.

The leave provided for in the contested provision corresponds to the principle of priority of the best interests of a child, because it provides a child with a possibility to form bonds with its father at an early stage, promotes a good future relationship of a father and a child and promotes the emotional and physical health of a child. The contested provision corresponds to the non-discrimination principle because the partner of a mother of a child is not under circumstances that are equal and comparable with respect to certain criteria with the father of a child. The father of a child, unlike the partner of a mother of a child, has legal bonds with a child, which encompass certain rights and obligations. Even if it could be considered that these persons are under circumstances that are equal and comparable with respect to certain criteria, in accordance with the findings of the European Court of Human Rights the legal recognition of a family of same-sex partners is an issue of political choice under the competence of the legislator. The contested provision provides for a leave specifically to the father of a child and does not thereby cause a violation of the non-discrimination principle, because this provision is not based upon the gender or orientation of a person; namely, the contested provision provides for equal treatment of a partner of the mother of a child, irrespective of the gender and sexual orientation of such a partner.

Article 110 of the Constitution prescribes the obligation of the state to protect all families; however, the scope and type of such a protection may differ. In accordance with Article 110 of the Constitution the legislator has a discretion in deciding whether legal recognition, for example registration, is to be provided to certain family forms. The state can also ensure protection for such families who are not subject to any legal

regulation of family relationship by establishing separate, sufficiently broad protection mechanisms, which would encompass different types of families, *inter alia*, families actually existing in social reality. Latvian normative acts do provide for such mechanisms.

Allegedly, it is not possible to agree with the opinion of the Applicant that the first sentence of Article 110 of the Constitution would guarantee the protection of fundamental rights of a person at a higher level than Article 8 of the Convention.

4. The person summoned to submit an opinion – the Ministry of Justice – is of the opinion that the contested norm complies with the first sentence of Article 110 of the Constitution.

Allegedly, the notion of family contained in Article 110 of the Constitution in practice is being interpreted uniformly. In accordance with the Civil Law, the notion of “family”, in its narrowest sense, entails spouses and their children, while they live in a joint household. Nevertheless, this notion also entails the relationship between the parents and grandparents of a child, between a child and his grandparents, as well as between parents and their adult children. The meaning of family is also corroborated in the preamble to the Constitution. The Constitutional Court has recognised that the State must protect each and every family. The state has ensured protection for persons who choose to form any family relationship, also other than marriage institution, and is taking care of the rights of the less protected person in a particular legal relationship in accordance with Article 96 of the Constitution. Therefore, there is no reason to review the interpretation of the notion of family corroborated in Latvian normative acts. Every person is entitled to lead their private life at their own discretion and to form a private union with another person in the form of marriage or any other form.

It should be taken into consideration that the European Union legal acts do not regulate marriage and partnership. In accordance with Article 9 of the Charter of Fundamental Rights of the European Union (hereinafter, the Charter) the right to marry and the right to found a family shall be guaranteed by the state in accordance with the national laws. Article 9 of the Charter intentionally does not specify a particular gender. This norm does not prohibit countries from granting same-sex partners the rights to enter into marriage; however, it does not impose an obligation to ensure such a right to them, either. Therefore, the legal regulation of different countries on this issue may differ considerably, depending on the historical development and culture of the country concerned. From the case-law of the European Court of Human Rights it does not derive that a violation of the Convention would be found in situations similar to the circumstances of the case under examination. Judgments of the European Court of Human Rights are not generally binding and applicable to each and every country, situation or person. Therefore, the conclusions contained in the judgments of the European Court of Human Rights with respect to a situation in one country cannot be

automatically related to the situation in another country with completely different circumstances. The state is entitled to select a solution corresponding to its legal system and ethical and moral values of society. Latvian legal regulation is based upon traditional values and does not contradict the norms of international law or European Union law binding on Latvia.

In 2018, the legislator has expressed a disapproving attitude towards a legal regulation that would allow registering of a partnership. A panel of the Constitutional Court, when examining the application related to the issue of the registration of same-sex relationships and the rights to private and family life, has recognised that the type of family protection to be prescribed by normative acts depends on the legal and political choices of the legislator.

In accordance with the contested provision the father of a child is entitled to the leave provided therein due to the birth of a child irrespective of whether he is married to the mother of a child and lives in a common household with her or not. The contested provision deprives the same-sex partner of the mother of a child of the right to a leave provided for in the contested norm and, thereby, causes differential treatment of such partner and other persons in the same situation. However, the partner of the mother of a child – a woman – cannot be the father of a child and, therefore, the differential treatment provided for in the contested provision is alleged to be objective and justified.

At the court hearing, the representatives of the Ministry of Justice Laila Medina and Dagnija Palčevska additionally pointed out that, allegedly, the leave provided for in the contested provision is intended for a particular person, who is to be legally recognised as one of the parents of a child – the father of a child – irrespective of whether the parents of a child are married or not. The purpose of this leave is to specifically facilitate the formation of a mutual personal relationship of a child and a father at the initial stage of life of the child and thereby to ensure the best interests of a child. The father of a child has a special role in the life of a child, and other persons who are not a father of child do not have such role. The state, by enjoying its discretionary powers, resolves upon the legal recognition of different forms of cohabitation and measures suitable for the support of persons living together. The state is entitled to determine more favourable legal regulation specifically with respect to the father of a child. Allegedly, the contested provision does not violate the non-discrimination principle and the principle of protection of the best interests of a child, either.

5. The person summoned to submit an opinion – the Ministry of Welfare – is of the opinion that the contested norm complies with the first sentence of Article 110 of the Constitution.

Allegedly, the purpose of the contested provision is to provide the possibility

for the father of a child to provide support to the mother of a child in the postnatal period and to engage in taking care of a new-born child. The inclusion of this provision in the Labour Law had been connected with the introduction of the principle of gender equality in labour law. The obligation to ensure a leave to the father of a child due to the birth of a child is both directly and indirectly regulated in separate international legal acts, as well.

In accordance with Directive 2019/1158, which is to be transposed by 2 August 2022, the Member States must ensure paternity leave of 10 working days due to the birth of a child to the father of a child, but such a leave must only be ensured to an equivalent second parent if the particular person is to be recognised as the second parent in accordance with the legal acts of the relevant country. Directive 2019/1158 allows the country itself to determine which persons are to be recognised as the father of a child or one of the parents of a child. In Latvia, the father of a child is determined in accordance with the provisions of the Civil Law, and the issue on persons who would have to be recognised as the parents of a child, is not included in the scope of the contested provision.

At the court hearing, the representative of the Ministry of Welfare Māris Badovskis additionally pointed out that the historical aim of the contested provision has been to ensure the equal engagement of specifically women and men into family and work life and the formation of a father-child relationship at a possibly earlier stage. The contested provision clearly and unambiguously stipulates that the right to a leave provided therein is an individual right of the father of a child, not subject to assignment to others. The first sentence of Article 110 of the Constitution allows the legislator, within the scope of its discretionary powers, to only guarantee certain rights to the parents of a child – the mother or the father – considering the special status of these subjects, legal bonds with a child and custody rights. A partner of the mother of a child, irrespective of their gender, is not to be regarded as the father of a child.

The first sentence of Article 110 of the Constitution does not require that the rights provided for in the contested provision would also be ensured to a partner of the mother of a child who is not the father of a child. The international legal acts binding on Latvia do not provide for the obligation of the state to grant the same rights to a person who is not the father of a child, either. There are no grounds to believe that the first sentence of Article 110 of the Constitution requires ensuring a higher level of protection of human rights. The issue of granting a leave to another person who is not the father of a child falls within the scope of discretionary powers of the legislator, and the solution depends upon a political choice.

6. The person summoned to submit an opinion – the Ombudsman – indicates that a person not recorded in the birth certificate as the father is not entitled to receive the leave provided for in the contested provision. Allegedly, the purpose of

the contested provision is to promote the possibly earlier involvement of the father in the care of a child. Directive 2019/1158, whose requirements must be fulfilled by the Member States by 2 August 2022, stipulates that the Member States shall provide paternity leave of 10 days due to the birth of a child to the father of a child and, insofar as permitted by the national legal regulation, to an equivalent other parent. The paternity leave in Directive 2019/1158 is provided in order to ensure the care of a child. Directive 2019/1158 states the minimum standards of legal regulation, and the state has discretionary powers, for the purposes of protecting the interests of a child, to grant such leave not only to fathers of children, but also to other persons.

From the international legal acts binding on Latvia, and the case-law of both the Constitutional Court and the European Court of Human Rights, it derives that in any legal relationships influencing the child the priority is to be given exactly to the rights and interests of a child. Traditionally, in a family a father takes care of a child together with a mother. Nevertheless, it should be considered that each year many children have no paternity established and only one parent – the mother – takes care of such children. Both children with established paternity and those with no established paternity must be given equal rights to receive additional support and care in the first moments of life. Besides, social reality must be considered, namely, the fact that in certain cases in accordance with the paternity presumption the spouse of the mother who is not the biological father of a child and does not maintain a family relationship with the mother and her child is being recognised as the father of a child. The contested provision in such cases does not allow for the biological father of a child to receive the leave provided therein, so that he could take care of the child together with the mother of the child and establish emotional bonds with the child. The contested provision does not allow the leave provided therein to be used by persons other than the father of a child, also in cases when the father of a child is not able to take care of a child due to objective reasons.

In accordance with the first sentence of Article 110 of the Constitution and the preamble of the Constitution it is the duty of the state to protect each and every family, *inter alia*, by creating and maintaining the system of social and economic protection of the family. The contested provision forms a part of the social protection system of families established by the state. Therewith, in the case under examination it should be assessed whether legal regulation that leaves certain types of families outside the social protection system established by the state complies with the Constitution. From the first sentence of Article 110 of the Constitution derives the duty of the state to equally protect and support all families and the rights and lawful interests of all children, irrespective of the composition of the family and other circumstances. The contested provision does not ensure an equal possibility for all new-born children, in addition to the care provided by a mother, to receive the care they need from another person in situations when the involvement of the father of a child in the care is not

possible due to objective reasons.

Normative acts provide for certain support to persons who take actual care of a child in the case when parents do not ensure the care of their child. Therefore, there are no systemic obstacles to also stipulate in the contested provision a leave of 10 days immediately after the birth of a child to another person, in the case when the birth register of a child has no record of its father, the father of a child has died or the involvement of the father in the care of a new-born child is not possible.

At the court hearing, the representative of the Ombudsman Laila Grāvere additionally pointed out: when assessing the constitutionality of the contested provision, the purpose of the leave provided therein is to be considered – to promote the possibly earlier involvement of the father in the care of a child. The contested provision does not allow the leave provided therein to be used by another person in the case when the father cannot take part in the care of child due to objective reasons. Thus, the contested provision does not ensure an equal possibility to each and every child in the first days following their birth to receive the necessary care from the mother and another person and does not protect the interests of a child in the best possible way in all families.

The state must ensure the protection of each and every family, but the state is entitled to ensure different protection mechanisms for different families. The contested provision is incompatible with the first sentence of Article 110 of the Constitution, insofar as it does not provide for the right to a leave due to a birth of a child also to another person who is not the father of a child in the case when the father cannot exercise this right due to objective reasons. The state has fulfilled its positive obligation arising out of the European Union law to a minimum extent; however, it has not observed the principle of protection of the best interests of a child and has not fulfilled its positive obligation arising out of the first sentence of Article 110 of the Constitution at least to a minimum extent.

7. The person summoned to submit an opinion – the Association of Lesbian, Gay, Bisexual, Transgender Persons and their Friends “Mozaika” - considers that the contested provision is incompatible with the first sentence of Article 110 of the Constitution.

Allegedly, in the case to be examined, the essential issue to be resolved is about unmarried but cohabiting couples whose legal status is not regulated in the state. The sole legally recognised and protected family form in Latvia is marriage. Marriage is a significant union, as a result of which a family is established and children can be born; however, it is no longer the sole form of family in Latvia. Based on statistical data, since the restoration of the independence of Latvia, children are increasingly born to unmarried parents. Such data are indicative of the changes in the choice of family form. The households of married and unmarried couples do not differ; however, the

cohabitation of persons outside of marriage in Latvia is not legally recognised; namely, Latvian normative acts do not provide for the registration of such cohabitation. Therefore, cohabiting but unmarried persons are considered to be unrelated persons and are not recognised as a family. Issues regarding the discrimination and legal protection of same-sex couples have been widely discussed, however, the legislator, keeping to conservative beliefs, was not solving them.

The notion of family is wider than the notion of “marriage” and in the international legal acts it is defined more broadly than in Latvian normative acts. Within the meaning of the Convention, persons having kinship or close social bonds are considered to be a family. The Constitutional Court has also specified that the notion “family” is not connected solely with relationships which are based on marriage but it can also entail other social ties in cases when persons live together but are not married. Latvian legal regulation that should ensure family protection no longer corresponds to the social reality, because family ties are no longer based solely on marriage and the moral standards of society have changed, thus opening the way for also protecting a family of same-sex partners. Considering the changes that have taken place at the international level with regard to the issues of the protection of rights of same-sex partners, Latvia also has an obligation to ensure the legal recognition and protection of such relationships in accordance with the Constitution.

There exists a consensus among European Union Member States as to the legal regulation of relationships of same-sex partners, namely, the legal regulation applicable in the majority of the European Union Member States provides for the rights of unmarried but cohabiting same-sex and opposite-sex partners to register their union in the form of marriage or partnership, thus this legal regulations allows to protect the rights of such persons to family life and to ensure them protection and support. In Latvia, no such legal regulation has been adopted. Same-sex families have also been existing for a long time already in Latvia; however, they are considered to be invisible. This can be explained by a disapproving attitude or fear on the part of society. Attitude towards same-sex families in Latvia is manifestly disapproving and the needs of such families for legal protection are being ignored.

The legislator has already interfered with the private law relationship of the employee and employer by means of the contested provision. If the contested provision is considered to be the minimum of legal protection of an employee, then the compliance of this provision with the first sentence of Article 110 of the Constitution is to be assessed in conjunction with the principle of equality and principle of non-discrimination contained in Article 91 of the Constitution, because the contested norm can only be applied with respect to opposite-sex partners, irrespective of whether they are married and who is the biological father of a child.

Opposite-sex partners and same-sex partners within the scope of whose cohabitation a child has been born are under circumstances that are equal and

comparable with respect to certain criteria. The legislator has prescribed a differential treatment of such groups of persons. When a child is born as a result of in-vitro fertilisation, its father has the right to receive the leave provided for in the contested provision, but the partner of the mother of a child – a woman – in such a case has no right to be recognised as a parent of the child and to receive the leave provided for in the contested provision. The aim of the contested provision is to provide support to families where a child has been born; namely, to allow the partner of the mother to provide support to the mother and her child. Therefore, the differential treatment of same-sex partners stipulated in the contested provision has no legitimate aim. The possibility specified by the *Saeima* for the employee to agree with the employer on more favourable provisions of the employment legal relationship is more cumbersome for same-sex partners than for opposite-sex partners, whose rights to a leave due to the birth of a child are imperatively stipulated by the contested provision. Certain employers in Latvia are more accommodating and ensure equally favourable provisions of the employment legal relationship to all their employees; however, it is merely an individual, voluntary initiative of the particular employers.

Up to now the family social protection system established in Latvia does not also entail families with children formed by same-sex partners. Therefore, the rights of children born in such families to receive a full-fledged care and protection, for example in the case of death of the biological mother, are also restricted.

At the court hearing, the representatives of the Association of Lesbian, Gay, Bisexual, Transgender Persons and their Friends “Mozaika” Kaspars Zālītis and Lauris Liepa additionally specified: both the *Saeima* and the Ministry of Justice have recognised at the court hearing that the cohabitation of same-sex partners corresponds to the notion of “family”. This means that the right to protection and support must be provided to the families of same-sex partners, *inter alia*, also the right of the partner of the mother of child to the leave provided for in the contested provision. The state has not formed a legal framework for the family relationship of same-sex partners, and the absence of such a framework is *per se* to be recognised as a violation of the first sentence of Article 110 of the Constitution.

The possibility pointed out by the *Saeima* for an employee to agree with their employer upon more favourable provisions of the employment legal relationship cannot be deemed to be an alternative of the rights provided for in the contested provision. The partner of the mother of a child is in fact under equal and comparable circumstances with the father of a child, even though she has no legal bonds with the child and its mother. In Latvia, the treatment of families of same-sex partners is discriminatory, based on the gender and sexual orientation of a person. The state is entitled and, under certain circumstances, also obliged to treat comparable groups differently, in order to correct the actual inequality. Therefore, the state should attempt to improve the conditions of the families of same-sex partners, creating the legal

framework also for such family relationships, and not to leave such families behind.

The compliance with the rights and freedoms of a person and their dignity cannot depend on political choices or different opinions of members of the society. The first sentence of Article 110 of the Constitution requires the provision of an equal level of protection to each and every family, including the families of same-sex partners. The partner of the mother of a child should also be recognised as a parent of a child, because she fulfils the same functions, which would have been fulfilled by a father of a child. There are no grounds to believe that the partner of a mother of a child does not need the possibility to spend time with her family immediately after the birth of a child. Granting the leave provided for in the contested provision to the partner of the mother of a child is also in the best interests of a child.

8. The person summoned to submit an opinion – associate professor of the International and European Law Department of the Faculty of Law of the University of Latvia *Dr iur.* Kristīne Dupate – considers that the contested provision is incompatible with the first sentence of Article 110 of the Constitution.

Kristīne Dupate agrees with the arguments of the Applicant. In addition, she points out that the issues of support measures for families fall within the scope of Article 110 of the Constitution. Leave provided for in normative acts in relation to the birth of a child, has several purposes, *inter alia*, promotion of gender equality, ensuring the mutual support of the parents and formation of family ties. However, the primary purpose of such a leave is to ensure the rights of a child and to protect the interests of a child. The criteria for granting leave laid down in the normative acts do not facilitate the achievement of these purposes in the most effective way.

The interests of a child are to be protected not only on a short-term basis but also on a long-term basis. To ensure the social and economic interests of a child, it should be ensured that taking care of a child would not deteriorate the social and economic situation of a family. This purpose can be achieved, first of all, by ensuring legal protection for employees who use of the leave, and, secondly, by ensuring the possibility for family members to take care of a child jointly and, thereby, facilitating the employee's return to work as soon as possible. Therefore, normative acts provide for the rights of each parent to receive the leave irrespective of whether the leave has also been requested by the other parent. If the leave related to the birth of a child is not ensured for persons actually forming the family and fulfilling the functions of a parent, then the interests of a child are not protected – neither on a short-term basis, nor on a long-term basis.

The legal regulation of the specific field is not internally coordinated. The notion of “family” can be defined formally, only recognising legally related persons as a family, or functionally, namely, based on the actually existing social ties of persons. Rights to prenatal and maternity leave, as well as parental leave are intended

not only for the parents of a child but also for a person who in fact takes care of a child; however, the paternity leave specified in the contested provision is intended only for a father, namely, based on formal family ties. Such legal regulation does not ensure effective protection of the interests of a child. Considering the versatility of family forms existing in the contemporary society, a functional approach to the clarification of the content of the notion of family would be more suitable and effective, as well as would better correspond to the interests of a child.

At the court hearing, Kristīne Dupate additionally indicated that the issue underlying the case under examination is to be viewed in broader terms, and not only in the context of the common welfare of the society and the care of the state for the welfare of each member of society. Considering the purposes of the leave provided for in the contested provision that can be derived from the European Union law, it is clear that such a leave would have to be ensured for a person who in fact takes care of a child, irrespective of whether such a person is the biological father of a child or the man who is to be legally recognised as the father of a child. The legal regulation adopted by the legislator prescribes that in certain cases the right to a leave provided for the mother of a child due to the birth of a child can also be exercised by another person who in fact is taking care of a child. Allegedly, no grounds can be observed as to why the leave provided for in the contested provision would have to be granted only to a person who is to be legally recognised as the father of a child.

9. The person summoned to submit an opinion – associate professor of the Constitutional Law Department of the Faculty of Law of the University of Latvia Dr iur. Annija Kārklīņa – considers that the issue of granting the leave provided for in the contested provision to other persons falls within the competence of the legislator.

Allegedly, from the first sentence of Article 110 of the Constitution, a positive obligation of the state derives to protect and support marriage, family, rights of parents and children. Even though these groups of persons are mutually related, it is also necessary to distinguish them from each other, because the state must select and determine the legal remedies suitable to the nature of each group.

The employer does not pay for the leave provided for in the contested provision; however, in accordance with the law On Maternity and Sickness Insurance the father of a child receiving this leave is entitled to receive the paternity benefit. The right provided for in the contested provision to a paternity leave is to be considered as the rights of the parents. In Latvia, the parents of a child are to be determined in accordance with the provisions of the Civil Law. In accordance with the Civil Law, a man who is not the biological father of a child can also be recognised as a father of a child. Besides, the father of a child is entitled to receive this leave irrespective of whether he is married to the mother of a child or not. Hence, the notion of a father is to be distinguished from the notion of the partner of a mother. The partner of a mother, irrespective of their gender, is not to be compared to the father of a child.

International human rights documents define the concept of “family” more broadly than the national normative acts of Latvia. In accordance with the Civil Law only the spouses and their children, while they live in a single household with their parents, are to be recognised as a family in a narrower sense. However, the Constitutional Court, by reference to the case-law of the European Court of Human Right, has recognised that the notion of “family” for the purposes of Article 8 of the Convention encompasses not only marriage-based relationships and can also entail actual family ties in cases when persons live together outside of marriage. Nevertheless, the European Court of Human Rights has recognised that the Convention does not impose an obligation on the states to provide the same rights to persons living in a partnership as those provided to spouses. This finding of the European Court of Human Rights could be applicable when comparing partnerships which the state has allowed to register and partnerships the registration of which is not allowed in the country. In Latvia, the right to a paternity leave is granted only to the father of a child, because the state only recognises the bringing up of a child in a family of parents of both sexes but not in a family of same-sex parents. The notion of “family life” can also entail relationships between other persons; however, in such cases, the actual circumstances must be established that would be indicative of a family relationship.

Directive 2019/1158 prescribes the obligation of the Member State to provide the paternity leave of at least 10 days for the father of a child in order to ensure the care of a child; however, the right of a partner of the mother of child to the leave do not derive from it, if the laws and regulations of the relevant Member State do not make such a partner equal to the second parent.

The European Court of Human Rights has not found a violation of Articles 8 and 14 of the Convention in the case *Hallier and Others v. France*, the facts of which were similar to the situation of the Applicant. In accordance with the French legal regulation the right to a paternity leave had only been granted to the father of a child but a partner of the mother did not have such rights, irrespective of the gender of such a partner. The European Court of Human Rights has recognised that such a differential treatment towards persons serves a legitimate aim, namely, it promotes the involvement of a farther in the bringing up of a child, facilitates a fair distribution of house work between men and women, and is not based upon gender or sexual orientation. Since 2012, in accordance with the normative acts of France such a leave is provided not only to the father of a child, but also to the husband or partner of a mother who is not the biological father of a child. Hence, it may be concluded that it is not permissible to expand the circle of recipients of paternity leave by way of further development of law, and the legislator when determining the circle of such persons, enjoys discretionary powers. Legal regulation regarding the granting of paternity leave to particular persons restricts the rights of the employer, therefore this issue falls within

the competence of the legislator.

In the Member States of the European Union the granting of paternity leave is regulated in different ways, because the European Union is not competent to determine what is and what is not to be regarded as marriage and family. Also in Latvia the issue of granting paternity leave to a partner of the mother of a child is of a legally political nature and this issue would have to be resolved by the legislator, *inter alia*, in the context of the registration of same-sex partnerships.

Even though labour law is to be regarded as a field of private law, the contested provision is of a public law nature, because it considerably restricts the rights of the employer; namely, it stipulates the obligation of the employer to grant leave to an easily identifiable group of persons – fathers of children. If the contested provision were to be interpreted so that it would also be applicable to same-sex partners or persons having close family relationships, then the employer would be obliged to verify the actual life circumstances of each employee. Such an obligation would put a disproportionate burden on the employer and could also violate the rights of employees to the right to respect for inviolability of their private life, guaranteed by Article 96 of the Constitution. If the fact that a particular person is a partner of the mother of a child has not been legally confirmed, then the employer, in fact, has no possibility to ascertain whether such a person is entitled to receive the leave provided for in the contested provision. The issue of granting the status of a parent to the partner of the mother of child is to be assessed in conjunction with other rights and obligations of parents laid down in the Civil Law and is to be regulated by a special law.

In the case under examination, it should also be considered that the legal regulation of the Labour Law allows employees and employers to agree upon the coordination of the period of the annual paid leave with important events in the family of the employee.

10. The person summoned to submit an opinion – *Dr psych. Diāna Zande* - provided an opinion at the court hearing regarding the impact of the birth of a child on the psychological condition of family members.

Birth of a child is an event causing new sensations and concerns for the parents, thereby requiring them to make a considerable contribution of physical and emotional resources. To promote the emotional wellbeing of the parents and the physical health, emotional development and the best interests of a child, the biological, psychological and social aspects must be taken into consideration. Social aspects, in a broader sense, *inter alia*, also entail social and cultural norms, stereotypes and the existing legal regulation. The views of society are important on the role of parents and on whether this role can only be fulfilled by biological parents of a child or also by the same-sex partners of the parents, receiving protection and support from the state intended for parents. In this respect, it should be noted that it is in the best interests of a child to

grow in an environment where its family model is accepted and not discriminated against.

Childbirth creates a considerable load on the body of a woman and considerably impacts her emotional state. Therefore, for the mother of child it is essential to receive the support that can be provided to her by the closest person – a male or female partner – and this need of the mother of a child does not depend on the sexual orientation of the partners. The support of a male or female partner helps the mother of a child to sooner master her new role and to build mutual bonds between the mother and the child, as well as it reduces the risk of post-natal depression and anxiety. The mother of a child living in a same-sex relationship receives less social support from her relatives than opposite-sex partners. Also, the partner of the mother of child receives less support from the surrounding people, and often her joy for the birth of a child is not accepted in society.

Studies show that children who have been born and raised in families of same-sex partners do not differ from those children born and raised in families of opposite-sex partners in terms of their biological, psychological and social needs and interests. A permanent and possibly longer presence of a partner during the period after the birth of a child is important not only for her own emotional wellbeing and the emotional wellbeing of the mother of child, but also for the emotional wellbeing of the child both on a short-term and on a long-term basis, and corresponds to the best interests of a child. Emotional contact of the partner of the mother of a child with the child and functions in bringing up the child are, substantially, the same as those of the father of a child.

In their cohabitation same-sex partners, more often than opposite-sex partners, equally engage in household work, the upbringing of a child and other spheres of cohabitation. If it is impossible to ensure the presence of the partner of the mother of a child following the birth of a child, then it is more difficult to also ensure the equal involvement of both partners in family life. After the birth of a child, the roles of both partners in the family change slightly. Therefore, it is important exactly in the first days after the birth of a child for the family to be together and to adapt to the new situation.

Because a family of same-sex partners is formed by two individuals having the same physical, emotional and other needs as any other individual, from the perspective of the science of psychology there are no reasons to doubt that such families also need the possibility to be together after the birth of a child, just like opposite-sex partners. Allegedly, the leave due to the birth of a child is also important for the purposes of protecting the best interests of a child who has entered such a family.

Conclusions Part

11. From the application and the attached documents it is to be concluded that the Applicant and her partner own a real estate as joint owners. Already before the birth of the second child of the partner of the Applicant, the Applicant, her partner and the first child of her partner have been living together in a joint household for several years. The Applicant and her partner had jointly planned the birth of both children of the partner of the Applicant. After the birth of the second child of the partner of the Applicant, the Applicant wished to use the leave provided for in the contested provision, but she could not receive it, because in accordance with the contested provision only the father of a child has the right to such a leave (*see vol. I, pp. 1-25 of the case file*)

11.1. Pursuant to the contested provision an employee who had become the father of a child was entitled to the leave due to the birth of a child. The contested provision governs employment legal relationships; namely, it provides for the right of an employee to a leave but it does not set any criteria by which it would have to be detected whether the particular person is to be regarded as the father of a child and is thus entitled to receive such a leave. The criteria and procedure for establishing a person who shall be regarded as the father of a child are prescribed by the norms of the Civil Law; norms of the Law on Registration of Civil Status Documents, *inter alia*, prescribe the procedure for the registration of the parents of a child.

In accordance with the presumption of paternity laid down in Article 146 of the Civil Law, the following person shall be considered to be a father of a child: 1) the husband of the mother of the child if the child is born during marriage; 2) the former husband of the mother of the child, if the child is born no later than 306 days after the marriage has ended due to death of the husband, divorce, or annulment, and the mother of the child has not remarried. Articles 146, 148, and 149 of the Civil Law prescribe, *inter alia*, which persons are entitled to contest a presumption of paternity by observing the conditions laid down in these provisions.

If the father of the child cannot be determined on the basis of presumption of paternity, or a court acknowledges that the child has not been born of their mother's husband, in accordance with Articles 154 and 155 of the Civil Law the father of the child shall be determined on the basis of a voluntary acknowledgement of paternity. Paternity may be voluntarily acknowledged before the birth of a child, at the moment of registration of the birth of a child or after the registration of the birth of a child, by the mother and the father of the child filing a joint application to the Civil Registry Department. As an exception, if the mother of the child has died or her whereabouts are unknown, an application for the recognition of paternity may be submitted by the father of the child alone, observing the conditions laid down in Article 155(3) of the Civil Law. Paternity may also be acknowledged in case if the mother of the child, the

husband of the mother of the child or the former husband of the mother of the child or the natural father of the child submit a joint application on acknowledgement of paternity to the Civil Registry Department. In accordance with Article 146(5) of the Civil Law, in such a case the presumption of paternity shall not be in force. Article 156 of the Civil Law lays down the procedure for contesting a voluntarily acknowledged paternity.

In accordance with Articles 154, 157, and 158 of the Civil Law, in the case if paternity cannot be acknowledged on the basis of a presumption of paternity, and paternity has not been voluntarily acknowledged (or the obstacles laid down in Article 155 of the Civil Law for recording a voluntarily recognised paternity in the birth register are present), the paternity of a child shall be determined by a court. In accordance with Article 159 of the Civil Law paternity that has been determined by a judgment of a court may not be disputed.

Thus, the legal regulation of the Civil Law exhaustively provides which person in a certain situation is to be recognised as the father of a child. Namely, in accordance with the mentioned provisions of 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 provision who:

- 1) is to be recognised as the father of a child on the basis of the presumption of paternity;
- 2) has acknowledged paternity voluntarily;
- 3) has been recognised as the father of the child by a judgment of a court.

In accordance with the norms of Chapter V of the Law On Registration of Civil Status Documents “Registration of the Fact of Birth” information about a new-born child, as well as about his parents – mother and father – shall be registered in the birth register within one month after the birth of the child.

11.2. The contested provision prescribes that the father of a child is entitled to a leave of 10 calendar days immediately after the birth of the child, but no later than within two months after the birth of the child. In accordance with Articles 10¹-10³ of the Law on Maternity and Sickness Insurance the paternity benefit shall be granted to the father of a child who has taken the leave envisaged in the contested provision in the amount of 80 per cent of his average insurance contribution wage.

By teleologically interpreting the contested provisions and the mentioned provisions the Law on Maternity and Sickness Insurance, it is to be concluded that the purpose of the leave established in the contested provision was to give 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 partially substitutes for the father of a child the income from work not gained during

the 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 (*cf. see para. 9.1 of the judgment of the Constitutional Court of 4 November 2005 in case No. 2005-09-01*). The *Saeima*, the Ministry of Justice and the Ministry of Welfare also indicate that the leave envisaged in the contested provision is intended to promote equality between women and men, distribution of household duties between the parents, as well as to give the possibility to a father to form a bond with his child at an early stage (*see vol. I, pp. 46-47 and 69 and vol. II, pp. 34-37, 66-67 and 82-83 of the case file*).

The obligation of the European Union Member States to ensure such a leave and benefit to the father of a child is envisaged by Directive 2019/1158, which is to be transposed into the normative acts of the Member States by 2 August 2022. Article 4 of Directive 2019/1158 lays down the obligation of the Member States to ensure paternity leave to the father of a child, while Article 8 obliges to ensure allowances to the father of a child for the duration of such a leave to guarantee an income at least equivalent to that which he would receive in the event of a break in the worker's activities on grounds connected with his state of health. From the considerations of the preamble of Directive 2019/1158 it follows that the leave to be granted to a child's father due to the birth of a child, and the related benefit is intended to give a possibility to the father to take part in family life and, thus, promote the participation and equality of both parents in caring for the child, as well as to enable the father to create a bond with the child already from the first moments of its life.

11.3. The Applicant asks the Constitutional Court to declare the contested norm incompatible with Article 110 of the Constitution, insofar as it does not provide for a right to the leave envisaged therein due to the birth of a child also to the partner of a mother of a child in a family of same-sex partners. The Applicant is of the opinion that the legislator has not envisaged legal regulation of family relationship of same-sex partners and their children; namely, has not regulated the personal and property relations of the participants of such relationships. The Applicant does 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 is of the opinion that the state has not fulfilled the positive obligation that follows from the first sentence of Article 110 of the Constitution to also ensure protection to families of same-sex partners. Even if it could be considered that the protection of such families has been ensured, the contested provision should be declared incompatible with the principle of legal equality and the principle of protection of the child's best interests (*see pp. 3-12 of vol. I and pp. 6-11, of vol. II of the case file*).

Therefore, in the present case, the Constitutional Court will assess the constitutionality of the contested provision insofar as the contested provision does not envisage protection and support to the partner of the child's mother in

relation to the birth of a child.

12. The first sentence of Article 110 of the Constitution states: “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.”

12.1. First and foremost, the state’s obligation to protect marriage as a union between a man and woman is defined in the first sentence of Article 110 of the Constitution. Marriage is a form of family relationship that has developed historically, the protection of which is envisaged in the first sentence of Article 110 of the Constitution 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 society. Different content of the concept of marriage may only be established by amending the first sentence of Article 110 of the Constitution.

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 Constitution establishes an obligation of the state to also protect and support family, parents, and children. Measures for the protection and support of marriage, parents and children are systemically linked to general family protection and support mechanisms, because they also indirectly promote family protection and support and, thereby, form a uniform system of protection and support of a family. The positive obligation of the state to protect and support the family which is included in the first sentence of Article 110 of the Constitution does not apply only and solely to families established through marriage.

Family is a social institution and based on understanding and respect and founded on close personal ties that may be identified in the social reality. Even in the absence of a biological link or a 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 social reality close personal ties also develop in other ways, for instance, as a result of *de facto* cohabitation. The first sentence of Article 110 of the Constitution defines a positive obligation of the state to protect and support all families, also, *inter alia*, *de facto* families (*cf. see para. 16.2.2 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*).

The concept of marriage is defined in the first sentence of Article 110 of the Constitution – 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 persons who should be recognised as being a family.

12.2 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. The value of each individual is the essence of fundamental rights. Human dignity must be protected both in relations between the state and an individual and in mutual relations between persons. In a democratic state governed by the rule of law, both the legislator when adopting legal norms and the entity applying legal norms must both protect and ensure human dignity (*cf. see para. 19.1 of the judgment of the Constitutional Court of 19 December 2017 in case No. 2017-02-03 and para. 17.1 of the judgment of 25 June 2020 in case No. 2019-24-03*). The fourth paragraph of the preamble to the Constitution also directly states that Latvia as a democratic, socially responsible state is based on human dignity. Human dignity as a fundamental right is vested in all human beings, unconditionally (*see para. 17.1 of the judgment of the Constitutional Court of 25 June 2020 in case No. 2019-24-03 and para. 11.1 of the judgment of 16 July 2020 in case No. 2019-25-03*). Article 1 of the Universal Declaration of Human Rights also prescribes that all human beings are born free and equal in dignity and rights.

The view that the dignity of one human being could be of 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 fundamental rights of a certain person or a group of persons in a democratic state governed by the rule of law.

The Constitution is a unified entirety, and the legal norms contained in it are closely interrelated (*see, for instance, para. 16.3 of the judgment of the Constitutional Court of 8 March 2017 in case No. 2016-07-01*). The first sentence of Article 110 of the Constitution is closely linked to a person's right to respect for inviolability of their private life established in Article 96 of the Constitution.

The Constitutional Court has already ruled before that in accordance with Article 96 of the Constitution every person has the right to the protection of his or her physical and mental integrity, respect and dignity, as well as the right to live according to their own mind set and own essence and wishes to develop and enhance their personality, with possibly minimal interference by the state or other persons. This provision of the Constitution protects the right of every person to be different, to preserve and develop the qualities and abilities which make them different from other persons and that make them individual. Article 96 of the Constitution includes, *inter alia*, every person's right to inviolability of their family life (*cf. see paras. 8 and 9 of the judgment of the Constitutional Court of 23 April 2009 in case No. 2008-42-01*).

Sexual behaviour is one of the elements of a person's private life. A person's right to freedom of sexual behaviour requires protection, irrespective of the way it is

manifested and irrespective of a person's sexual orientation. Within the scope of private life, a person is provided with the possibility to establish relationships of differing nature, *inter alia*, also sexual relationships. Freedom of sexual behaviour ensures the manifestation of a person as a biological being, as well as natural development of human personality (*see Danovskis E., Ruķers M., Lībiņa-Egnere I. 96. panta komentārs. Grām.: Balodis R. (zin. red.) Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: Latvijas Vēstnesis, 2011, p. 255*).

Society consists not only of persons who, as to their nature, form close personal and family ties with representatives of the opposite sex, but also of persons who, as to their nature, form such relationships with representatives of their own sex. In accordance with the principle of human dignity the state must also equally respect 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 Constitution in conjunction with the principle of human dignity and to the right to respect for their private life determines the obligation of the state to also protect and support families of same-sex partners.

The European Court of Human Rights has recognised that, in general terms, Article 8 of the Convention does not impose an obligation on the state to ensure the right of same-sex partners to marry or to ensure the right of a family of same-sex partners to a legal recognition in another form and that the state enjoys discretion when selecting the moment of introduction of the relevant legal mechanisms. Article 8 of the Convention may demand that the legislator only ensures the legal recognition of the family of same-sex partners in situations when a *de facto* recognition of such relationships has already taken place in the social and legal reality of the state (*see paras. 163-187 of the judgment of the European Court of Human Rights of 21 July 2015 in the case "Oliari and Others v. Italy", application nos. 18766/11 and 36030/11*). Nevertheless, in accordance with the case-law of the European Court of Human Rights, Article 8 of the Convention is to be interpreted so that it also covers and protects families of same sex partners, notwithstanding the fact that the state has not provided mechanisms for legal recognition of such family relationship (*see, for example, paras. 87-95 of the judgment of the European Court of Human Rights of 24 June 2010 in the case "Schalk and Kopf v. Austria", application no. 30141/04, and paras. 70-74 of the judgment of the Grand Chamber of the European Court of Human Rights of 7 November 2013 in the case "Vallianatos and Others v. Greece", application nos. 29381/09 and 32684/09*).

European Union law also does not prescribe the content of the notion of marriage and family, nor does it impose an obligation on Member States to ensure a legal recognition of families of same-sex partners, leaving this issue within the competence of the Member States (*see, for example, paras. 56-59 of the judgment of*

the Court of Justice of the European Union of 24 November 2016 in the case C-443/15 “Parris”). Nevertheless, it is recognised in the European Union law that in accordance with the legal regulation of Member States a family can also be formed by same-sex partners. This follows from the first sentence of Article 4(1) of Directive 2019/1158 stating that the Member States shall take the necessary measures to ensure that fathers or, where and insofar as recognised by national law, equivalent second parents, have the right to a paternity leave of 10 working days that is to be taken on the occasion of the birth of the worker’s child.

The Constitutional Court has already recognised before that the Convention sets a minimum standard of human rights and fundamental freedoms, but the state may guarantee a broader scope of such rights and a higher standard of protection in its national laws, first and foremost – in the Constitution of the state. The Constitutional Court, when putting the norms of the Constitution in more detail, must take into consideration the Convention and the case-law of the European Court of Human Rights; however, it does not preclude the Constitutional Court from coming to the conclusion that the Constitution provides for a higher level of protection of fundamental rights than the Convention (*see para. 29.2 of the judgment of the Constitutional Court of 10 February 2017 in case No. 2016-06-01*). Namely, the fact alone that the Convention or norms of the European Union law do not envisage the obligation of the state 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 Constitution.

12.3. The first sentence of Article 110 of the Constitution includes two obligations of the legislator: 1) to ensure legal protection for families; 2) to ensure social and economic protection and support for families.

The obligation of the legislator to ensure legal protection for families requires establishing legal regulation of family relationships existing in social reality, namely, to determine personal and property relations of the participants of such relationships (*cf. see para. 16.2.1 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*). In turn, the legislator can fulfil the duty to ensure social and economic protection and support for families by putting the rights of family to special protection and support in more detail in law, namely, by providing for various family protection and support measures in law (*cf. see para. 9 of the judgment of the Constitutional Court of 15 February 2018 in case No. 2017-09-01*). Both obligations of the legislator that follow from the first sentence of Article 110 of the Constitution are closely interconnected. If the state does not ensure legal protection for families, i.e., does not establish a legal regulation of family relationships, then it is impossible to also ensure the social and economic rights included in Article 110 of the Constitution for the participants of these relationships (*cf. see para. 16.2.1 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*).

Although the legislator has discretion in determining the form and content of the legal regulation of family relationships and measures of social and economic protection and support for families, this discretion is not unlimited (*see para. 16.2.1 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*). The first sentence of Article 110 contains the rights of not only family, but also parents and children to the protection and support from the state. The legislator has the right to establish such legal regulation of family relationships which is based on objective and substantiated criteria. It is the legislator's duty to take the particularity of these relationships into account, including 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 legal regulation of family relationships and measures of social and economic protection and support, the legislator must take into account general principles of law and other provision of the Constitution, international and the European Union law, and also, in accordance with the second sentence in the fifth paragraph of the preamble to the Constitution, must ensure that the respective legal regulation is aimed at creating a cohesive society (*cf. see para. 16.2.1 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*).

In accordance with the legal equality principle contained in Article 91 of the Constitution, the legislator is not entitled to adopt legal regulation which, without any reasonable grounds, allows for a differential treatment of persons under circumstances that are equal and comparable with respect to certain criteria, or an equal treatment of persons under different circumstances. The legislator must observe the non-discrimination principle contained in the second sentence of Article 91 of the Constitution which is aimed at preventing the possibility that in the democratic state governed by the rule of law fundamental rights of a person would be restricted on the basis on certain impermissible criteria (*cf. see para. 9 of the judgment of the Constitutional Court of 10 July 2020 in case No. 2019-36-01*).

Article 91 of the Constitution includes a general prohibition of discrimination but it does not list the criteria on the basis of which discrimination is prohibited. These criteria have to be "read into" the article by using methods of interpretation of legal provisions, and also on the basis of the principle characterising the Latvian legal system that it is open to international law. Thus, attention should also be paid to the development trends of human rights in the world (*see para. 21 of the judgment of the Constitutional Court of 23 April 2019 in case No. 2018-12-01*).

The Constitutional Court has already recognised before that in accordance with international human rights norms binding on Latvia gender is one of the criteria contained in the content of Article 91 of the Constitution (*see para. 17 of the judgment of the Constitutional Court of 7 November 2018 in case No. 2018-25-01*).

Furthermore, the legislator must take into consideration the fact that both Article 14 of the Convention and Article 26 of the International Covenant on Civil and Political Rights directly prohibit discrimination due to the sex of a person. In accordance with the case-law of the European Court of Human Rights, Article 14 of the Convention essentially also entails the prohibition of discrimination on the grounds of sexual orientation (*see, for example, paras. 76-77 of the judgment of the Grand Chamber of the European Court of Human Rights of 7 November 2013 in the case “Vallianatos and others v. Greece”, application nos. 29381/09 and 32684/09*). Article 21 of the Charter also states that any discrimination based on any grounds such as sex and sexual orientation shall be prohibited. This prohibition in the European Union law is detailed, for instance, in the European Union Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

The legislator should also consider the fact that in legal relationships affecting children and in all actions relating to children, their rights and best interests shall prevail. The legislator shall ensure that the adopted normative acts protect the lawful interests of the child in the best possible manner. Besides, the rights and lawful interests of a child are affected not only when a decision is to be taken directly with respect to a child, but also when the decision can only be applicable to a child or can indirectly affect a child. Recognition of any other priority without serious reason and substantiation is not permissible (*see para. 23.1 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*). The state, insofar as possible, must ensure that a child grows up in a family-like environment (*see para. 16.2 of the judgment of the Constitutional Court of 16 May 2019 in case No. 2018-21-01*). When drafting legal regulation affecting children, it is the duty of the legislator to assess its impact on the affected rights of a child and to clearly substantiate that the selected solution corresponds to the best interests of a child, specifying: 1) what, within the process of drafting the particular legal regulation, is to be considered as the best interests of a child; 2) criteria on which the relevant assessment of the interests of a child is based; 3) how the best interests of a child are balanced in proportion to other considerations (*see para. 23.1 of the judgment of the Constitutional Court of 5 December 2019 in case No. 2019-01-01*).

Pursuant to the first sentence of Article 110 of the Constitution the legislator also has the duty to ensure, *inter alia*, legal protection for families of same-sex partners and to envisage measures of social and economic protection and support appropriate also for such families, complying with the general principles of law and other provisions of the Constitution. 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 discretion to choose whether legal protection as well as

economic and social protection and support should be ensured to such families at all.

Hence, the first sentence of Article 110 of the Constitution requires the legislator to ensure legal protection and measures of social and economic protection and support to all families, including families of same-sex partners.

13. Considering the request contained in the application and the nature of the positive obligation of the legislator arising out of the first sentence of Article 110 of the Constitution, in verifying whether the contested provision, insofar as it does not envisage protection and support in relation to the birth of a child to the partner of the child's mother, complies with the first sentence of Article 110 of the Constitution, the Constitutional Court has to ascertain:

1) whether the legislator has established legal regulation of family relationships of same-sex partners and has envisaged measures of social and economic protection and support for families of same-sex partners in relation to the birth of a child;

2) whether the established legal regulation of family relationships and the envisaged measures of social and economic protection and support ensure, at least to a minimum amount, 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 of family relationships and the envisaged measures of social and economic protection and support comply with general principles of law.

14. The Constitutional Court must, first of all, clarify what legal regulation is applicable to a family of same-sex partners in relation to the birth of a child.

14.1. The *Saeima* points out that there are several protection mechanisms provided for in normative acts that are applicable to families of same-sex partners, for example, the legal regulation of the Criminal Procedure Law, allowing same-sex partners not to testify against their partners, as well as the legal regulation of the Civil Procedure Law regarding provisional protection against violence (*see p. 44 and pp. 46-47 of vol II of the case file*). At the court hearing, the representative of the Ministry of Justice specified that same-sex partners are also subject to the norms of the Criminal Law directed towards the protection of persons living together in a common household. Same-sex partners are also entitled to exercise the rights provided for in normative acts to indicate their partner as the beneficiary when insuring their life against accidents, to enter into a future authorisation agreement with their partner and to authorise their partner to provide consent to medical treatment (*see pp. 71-72 of vol. II of the case file*).

At the court hearing, the representatives of the *Saeima* and the Ministry of Justice indicated that the mentioned legal regulation confirms that the legislator has

respected families of same-sex partners; however, within the scope of its discretionary powers, it has selected to govern the protection and support of such families by prescribing discrete measures in particular fields (*see pp. 44-47 and p. 71 of vol. II of the case file*). The Applicant considers that these mechanisms are also available for same-sex partners; however, they are not sufficient for ensuring protection and support for families of same-sex partners (*see p. 22 of vol. III of the case file*).

From the legal regulation of the Criminal Procedure Law it can be concluded that in accordance with Article 12(5) of the Criminal Procedure Law, for the purposes of this law, the immediate family of a natural person shall be considered to be not only the betrothed, spouse, parents, grandparents, children, grandchildren, siblings of such person, but also the person with whom the relevant person is living together and with whom he or she has a joint household. However, other norms of the Criminal Procedure Law with respect to the immediate family of a person prescribe special family protection mechanisms, for example, Article 110(3)(2) provides for the rights of a witness not to testify against his/her immediate family.

From the legal regulation of the Civil Procedure Law it follows that the rights to protection against violence provided for in Chapter 30⁵ of this law, *inter alia*, can be exercised not only by the persons who live or have lived in one household, but also persons between whom close personal or intimate relations exist or have existed. Also, in accordance with the norms of the Criminal Law, for example, Article 126(2)(7) of the Criminal Law, a criminal offence committed against a person with whom the perpetrator of a criminal offence is or has been in a continuous intimate relationship, or against a person with whom the perpetrator of a criminal offence has a joint household, is considered to be a circumstance requiring the imposition of a more severe punishment.

Finally, from the legal regulation of Article 57 of the Insurance Contract Law it can be concluded that it provides for the right of an insured person to indicate a particular person as a beneficiary who will receive the insurance benefit in the event of the death of the insured person. In turn, from the legal regulation of the Civil Law and the Law On the Rights of Patients it follows that both the future authorisation institute provided for in Articles 2317¹ – 2317⁷ of the Civil Law, and the rights of a patient provided for in Article 6(7) and Article 7 of the Law On the Rights of Patients to authorise another person to agree on his or her behalf to medical treatment at large or to any method used in the medical treatment, as well as to receive information regarding medical treatment, may be exercised by any persons, irrespective of the nature of their mutual relationship.

From the mentioned legal regulation it can be concluded that the legal mechanisms pointed out by the *Saeima* and the Ministry of Justice cover a totality of different situations and, *inter alia*, can be applied to same-sex partners who come within the scope of this regulation. However, the rights of same-sex partners to use

some of the mechanisms envisaged in normative acts which, moreover, are applicable in specific situations, cannot be considered to be legal regulation of 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.

14.2. In accordance with the first sentence of Article 110 of the Constitution, only two persons of the opposite sex have the right to legally corroborate their family relationships by entering into marriage under the procedure laid down in the Civil Law. After the conclusion of a marriage, the spouses are subject to the legal regulation of the Civil Law and other laws and regulations governing mutual personal and property relations of the spouses (for example, the norms of Sub-Chapter 4, Chapter 1, Part 1 of the Civil Law “Family Law” govern the property rights of spouses), rights and obligations of spouses with respect to third parties (for example, the rights of one of the spouses to act on behalf of the other spouse, within the domain of the household, provided for in Article 87 of the Civil Law), as well as ensure the economic and social protection of spouses in certain situations (for example, Article 9(1) of the law On Residential Tenancy provides for the right of a tenant to lodge his or her spouse in the residential space the tenant is renting, by informing the landlord but without asking for the renter’s consent).

In social reality children are also born to persons who have not entered into marriage. In accordance with the data of the Central Statistical Bureau, in 2019 only about 62 per cent of new-born children were born in marriage (*see Demogrāfija 2020. Statistisko datu krājums. Rīga: Centrālā statistikas pārvalde, 2020, p. 66. Available at: <https://www.csb.gov.lv/>*). Chapter 2, Part 2 of the Civil Law “Family Law” also provides for the legal regulation of family relationships of a child and their parents in a family of two opposite-sex partners where a child is born, irrespective of whether a marriage has been entered into between the mother and the father of a child. The norms of this Chapter of the Civil Law, *inter alia*, prescribe the rights and obligation of parents to implement custody of a child, taking care of him/her and his/her property and representing him/her in personal and property relations from the moment of the birth of a child until the moment of him/her reaching majority. Article 188 of the Civil Law prescribes the duty of children to care of their parents and, if necessary, also of grandparents.

In normative acts the legislator has prescribed economic and social protection and support measures for a family established by opposite-sex partners in relation to the birth of a child. The Labour Law, *inter alia*, prescribes the rights of the mother of a child to prenatal and maternity leave provided for in Article 154 of this law. In accordance with Article 156 of this law one of the parents of a child has the right to a parental leave. In turn, the contested provision prescribes the right of the father of child to a leave of 10 days in relation to the birth of a child. Besides, according to

Article 155(2) and (3) of the Labour Law, if a mother cannot take care of the child up to the 42nd day following childbirth, the father or another person who actually takes care of the child shall be granted leave for those days on which the mother herself is not able to take care of the child. In turn, if the mother has died or in accordance with the procedures prescribed by law has refused to take care and bring up the child up to the 42nd day following childbirth, the father of the child or another person who actually takes care of the child shall be granted leave, allowing him/her to undertake care of a child, for a period up to the 70th day of the child's life.

Correspondingly, the Law on Maternity and Sickness Insurance provides several social insurance benefits for parents of a child, namely, maternity, paternity and parental benefit. These benefits ensure the economic protection of parents, to a certain extent replacing their work income in case if parents exercise their rights to use any of the leave provided for in the Labour Law due to the birth of a child. In turn, the Law on State Social Allowances provides additional support to parents, providing the rights to receive several state social benefits - state family benefit, childcare benefit and childbirth benefit.

In accordance with Article 146(1) of the Civil Law the woman who has given birth to the child shall be recognised as the mother of a child. Hence, the legal regulation of family relationships prescribed by the Civil Law are also to be equally applicable in the relations of a child and his/her mother in the family of same-sex partners. Hence, the legal regulation prescribing social and economic protection measures to the mother of a child is also applicable to a family of same-sex partners. Nevertheless, in paragraph 11 of this judgment the Constitutional Court has already concluded that the legal regulation of the Civil Law exhaustively provides which persons can be recognised as the father of a child, and does not permit that a woman could be recognised as the father of a child. The legal regulation of family relations of a child and a father prescribed by the Civil Law, as well as the legal regulation granting the right to the father of child to use social and economic family protection measures cannot be applied to a partner of the mother of a child.

In accordance with the legal regulation in a family of same-sex partners, legal protection and social and economic protection measures are only available to a mother and her child. Therewith, the protection and support available to a family of same-sex partners essentially does not differ from the protection and support available to a family consisting of only a mother and her child. Thus, the applicable legal regulation of family relationships does not ensure protection and support to same-sex partners and children born in their family as a unified family. The legislator has not established the legal regulation of the family relationships of same-sex partners and has not envisaged measures of social and economic protection and support for families of same-sex partners in relation to the birth of a child. Thus, the legislator has not fulfilled its positive obligation arising out of the first sentence of Article 110 of the Constitution

to also ensure legal, social and economic protection for families of same-sex partners.

Thus, the contested provision, insofar as it does not envisage protection and support to the partner of the child's mother in relation to the birth of a child, is incompatible with the first sentence of Article 110 of the Constitution.

15. In accordance with Article 32(3) of the Constitutional Court Law, a legal provision that the Constitutional Court has declared as non-compliant with a provision of a higher legal force shall be regarded as not in effect from the day of publication of the judgment of the Constitutional Court, if the Constitutional Court has not determined otherwise. In accordance with Article 31(11) of the Constitutional Court Law the Constitutional Court judgment shall indicate the moment at which the contested legal provision found to be non-compliant with the provision of a higher legal force shall cease to be in force.

By exercising the rights granted by the above-mentioned provision, the Constitutional Court, in cases initiated on the basis of a constitutional complaint, should, as far as possible, prevent the infringement of fundamental rights of a person (*see para. 25 of the judgment of the Constitutional Court of 16 December 2005 in case No. 2005-12-0103*). At the same time, the Constitutional Court should also take care to ensure that the situation which could arise from the moment the contested norm ceases to be in force would not cause new infringements of fundamental rights prescribed by the Constitution, as well as would not cause considerable harm to national or public interests (*cf. see para. 26 of the judgment of the Constitutional Court of 19 October 2011 in case No. 2010-71-01 and para. 22 of the judgment of 16 April 2015 in case No. 2014-13-01*).

To establish the legal regulation of family relationships of same-sex partners and measures for social and economic protection and support with an appropriate form and content, the legislator needs to conduct an 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.

The Applicant has expressed a request that the contested provision be declared void as of the date of the birth of her partner's second child.

From the application, documents attached thereto, as well as the explanation of the representative of the Applicant at the court hearing, it follows that following the birth of the second child of her partner the Applicant had no possibility to use the leave provided for in the contested provision. 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.

Resolutive Part

On the basis of Articles 30-32 of the Constitutional Court Law, the Constitutional Court

adjudged:

1. To declare Article 155(1) of the Labour Law, insofar as it does not envisage protection and support to a partner of the child's mother in relation to the birth of the child to be incompatible with the first sentence of Article 110 of the Constitution 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 not envisage protection and support to a 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 Constitution of the Republic of Latvia and void as of the moment when the infringement on her fundamental rights occurred.

The judgment is final and not subject to appeal.

The judgment has been pronounced in Riga, on 12 November 2020.

The judgment shall take effect at the moment of its pronouncement.

Chairperson of the court hearing

Sanita Osipova