



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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DISSENTING OPINION of the Constitutional Court Justice

Aldis Laviņš

Riga, 26 November 2020

in case No. 2019-33-01

“On the Compliance of Article 155(1) of the Labour Law with the First Sentence of Article 110 of the Constitution of the Republic of Latvia”

1. On 12 November 2020, the Constitutional Court proclaimed the judgment in case No. 2019-33-01 “On the Compliance of Article 155(1) of the Labour Law with the First Sentence of Article 110 of the Constitution of the Republic of Latvia” (hereinafter, the Judgment) and adjudged:

1) to recognise Section 155, Paragraph one of the Labour Law, insofar as it envisages protection and support to the 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 Section 155, Paragraph one of the Labour Law, insofar as it envisages protection and support to the partner of the child’s mother in relation to the birth of a 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.

I do assent to that which is recognised in the Judgment that from the first sentence of Article 110 of the Constitution, a positive obligation of the legislator derives

to ensure legal, social and economic protection for a family. However, I cannot assent to the finding that, due to the referred to reason, the contested norm, insofar as it envisages protection and support

to the partner of the child's mother in relation to the birth of the child, is incompatible with the first sentence of Article 110 of the Constitution.

I shall use the abbreviations used in the Judgment to explain my point.

2. By recognising the contested norm as incompatible with the first sentence of Article 110 of the Constitution, the Constitutional Court, first of all, has broadened the purpose of the contested norm and, secondly, moved into the democratically legitimated realm of activities of the legislator.

2.1. The contested norm prescribes that the father of a child is entitled to leave of 10 calendar days immediately after the birth of the child, but no later than within two months from the birth of the child (hereinafter, also, paternity leave).

The purpose of this leave is 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, *inter alia*, by assuming care for the child. Paternity leave allows the child's father, already at an early stage, to develop an emotional link with the child (*see Clauses 11.1 and 11.2 of the Judgment*). The contested norm has been adopted to promote gender equality, change the stereotypes in society as to gender roles in an institution as important as the family, strengthening the role of the man as the father in bringing up a child.

It must be emphasised that the obligation of the European Union Member States, including Latvia, to ensure the paternity leave specifically to the father of a child, derives from Article 4 of Directive 2019/1158. Also, within the meaning of Directive 2019/1158, the purpose of the paternity leave is to encourage the more equal sharing of responsibilities of caring for a child between women and men, and to create such circumstances, which allow for the early creation of a bond between the father and a child (*see Recital (19) of Directive 2019/1158*). From Directive 2019/1158 it derives that a partner of a mother of a child is only entitled to paternity leave where and insofar as recognised by the national law of a Member State, a partner of a parent of a child is equivalent to the second parent. Under the Latvian legal system, a partner of the mother of a child is not equivalent to the father of a child. In accordance

with the provisions of the Civil Law, a man is to be recognised as the father of a child having the right to receive the paternity leave envisaged in the contested norm who: 1) is to be recognised as the father of a child on the basis of the presumption of paternity; 2) has acknowledged the paternity voluntarily; 3) has been recognised as the father of a child by a judgment of a court.

The first sentence of Article 110 of the Constitution does not prohibit the legislator from providing for certain rights to the parents of a child only - mother or father - because each of them has legal bonds, as well as rights and obligations prescribed by the legal doctrine of custody. In accordance with the law On Maternity and Sickness Insurance the father of a child, who has received the leave provided for in the contested norm, is entitled to receive the paternity benefit. The mother of a child, in turn, is entitled to receive the maternity benefit for prenatal and maternity leave.

Therewith, the norm contested in the examined case creates the rights for the father of a child, and not for a partner of the mother of a child or any other family member, namely, the contested norm unambiguously prescribes that the rights to leave provided for therein are individual rights of the father of a child not subject to be transferred to any other person. Leave of the father of a child and the paternity benefit related thereto is targeted social support to one of the parents - the father of a child. The applicant has erroneously classified the leave intended for the father of a child as social support for a family, which is thus also due for her family.

Considering the above-mentioned, I conclude that exactly the contested norm, providing for the rights of the father of a child to paternity leave, does not cause an infringement on the Applicant's fundamental rights prescribed by the first sentence of Article 110 of the Constitution.

2.2. The Constitutional Court, by interpreting the contested norm so that it is also applicable to a partner of the mother of a child, in legal reality has created significant legal uncertainty. At present, there is an obligation imposed on an employer, which it has no actual possibility to fulfil. Namely, the employer, for it to be able to grant the employee - a partner of the mother of child - the paternity leave provided for in the contested norm, must clarify, whether a partner of the employee has given birth to a child. Even if a partner of the mother of a child submits the employer written confirmation of her partner that they are both living as partners in a joint household, or, alternatively, ensures witness statements, such evidence would not be permissible. Both Section 95, Paragraph two of the Civil Procedure Law and

Article 152, Paragraph two of the Administrative Procedure Law prescribe that facts which, in accordance with the law, may only be proven by particular means of evidence, may not be proven by any other means of evidence. In accordance with Section 46 of the Law on Registration of Civil Status Documents the fact, namely, that a person is a parent of a child, may only be proven by documents certifying civil status registration, in the case at hand - birth certificate of a child, containing the particulars of both the mother of a child and the father of a child. Only when the fact is proven by means of evidence permitted by the law, is the employer entitled to grant the paternity leave provided for by law, and the State Social Insurance Agency, in turn, is entitled to disburse the paternity benefit. It should be noted that the Latvian legal system does not contain such legal regulation that would grant the status of a parent of a child to a partner of the mother of a child and would create legal bonds with a child, *inter alia*, rights with respect to a child and obligations towards a child.

The referred to considerations confirm that the Applicant, by trying to achieve legal protection for a family of same-sex partners, has, probably, contested another norm of law, and not the norms of law actually infringing on her rights. In turn, the Constitutional Court, by recognising particular social rights of a partner of the mother of a child, namely, rights to paternity leave, in the situation where the Latvian legal system does not provide for a regulation that would grant the status of a parent to a partner of the mother of a child and would create bonds with a child, has moved into the democratically legitimated realm of activities of the legislator. I will explain the situation at hand in more detail in the following clauses of this Dissenting Opinion.

3. It is commonly recognised in legal science that legal and political considerations set the goal to be achieved, namely, the improvement of overall - economic, political and social public life aspects, while legal considerations prescribe the provisions to be observed, not because they would per se ensure the desirable economic, political and social situation, but because it is required by the rule of law (*see Dworkin R. Taking Rights Seriously. London: Harvard University Press, 1977, p. 22*).

The court is only entitled to assess the case insofar as the arguments of law (legal arguments) can be referred thereto, distinguishing them from legal and political arguments. The issues, for the resolution whereof there are no sufficiently strict legal standards established,

and the conclusions to be made therein are mainly based upon political feasibility, must be resolved by democratically legitimated, political public bodies, first of all - the legislator (*see Clause 11.2 of the judgment of the Constitutional Court of 3 February 2012 in case No. 2011-11-01*). The judiciary is not the power elected by the democratic majority of citizens, and therefore it has no, in any aspect whatsoever, democratic legitimacy to implement political considerations (*see Dworkin R. Taking rights seriously. London: Harvard University Press, 1977, p. 84*).

The Constitution characterises the identity of the relevant State, encompassing not only legal, but also historical, political, national, cultural and other extrajudicial factors characterising the relevant State (*see Pleps J., Pastars E., Plakane I. Constitutional Law [Konstitucionālās tiesības]. Riga: Latvijas Vēstnesis [Latvian Herald], 2014, p. 19*). Constitutional law has the closest relation with politics, and the assessment of the constitutional court is often made on the line of contact of politics and law (*see Wilberg. H. J. Foreword. Interpreter as a sovereign with unlimited power. Law and Rights. 2001, No. 10, p. 299*). The court, when ensuring the protection of values contained in the Constitution, may not cross the line, where the legal and political considerations and the competence delegated to the legislator in a democratically legitimate way begin. According to the principle of separation of powers, the choice of a politically more feasible solution is the task of the legislator.

3.1. The European Court of Human Rights in its case-law has recognised that from Article 8 of the Convention a positive obligation of the State may only arise to ensure the legal recognition of the family of same-sex partners, when the *de facto* recognition of such relationship has already taken place in the social and lawful reality of the State, as well as to establish the legal framework for the protection of such families. Furthermore, the State has discretionary powers as to the form and content of the legal regulation for the legal protection of families of same-sex partners (*see, for example, Clauses 97, 105, 108, 109 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 Clauses 162-187 of the judgment of the European Court of Human Rights of 21 July 2015 in the case “Oliari and Others v. Italy”, application Nos 18766/11/09 and 36030/11*).

Thus, *there are no strict legal standards established with respect to the form and content of the legal regulation for legal recognition of the family of same-sex partners that*

would impose an obligation on the State to act in a certain specified way. Therewith, *the issue as to when and in what way exactly legal protection for families of same-sex partners must be ensured is not a legal issue, but an issue of the legal and political choice of the legislator.*

3.2. In the examined case, the Constitutional Court recognised that Section 155, Paragraph one of the Labour Law, insofar as it envisages protection and support to the partner of the child's mother in relation to the birth of the child, is incompatible with the first sentence of Article 110 of the Constitution. By recognising that unlawful infringement on the fundamental rights of the Applicant has been caused by the lack of relevant regulation exactly in Section 155, Paragraph one of the Labour Law, the Constitutional Court has, in fact, concluded that the legal protection of a same-sex couple in the case of the birth of a child had to be ensured so that, along with the regulation providing for the leave for the father of a child due to the birth of a child, there should have been a regulation that would also provide for granting exactly the same leave to a partner of the mother of a child. By selecting such solution in the examined case, the court has disregarded the fact that the type of social and economic protection and support for a family to be provided for in the laws and regulations must be determined by the legislator.

The fact that there are different solutions possible with respect to the legal protection of families of same-sex partners and they must not be mandatorily prescribed exactly by the Labour Law is also evidenced by the regulation of other European Union Member States. As explained by the representatives of the Saeima (Parliament) at the court hearing, the regulation similar to the contested norm, under which the leave is only being granted to the father of a child, also exists in countries such as Greece, Hungary, Italy, Luxembourg and the Czech Republic. Social and economic protection of families of same-sex partners is ensured in a different way (*see the transcript of the court hearing of 13 October 2020*). Thus, the court had no grounds to conclude that the flaw of regulation is to be detected exactly in Section 155, Paragraph one of the Labour Law, besides such flaw that is incompatible with the first sentence of Article 110 of the Constitution.

3.3. The discretionary powers of the legislator to determine the persons entitled to leave for the father of a child have also been recognised by the European Court of Human Rights in its decision of 12 December 2017 in the case "*Hallier and Others v. France*", the actual circumstances whereof were almost identical to the situation of the Applicant. Namely,

the French courts, *inter alia*, the supreme court instance, recognised that in accordance with French legal regulation at that time only the father of a child had the rights to paternity leave, but a partner of the mother, irrespective of the gender of such partner, had no such rights. The complaint regarding the violation of Article 8 and 14 of the Convention was filed by a partner of the mother of a child, for whom, based on the referred to regulation, the granting of paternity leave was refused. The European Court of Human Rights considered this complaint to be obviously declinable, concluding that, first of all, such differential treatment permitted towards a partner of the mother of a child serves the achievement of the legitimate aim, namely, promotes the involvement of the father in bringing up a child, facilitates the fair distribution of house work between men and women, and is not based upon gender or sexual orientation, and, secondly, determination of the circle of recipients of the paternity leave is an issue under the competence of the democratically legitimated legislator. Since 2012, by enjoying its discretionary powers, exactly the French legislator, and not the court of this country, has also established the rights to the leave for the father of a child for a partner of the mother, other than the biological father of a child.

3.4. As regards the principle of human dignity of relevance to the examined case, I would like to turn your attention to several findings.

First of all, the European Court of Human Rights has recognised that the observance of human dignity forms part of the essence of the Convention (*see, for example, Clauses 89 of the judgment of the Grand Chamber of the European Court of Human Rights of 28 September 2015 in the case “Bouyid v. Belgium”, application No. 23380/09*). Nevertheless, in the cases regarding protection for families of same-sex partners, the court, when applying the Convention, has not derived any specific obligations from human dignity for the Member States for the protection of such families. This is based upon several reasons; first of all, the issue on protection for families of same-sex partners is integrally linked with the moral standards and ethical values prevailing in society, and, secondly, the Member States are not unanimous as to the types of protection for such families (*see, for example, Clauses 162 of the judgment of the European Court of Human Rights of 24 July 2010 in the case “Oliari and Others v. Italy”, application Nos 18766/11/09 and 36030/11*).

Secondly, there are no doubts as to the fact that human dignity is the fundamental value of the European cultural space and the legal system of each and every European Union Member

State. However, if the principle of human dignity would unambiguously impose an obligation on the State to establish legal protection for families of same-sex partners, then, in the referred to issues, there would be no need to point out the presence of discretionary powers of the State in resolving such issues. Besides, then it would also be necessary to conclude that those European Union Member States, who have recognised that only a marriage forms the basis for the creation of a family, violate human dignity and act unlawfully. Such conclusion is, however, hasty and prejudged.

Thirdly, without denying the meaning of human dignity in the legal system of a democratic state governed by the rule of law, the legal doctrine, at the same time, contains findings as to the need to observe precaution in applying this principle. Namely, the principle of human dignity has a broad and indeterminate scope, which can give rise to unpredictability in the application thereof (see *Kernaleguen F. The Jurisprudential Reality(-ies) of the Principle of Human Dignity in France: A Prevailing or an Authoritative Principle? The Reality of Human Dignity in Law and Bioethics: Comparative Perspectives. Springer Verlag, 2018, p. 34*).

Considering that which is referred to in this Clause, I do believe that in the examined case, with the issue reviewed therein being assessed differently in Latvian society, the court, when applying the principle of human dignity, had to specify the scope thereof in more detail and to indicate arguments as to why the obligations of the legislator arise from the principle of human dignity with respect to legal protection for families of same-sex partners, and why the protection of fundamental rights in the situation at hand is to be ensured at a higher level than prescribed by the norms of international law binding on Latvia. Nevertheless, the Judgment does not contain such arguments. Therefore, the court had no sufficient grounds to conclude that the contested norm, insofar as it envisages protection and support to the partner of the child's mother in relation to the birth of the child, is incompatible with the Constitution. Instead, when explaining the first sentence of Article 110 of the Constitution, the court as *obiter dictum* could point out the obligation to the legislator to protect and support each and every family, and to specify in more detail the principles to be observed by the legislator, when fulfilling this obligation.

Therefore, I cannot assent to the finding that exactly Section 155, Paragraph one of the Labour Law, insofar as it envisages protection and support to the partner of the child's mother in relation to the birth of the child, is incompatible with the first sentence

of Article 110 of the Constitution.

4. Finally, by way of concluding, I will mention several general considerations, which, in my opinion, were important when examining the case concerned.

In accordance with the meaning of Section 214 of the Family Law Part of 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. Thus, the legal act, the task whereof is to, inter alia, define the notion of a family, exactly prescribes that a family is based upon marriage.

To ensure the protection of the State for a marriage and a family, lay the foundation for creating of stable marriage relationship, as well as to ensure the equality of a woman and a man in a family relationship, the legislator has included the provisions on entering into marriage in the Civil Law (*see Vēbers J. Comments to the Civil Law of the Republic of Latvia. Family Law Riga: Mans Īpašums, 2000, pp. 16-24*). At present, the basis of the family legal relationship established in Latvia is, first of all, the freedom of a person to found his/her family at his/her own discretion. At the same time, there are also several restrictions, the purpose whereof is to ensure the existence of a healthy and sound family relationship in society (*see Vēbers J. Comments to the Civil Law of the Republic of Latvia. Family Law Riga: Mans Īpašums, 2000, pp. 16-24*). Namely, by regulating entering into marriage, the legislator, in Sections 32-38 of the Civil Law, has prescribed the cases, when entering into marriage is prohibited. For example, in accordance with Section 35 of the Civil Law, marriage between brothers and sisters, as well as between persons of the same sex is prohibited. In turn, Section 37 of this Law prohibits marriage between an adopter and an adoptee. Similarly, it is prohibited to concurrently be in several marriages.

The Judgment adopted in the examined case does not refer to the institution of marriage, nevertheless, the referred to provisions of the Civil Law also have such value that they disclose the legal idea currently existing in the legal system as to what form of cohabitation or union of persons is permissible at all, in legal terms, as well as from the perspective of the moral standards and ethical values, also when persons have selected to create actual cohabitation without entering into marriage.

Undoubtedly, as the reality of life changes and society develops, the understanding of the values changes, as well. Nevertheless, only the sovereign Latvia itself - directly or via the

public body elected in democratic elections - the parliament - is entitled to resolve the issue regarding the most appropriate regulation of the family legal relationship in contemporary Latvia, based on the moral standards and ethical values commonly accepted in society, as well as on the general principles of law and other norms of the Constitution.

Constitutional Court Justice

Aldis Laviņš