



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

---

## JUDGEMENT

on Behalf of the Republic of Latvia

in Riga on 5 December 2019

in Case No. 2019-01-01

The Constitutional Court of the Republic of Latvia, comprised of: chairperson of the court hearing Ineta Ziemele, Justices Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis, and Artūrs Kučs, having regard to an application by the Supreme Court,

on the basis of Article 85 of the *Satversme* of the Republic of Latvia and Para 1 of Section 16, Para 9 of Section 17 (1) and Para 19<sup>1</sup> and Para 28<sup>1</sup> of the Constitutional Court Law,

examined at the court hearing of 5 November 2019 in written procedure the case

**“On Compliance of Para 1 of Section 163 (4) of the Civil Law with Article 96 and Article 110 of the *Satversme* of the Republic of Latvia”.**

### The Facts

1. On 14 January 1992, the Supreme Council of the Republic of Latvia (hereafter – the Supreme Council) adopted the law “On the Civil Law of the Republic of Latvia 1937”, pursuant to which the Civil Law of the Republic of Latvia of 1937 (hereafter – the Civil Law) was reinstated. The date and procedure, in which separate parts of the Civil Law entered into effect, were defined in special laws. On 25 May 1993, the Supreme Court passed the law

“On the Date and Procedure, in which the Part on Family Law of the Civil Law of the Republic of Latvia of 1937 shall Enter into Force”, which provided that this law and the Family Law Part of the Civil Law entered into force on 1 September 1993.

Section 163 of the Civil Law, in the wording that entered into force on 1 September 1993, provided: “The adopter shall be legally capable, at least twenty five years old and at least eighteen years older than the adoptee.”

By the law, passed by the *Saeima* on 29 November 2012 “Amendments to the Civil Law”, which entered into force on 1 January 2013, Section 163 of the Civil Law was expressed in the following wording:

“The adopter must be at least twenty-five years old, and be at least eighteen years older than the adoptee.

The conditions regarding the minimum age of the adopter and permissible difference in age between the adopter and adoptee may be disregarded if ones own spouse's children are being adopted. Nevertheless, also in such case the adopter must be at least twenty-one years of age.

The restrictions laid down in Paragraph one of this Section may be disregarded if a genuine parent and child relationship is established between the adopter and adoptee.

The adopter may not be a person:

1) who has been punished for intentional criminal offences related to violence or threatening of violence – regardless of extinguishing of the criminal record or removal thereof;

2) who has been punished for criminal offences against morality and for sexual offences – regardless of extinguishing of the criminal record or removal thereof;

3) who has been removed from the performance of the duties of a guardian due to disorderly performance thereof;

4) whom the status of the foster family or host family has been removed, because he or she has not performed the relevant duties in conformity with the interests of the child;

5) whom the custody rights have been removed by a court judgment;

6) to whom a court has applied compulsory measures of medical nature laid down in the Criminal Law for a criminal offence provided for in the Criminal Law and committed in a state of mental incapacity.

In order to detect suitability for adoption, the Orphan's and Custody Court shall carry out research of the adopter's family in conformity with the procedures laid down by the Cabinet for not more than six months.”

On 29 October 2015, the *Saeima* adopted the law “Amendments to the Civil Law”, which entered into force on 3 December 2015. By Section 2 of this law, the word “intentional” was excluded from Para 1 of Section 163 (4) of the Civil Law (hereafter – the contested norm).

Since 3 December 2015, the contested norm has not been amended and is in force in the following wording: “The adopter may not be a person: 1) who has been punished for criminal offences related to violence or threatening of violence – regardless of extinguishing of the criminal record or removal thereof;”.

**2. The applicant – the Supreme Court** (hereafter – the Applicant) – holds that the contested norm is incompatible with Article 96 and Article 110 of the *Satversme* of the Republic of Latvia (hereafter – the *Satversme*).

The Applicant is hearing an administrative case, which has been initiated on the basis of a person’s application requesting issuing such favourable administrative act that would recognise the said person as the adopter of his spouse’s children. The applicant in the administrative case, which is heard by the Applicant, is living in a shared household with his spouse and her children already for more than ten years. The applicant had been involved in the daily care and supervision of his spouse’s children since their childhood, just as the children’s mother. The children address the applicant as the father and also perceive him as such. Thus, the actual familial relationship is said to exist between the applicant and the children. However, the Orphan’s and Custody Court, on the basis of the contested norm, had refused to recognise this person as

the adopter of his spouse's children because he had been punished for criminal offences related to violence or threatening of violence.

The concept of "family life", used in the *Satversme* is said to be applicable also to the spouses and the minor children of one of the spouses, who live in a shared household; and the actual family, where the parent-children relationships have evolved as the result of cohabitation of an adult and children and are based on mutual respect and trust, also enjoys the protection of rights established in Article 110 of the *Satversme*. Although Article 96 and Article 110 of the *Satversme* do not guarantee the right to adopt, a person has the right to apply for the adopter's status by requesting a competent institution to assess his or her compliance with the criteria set out in law. If the criteria set out in law prohibit a person from becoming an adopter then these persons' right to apply for the status of an adopter is restricted. However, if the institution refuses to grant the status of an adopter to a person, with whom the potential adoptees already have lasting actual family ties, which fall within the scope of protection of Article 96 and Article 110 of the *Satversme* as well as Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Human Rights Convention), by not granting the status of an adopter – which is a pre-condition for subsequent adoption – a person's right to family life is restricted. Hence, in the administrative case heard by the Applicant, the rights that follow from Article 96 and Article 110 are restricted.

The restriction on fundamental rights, included in the contested norms, – the restriction to become an adopter – had been established by law. The contested norm had been adopted, promulgated and is publicly accessible in accordance with the provisions of legal acts. A person is able to understand the content of rights that follow from the contested norm and forecast the consequences of application thereof. The legislator, in adopting the contested norm, had attempted to eliminate a threat to a child's safety. This approach by the legislator is aimed at protecting the child's interests and rights, which is compatible with the legitimate aim defined in Article 116 of the *Satversme* – protection of other persons' rights. In general, the legitimate aim of protecting

other persons' rights, in particular, children's safety, can be reached by the measure chosen by the legislator – the prohibition. However, the legitimate aim could be reached by measures that are less restrictive on a person's rights.

The prohibition included in the contested norm is absolute. I.e., the contested norm has been precisely worded and excludes any possibility to assess the particular case. This restriction is said to be applicable to criminal offences of a particular type, no exemptions to it are admissible, it is in force for an unlimited period and, thus, should be recognised as being absolute. Moreover, it is said to be questionable, whether the procedure, in which this prohibition was established, complied with the principle of good legislation.

The legislator substantiates the regulation included in the contested norm by the need to set for the adopters the same criteria, which, in the regulatory enactments aimed at reinforcing a child's safety, have been set for persons working with children, *inter alia*, teachers. Thus, the legislator had formally substantiated the need to establish the absolute prohibition to become an adopter for persons, who had been punished for committing a concrete criminal offence.

However, pursuant to the principle of good legislation, the legislator should have substantiated how the adopters, to whom the same requirements have been applied as to the teachers who work with children, are in similar and comparable circumstances with these teachers. Moreover, the preparatory materials of the contested norm do not provide confirmation that the legislator had assessed, whether, indeed, in all cases, where a criminal offence had been linked to violence or threatening of it, the prohibition to become an adopter is justified. Likewise, the legislator had not taken into account that, in connection with adoption, different situations are possible. I.e., a person may adopt a child from an out-of-family care institution or adopt one's ward, or adopt a child placed in his family as a foster family or, as in the particular case, adopt his spouse's child, with whom he had cohabited for a long period.

The legislator had not substantiated why, by establishing exemptions to the absolute prohibition envisaged in the contested norm, the legitimate aim of the restriction on the fundamental rights would not be reached in equivalent

quality. Namely, it has not been substantiated that the absolute prohibition is the only measure that would allow reaching the legitimate aim. However, the possibility to examine, whether a person, who had been punished for a violent crime, could become an adopter, would allow reaching the legitimate aim of the restriction on fundamental right – protecting other persons' rights – in the same quality as now. Also, the defining of a particular term, which has to expire after committing of a criminal offence and after the expiry of which a person could become an adopter, could be considered as being a less restrictive measure. Thus, the prohibition included in the contested norm is said to be incompatible with the principle of proportionality.

**3. The institution, which issued the contested act, – the *Saeima* – holds that the contested norm complies with Article 96 and Article 110 of the *Satversme*.**

The compliance of the contested norm with Article 96 and Article 110 of the *Satversme* should be examined in their interconnection. A family may exist also among persons, whose relationship has not been consolidated by biological or legally recognised ties. A familial relationship might have developed among the applicant in the administrative case heard by the Applicant and his spouse's children, the protection of which is the State's obligation, in accordance with Article 96 and Article 110 of the *Satversme*. In certain cases, the contested norm could restrict the right to private and family life, enshrined in Article 96 and Article 110 of the *Satversme*, as well as the protection of a family.

The State has an obligation, which follows from international law, to ensure the interests of a child take the priority in the adoption procedure. Likewise, the State has the obligation to protect children from violence and not permit adoption in cases, where the risk that the adopter could be violent against a child exists. By adopting the contested norm, the legislator had recognised that the situation, where a person, who had been punished for a criminal offence linked to violence or threatening of it, becomes an adopter, would not comply with the interests of the child. Hence, the legislator had adopted the contested

norm to ensure that the child's interests are respected, and the legitimate aim of the restriction on fundamental rights, included in the contested norm, is protecting other persons' rights.

The restriction on fundamental rights included in the contested norm is said to be appropriate for reaching the legitimate aim. The contested norm does not permit that persons, who previously had been violent and had committed crimes, which directly or in the form of threats had been related to violence against another person, could become adopters.

The measure chosen by the legislator should be recognised as the most effective, and the legitimate aim of the restriction on fundamental rights, included in the contested norm, could not be reached in the same quality by other measures, *inter alia*, assessment, referred to by the Applicant. By defining the categories of criminal offences, persons sentenced for the commitment of which could not be granted the right to apply for the adopter's status, the legislator already had chosen the most lenient measure for restricting a person's rights. The legislator is said to enjoy broad discretion in the matters of adoption. The contested norm, allegedly, does not set out a general restriction, which would deny the right to adopt to previously punished persons, but defines a concrete criterion for denying this right – violence or threatening of violence in committing a criminal offence. The damage that the restriction on fundamental rights, included in the contested norm, inflicts upon a person is said to be significantly smaller than the benefit to society by protecting children from possible domestic violence.

The State does not prohibit the applicant in the administrative case heard by the Applicant to cohabit or develop a familial relationship with his spouse's children. Likewise, the contested norm in no way weakens the mutual tie between him and his spouse's children and denies them the possibility to enjoy the family life in full. Hence, the restriction on fundamental rights included in the contested norms is said to be proportional.

**4. The summoned person – the Ministry of Justice** – holds that the contested norm complies with Article 96 and Article 110 of the *Satversme*.

The restriction on fundamental rights included in the contested norm had been established by law and, allegedly, has a legitimate aim – protection of both democratic state order and the rights of the child, and this restriction is said to be necessary and proportional.

It is maintained that the contested norm affects the rights of the child indirectly because it applies to the adopter. The rights and lawful interests of the child are said to be affected only insofar the person, who does not meet the criteria set in the contested norm, is prohibited from becoming an adopter and adopting a child. For a person, who, in compliance with the contested norm, has been prohibited from becoming an adopter, the legal consequences of criminal record continue even if the criminal record has been extinguished or removed. The criminal offence, committed by this person, that is related to violence or threatening of it, i.e., a concrete action, which is manifested as a violent infringement on another person's rights, characterises this person. In the Latvian legal system, the principle that a person, who has been punished for a criminal offence, which is related to violence or threatening of it, should reckon with various restrictions not only in matters of care and custody of children but also with respect to the right to take particular offices, is consistently complied with.

A child's right to be protected against violence and, thus, also the right to receive the care and upbringing appropriate for their age is said to prevail over the child's right to grow up in a familial environment. The family *per se* does not guarantee that the child is growing up in a safe and non-violent environment. Whereas the adoption of a child, even if the adopter is the spouse of the child's parent, cannot be an aim in itself because, in each particular case, the decision is made, in taking into account the principle that the rights and interests of the child take the priority.

Moreover, it should be taken into consideration that the child has the right to keep his identity. The concept of identity comprises awareness of those persons or groups of persons, who the child feels affiliated with. Thus, in

analysing, whether adopting the children of one's spouse complies with the interests of the child, in the context of the priority of the child's rights, special attention should be paid also to the fact, whether the child has or does not have the other parent, and, if yes, what are the actual relationships between the child and this parent.

**5. The summoned person – the Ministry of Welfare** – upholds the opinion presented in the written response by the *Saeima* and is of the opinion that the contested norm complies with Article 96 and Article 110 of the *Satversme*.

The best interests of the child are most important in the adoption procedure. No other interests – neither economic nor political, neither the interests of the national security or the adopters' interests – are more important than the child's interests, nor are they equivalent to them. In the context of adoption, the State must take all necessary actions, *inter alia*, also preventive, to eliminate a situation, where, following the adoption, the child's life is deteriorating and not improving.

Irrespective of the fact, whether a child, who has been in out-of-family care, or the child of the other spouse is adopted, adoption has the same consequences – a child-parent relationship is established. Therefore identical criteria have been set in the legal regulation for recognising a person as an adopter, and no exemptions have been envisaged. Moreover, due to the imperative nature of the contested norm, there is no need to assess, whether a person had committed a criminal offence, which has been related to violence or threatening of it, in early age or in later years of his life. A child's interest to grow up in a safe environment prevails over an adult's wish to adopt a particular child.

**6. The summoned person – the Ombudsman** – holds that the contested norm is incompatible with Article 96 and Article 100 of the *Satversme*.

The contested norm is said to be an absolute obstacle for persons, who have been punished for criminal offences, which are related to violence or threats of violence, to become adopters. In this context, the right to inviolability of private life, defined in Article 96 of the *Satversme*, and the right, defined in Article 110, to protection to the rights of the family, parents and children, are said to be interconnected and, thus, need to be examined in their interconnection.

In drafting the amendments to the Civil Law, by which, *inter alia*, the contested norm was introduced, the legislator had not assessed the fact that, in connection with adoption, various different situations were possible, depending on the previous relationship between the potential adopter and the child. Likewise, before the contested norm was adopted, it had not been analysed, whether, indeed, it was necessary to establish such absolute prohibition without any possibility to review it. However, the deficiencies identified in the legislative procedure are not that substantial to allow stating that the respective restriction had not been established by law.

The contested norm is said to have a legitimate aim – protecting the child from domestic violence of all kinds. This aim could be reached if a person, who has been punished for a violent crime wants to adopt a child that he is not cohabiting with. However, the legitimate aim cannot be reached by the contested norm in the case, where a person, who has been punished for a violent crime, is the spouse of a child's parent because, irrespectively of the possibility for him to adopt the child, the child, nevertheless cohabits with a person who has a previous criminal record. It is maintained that it is impossible to ensure by the contested norm that a person also following adoption would not encounter a person, who has been previously punished for a violent crime. If the risk that this person could act violently again cannot be identified then the restriction established by the contested norm does not reach its legitimate aim and this restriction limits the child's right to grow up in a family.

It is alleged that the restriction on fundamental rights, established by the contested norm, is not proportional because the legitimate aim could be reached by other measures, less restrictive on an individual's rights and lawful interests.

The State has the obligation to protect preventively children from domestic violence and not allow adoption if there is a risk that the adopter could be violent against the child; however, the preventive measures should be necessary and targeted. The fact that a person had been punished for a criminal offence involving violence *per se* cannot be the grounds for the absolute prohibition of adoption. The usefulness of such prohibition after the criminal record has been extinguished or removed should be meticulously reviewed in interconnection with all other materials in the case, *inter alia*, a psychiatrist's opinion on the person's mental health status and a psychologist's opinion on the person's suitability for performing the adopters' duties.

**7. The summoned person – the State Inspectorate for Protection of Children's Rights** – noted that the proportionality of the restriction on fundamental rights, established by the contested norm, should be examined, as well as the possibility to envisage in the contested norm such measures that would be less restrictive on a person's right but would ensure protection of a child against violence at least in the same quality.

The aim of the contested norm is to protect the child from the possible violence by the adopter. Pursuant to the provisions of international and national regulatory enactments, special protection has been envisaged for children, and the rights and interests of the child should take priority in the state. Moreover, in accordance with Article 96 and Article 110, the State has the obligation to protect and support also an actual family. Hence, the circumstances of adoption may differ on the case-by-case-basis, and they should be assessed individually.

**8. The summoned person – the Riga Orphans and Custody Court** – states that the assessment of the compliance of the contested norm with Article 96 and Article 110 of the *Satversme* is not unambiguous.

On the one hand, the contested norm is important and necessary because it serves to protect the children left without parental care, but, on the other hand, with respect to adopting a child of the other spouse, it turns into an

insurmountable legal obstacle; moreover, creates inequality between the children of the other spouse and the common child of both spouses, if there is such. The current legal regulation, in general, should be reviewed and improved to differentiate between the adoption of the other spouse's child and the adoption of children left without parental care.

The case reviewed by the Applicant is said to be the only case when the Riga Orphans and Custody Court had applied the contested norm. It had been applied as an imperative legal norm. In examining, whether the criminal offence committed by the applicant in the said case had been related to violence or threatening of violence, the Riga Orphans and Custody Court had taken into account the court judgement that had legally entered into force and the facts indicated therein.

**9. The summoned person – the Latvian Association of Local and Regional Governments** – holds that the contested norm is important and necessary since it does not allow persons, who previously have acted violently or have committed crimes, which either directly or through treats had involved violence, to become adopters. However, the actual circumstances in each particular case could be different, therefore, it should be considered whether any exemptions could be made.

**10. The summoned person – association “The Latvian Association of Employees of Orphans’ and Custody Courts”** – holds that the current legal regulation, in general, should be reviewed and improved to differentiate between the adoption of the other spouse's child and the adoption of children left without parental care.

Orphans and Custody Courts, in preparing the materials for any adoption case, request information from the Criminal Records Register and if the person applying for the status of an adopter has been punished they examine the compliance of the particular criminal offence with the criteria defined in the contested norm. In this process, those criminal offences, which are included in

Chapter XII of the Criminal Law “Homicide”, Chapter XIII of the Criminal Law “Criminal Offences against Health of a Person”, Chapter XVI of the Criminal Law “Criminal Offences against Morality and Sexual Inviolability”, Chapter XVII of the Criminal Law “Criminal Offences against Family and Minors” as well as in some Sections of Chapter XX “Criminal Offences against General Safety and Public Order”, for example, Section 231 “Hooliganism” are considered to be criminal offences related to violence or threatening of violence. If a person has been punished for a criminal offence that is related to violence or threatening of it, the Orphans and Custody Court, in accordance with the contested norm, adopts a decision on the person’s incompatibility with the status of an adopter.

**11. The summoned person –Dr. iur. Valentija Liholaja, Professor at the Faculty of Law of the University of Latvia,** – notes that the legitimate aim of the restriction on fundamental rights included in the contested norm could be reached by measures that are less restrictive on a person’s rights.

The prohibition, established by the contested norm, to become an adopter has been applied to all persons, who have been punished for any criminal offence, i.e., criminal offences, less serious, serious and particularly serious crimes if these have been related to violence or threatening of violence. Physical violence is criminal danger posed to a person’s physical safety. Emotional violence, in turn, threatens a person’s mental wellbeing, mental piece, which is understood as the status of mental balance and positive emotionality.

It follows from the international documents on human rights as well as Article 96 and Article 110 of the *Satversme* that the concepts “family” and “family life” should be interpreted more broadly and be applicable not only to a family, which is based on marriage, but also to actual families, i.e., the spouses and the minor children of one spouse who live in a shared household, to families, where the parent-child relationships have evolved as the result of adoption. The State has the obligation to protect such families. However, the rights established in Article 96 and Article 110 of the *Satversme* may be

restricted, and such restriction with respect to adoption is envisaged also in the contested norm.

The legitimate aim of the restriction on fundamental rights, included in the contested norm, is the protection of other persons' rights. The measure chosen by the legislator – the prohibition, in general, serves the legitimate aim, to not permit a situation, where persons, who had been convicted for violent offences, adopt children, and, thus, prevent the possible threat to the adoptees' safety. However, it should be considered, whether the legitimate aim could not be reached in the same quality by measures that would be less restrictive on an individuals' rights.

Firstly, the contested norm excludes any assessment of the criminal offence committed by the person, except for the note that it was related to violence or threatening of violence. However, the actual cases of perpetrating violence or threatening violence may differ as to the degree of harm, and the victim of the criminal offence may be both an adult and a minor. Moreover, the prohibition pertains to criminal offences envisaged both in the Criminal Law and the Criminal Code of the Latvian Social Socialist Republic, formerly in force. In the course of time, the criminal law and the policy of criminal sanctions have changed, innumerable changes and amendments have been introduced to the constituent elements of various criminal offences, *inter alia*, also totally or partially decriminalising some criminal offences. Likewise, the theoretical findings and interpretations of the features of constituent elements of criminal offences have changed.

Secondly, the absolute prohibition, included in the contested norm, excludes any possibility to evaluate the personality of the person, who wishes to become an adopter. It may also happen that a person who, in particular, early in his youth, has committed a criminal offence, even one that was related to violence or threatening of violence, has changed and has become a law-abiding member of society.

The State has the obligation to protect a child against violence, *inter alia*, not permitting adoption if there is a risk that the adopter could treat the child

violently. However, by establishing the absolute prohibition, the legislator had presumed, actually, the existence of such a risk with respect to each person who once, perhaps while being a child or of immature age, had committed a criminal offence related to violence or threatening of it. Hence, the possibility to reach the aims of criminal punishment, *inter alia*, re-socialisation of a person and special prevention, is excluded. Moreover, the absolute prohibition, included in the contested norm, restricts also a child's inalienable right to family, in particular, if lengthy existence of an actual family can be established.

An absolute prohibition to become an adopter should be applied to persons, who have committed criminal offences related to violence or threatening of it against persons who had not reached the age of eighteen or intentional violent crimes against a person's life, health, morals and sexual inviolability in the presence of a minor, irrespectively of the extinguishing or removal of the criminal record. If the criminal offence linked to violence or threatening of it had not been directed against the child's interests then the matter of the possibility of a person with a criminal record to become an adopter should be examined individually after the criminal record had been extinguished or removed or upon the expiry of another term set in the law. A solution like this would give the possibility to reach the legitimate aim in the same quality as by the contested norm but by more lenient measures.

**12. The summoned person –Dr. iur. Kaspars Balodis, Professor at the Faculty of Law of the University of Latvia,** – notes that the contested norm complies with Article 96 and Article 110 of the *Satversme*.

The contested norm comprises absolute prohibition, which prohibits the competent institution (Orphans and Custody Court) to continue any assessment of whether a person should be allowed to adopt a child who has not reached majority.

From the perspective of the *Satversme*, the legal relationship of adoption, primarily, should be linked to the concept, included in the first sentence of Article 110 of the *Satversme*, “supporting family”. However, a person's wish to

apply for the status of an adopter could be examined also in the context of the right to inviolability of private life, established in Article 96 of the *Satversme*. A person's attempt to adopt a minor child and thus find self-fulfilment in the area of creating familial relationships could be viewed as one of the forms in which his private autonomy manifests itself.

Persons' right to submit an application for the initiation of adoption process, requesting an assessment of their suitability for the status of an adopter, defined in regulatory enactments, falls within the scope of Article 96 and Article 110 of the *Satversme*. Hence, the restriction defined by the contested norm should be viewed as a restriction on a person's fundamental rights in the area of protection of the family and private life. Taking into account similar features in the scope of Article 96 and Article 110 of the *Satversme*, there are grounds to examine the compliance of the contested norms simultaneously with both articles of the *Satversme* referred to above.

The facts and arguments presented in the application do not create the conviction that the restriction on fundamental rights, enshrined in Article 96 and Article 110 of the *Satversme*, had not been established by law or had been adopted in haste, disregarding the principle of good governance. The Applicant's reasoning regarding the legitimate aim of the restriction on fundamental rights established in the contested norm can be upheld. I.e., minor children are protected against being adopted by persons who already have been punished for crimes related to violence or threatening of violence and, possibly, could be violent again, this time – against the adopted child. This is said to be compatible with the legitimate aim – protection of other persons' rights.

The restriction on fundamental rights, set in the contested norm, is compatible with the proportionality principle. It is said to be a rational, reasonable and effective measure for protecting preventively children against being adopted by a potentially violent person and, thus, should be recognised as being an appropriate measure for reaching the legitimate aim. Moreover, the prohibition included in the contested norm is said to be the only measure for reaching the legitimate aim in the required quality. Individual assessment of

persons, who had been punished for criminal offences referred to in the contested norm, setting a maximum term for the restriction or any other measures that would be more lenient towards the persons referred to in the contested norm would not allow reaching the legitimate aim in the same quality. The society benefits from the fact that the contested norm prohibits the persons, who have been punished for criminal offences that are related to violence or threatening of it, from becoming adopters since subjecting even one child to the risk of potential violence would be inadmissible. Whereas the infringement on the rights of the persons referred to in the contested norm, i.e., prohibition to become an adopter and, thus, find self-fulfilment in the area of private and family life should be recognised as being outweighed by the public benefit.

**13. The summoned person – Mg. iur. Kristīne Zīle, a sworn advocate, a lecturer at the Faculty of Law of the University of Latvia** – holds that the contested norm complies with Article 96 and Article 110 of the *Satversme*.

The contested norm had been adopted for the sake of child safety, respecting the supreme priority – protecting the interests of children to be adopted. The legislator had tried to prevent the possibility that, after the adoption, the child would come into an environment where he would be subjected to violence or become dependent on a person who, as known to the State, previously had committed a crime related to violence or threatening of violence. Moreover, it should be taken into account that the Latvian society is too tolerant of domestic violence. It is unacceptable, and the State should act firmly and immediately to improve the situation radically.

A family does not mean only a legally concluded marriage or such personal relationships that are based on biological or legally recognised ties. A family may be based on kinship; however, a couple's cohabitation, a shared household, striving for a common future, raising of children and other family-type relationships allow attributing the concept of "family" also to persons, who have not registered their partnership, thus ensuring equal rights to all children.

Viewing the interests of any child to be adopted as being the priority, which includes the right to be protected against the slightest probability of violence, the restriction included in the contested norm should be recognised as being compatible with the proportionality principle. If the contested norm were to be recognised as being incompatible with Article 96 and Article 110 of the *Satversme* and void then the situation without any regulation on the particular matter could not be recognised as being lawful and compatible with the best interests of the child.

**14. The State Probation Service** informs the Constitutional Court that the type of a criminal offence (a violent or non-violent criminal offence) is not the only characteristics that could be indicative of a risk that a criminal offence related to violence or threatening of it would be committed again. The fact that a person had been punished for a criminal offence related to violence or threatening of it is not enough to establish that a person would create threat to society in the long-term. To assess, whether persons, who have been punished for criminal offences related to violence or threatening of it, really pose a risk to society, the existence of criminal proceedings initiated in the past and the criminal record, the age of the sentenced person as well as the time that the person had spent in the community without committing new criminal offences should be taken into account. The risk that criminal offences related to violence or threatening of it could be committed is said to be higher with respect to young persons and to decrease over time. Moreover, with respect to many convicted persons, who, within seven to ten years, while being free in the community, have not reoffended, the level of this risk is said to decrease to the extent that the risk caused by these persons does not exceed the risk caused to society by persons with no previous criminal record.

## **The Findings**

15. The Applicant holds that the prohibition, included in the contested norm, is incompatible with the *Satversme* because it applies, *inter alia*, to cases, where a person applies for the adoption of the other spouse's child, with whom he has cohabited for a long time. In this situation, the research of the respective person and the family could reveal how this person acts in the relationship with the child and whether any circumstances are present that could be indicative of violence or risk of it in the relationship with the child. Moreover, the Applicant notes that, with respect to adoption, several different situations are possible; i.e., a person may adopt a child from a care institution, his or her ward as well as a child placed in foster care or the other spouse's child, with whom he already cohabits (*see the application in the Case Materials, Vol. 1, p. 7*).

It follows from a number of summoned persons that the situations, where a person submits an application for adopting the other spouse's child, should be separated from situations where a child, who has been placed in a care institution, is adopted (*see the opinions of the Ombudsman, Riga Orphans and Custody Court, the Latvian Association of the Employees of Orphans' and Custody Courts, Case Materials, Vol. 2, pp. 45–46, 48 and 83*).

The Applicant holds that in those cases, where a person submits an application for adopting the other spouse's child, with whom he cohabits, parent-child relationship might have developed between them. Such a relationship between an adult and a child is an actual familial relationship. The Constitutional Court has recognised that, in reviewing a case that has been initiated on the basis of a court's application, it must take into account the provisions of the Constitutional Court Law and assess the situation insofar it is necessary for adjudicating the particular administrative case. Moreover, the Constitutional Court must examine the situation of all those persons, who are in circumstances that are similar and comparable to the circumstances in the case to be examined in court. However, if the norm, contested in the application, applies to an extensive set of different situations, it might be necessary for the Constitutional Court to specify the extent, to which it will examine this norm (*compare, see Judgement of 28 March 2013 by the Constitutional Court in Case*

*No. 2012-15-01, Para 9, and Judgement of 7 July 2014 in Case No. 2013-17-01, Para 19).*

In view of the arguments presented in the application and other materials in the case, it can be concluded that the basic question in the case is, whether the State's actions, by including in the contested norm also the prohibition to adopt the other spouse's child, comply with the right to the inviolability of private life and protection of the family.

**Hence, in the present case, the Constitutional Court will assess the compliance of the contested norm with Article 96 and Article 110 of the *Satversme*, insofar it applies to persons, who submit an application for adopting the other spouse's child.**

**16.** If the compliance of a contested norm with several legal norms of higher legal force is challenged then the Constitutional Court, in view of the merits of the case under review, must determine the most effective approach to reviewing this compliance (*see, for example, Judgement of 18 October 2018 by the Constitutional Court in Case No. 2017-35-03, Para 8*). The Applicant notes that it is impossible to delimit precisely the right to protection of the family in the scope of Article 96 and Article 110 of the *Satversme* (*see the application in Case Materials, Vol. 1, p. 3*). In view of the above, the Constitutional Court, to determine the most effective approach to reviewing the compliance of the contested norm in the present case, will, first of all, clarify the scope of Article 96 and Article 110 of the *Satversme*.

**16.1.** Article 96 of the *Satversme* provides that everyone has the right to the inviolability of private life, home and correspondence.

The rights, specified in Article 96 of the *Satversme*, are indissolubly linked to the constitutional axiom, included in the first sentence of the fourth paragraph in the Preamble to the *Satversme*: Latvia, as a democratic state governed by the rule of law, is based on human dignity and freedom. A person's private life is that sphere of human existence, in which an individual, as a reasonable being and the supreme value of a democratic state governed by the

rule of law, exercises his or her freedom. The exercise of this freedom is the manifestation of a person's autonomy and self-determination, which constitute the private life of the respective person.

As the Constitutional Court has recognised, the right to inviolability of private life means that individuals have the right to their private space, the right to live as one wishes to, to live in harmony with one's essence and wishes, to develop and improve one's personality, the right to create and develop relationships with other persons and the external world, the right to identify with a certain social group and develop communication with other persons, suffering as minimum as possible interference by the State or other persons (*see Judgement of 23 April 2009 by the Constitutional Court in Case No. 2008-42-01, Para 9, and Judgement of 17 November in Case No. 2017-01-01, Para 19*).

The European Court of Human Rights also has recognised that the right to private life protects a human being as a person, their development, the right to create and develop relationships with other persons, in particular, in the area of emotions, and with the external world (*see Judgement of 16 December 1992 by the European Court of Human Rights in Case "Niemiets v. Germany", Application No. 13710/88, Para 29, Judgement of 29 April 2002 in Case "Pretty v. the United Kingdom", Application No. 2346/02, Para 61, and Judgement of 28 January 2003 in Case "Peck v. the United Kingdom", Application No. 44647/98, Para 57*). The right to private autonomy may comprise a person's interaction of public nature with other people (*see Judgement of 25 September 2001 by the European Court of Human Rights in Case "P.G. and J.H. v. the United Kingdom", Application No. 44787/98, Para 56 and 57*). Moreover, it comprises the right to privacy – the individuals' right to develop their social identity through creating relationships with other persons (*see Judgement of 5 September 2017 by the Grand Chamber of the European Court of Human Rights in Case "Bărbulescu v. Romania", Application No. 61496/08, Para 70*).

**16.2.** Article 110 of the *Satversme* provides that the State protects and supports marriage – a union between a man and a woman, the family, the rights

of parents and the rights of the child. The State provides special support to disabled children, children left without parental care or who have suffered from violence.

**16.2.1.** One of the rights included in Article 110 of the *Satversme* is the family's right to special support and assistance by the State (*see Judgement of 4 November 2005 by the Constitutional Court in Case No. 2005-09-01, Para 8*). Moreover, the State must protect every family (*see Judgement of 27 June 2016 by the Constitutional Court in Case No. 2015-22-01, Para 13*).

The Constitutional Court, in specifying the first sentence of Article 110 of the *Satversme*, in interconnection with the norms included in the international human rights documents and the practice of application thereof, has recognised that the State has the obligation to ensure social and economic protection to the family (*compare, see Judgement of 4 November 2005 by the Constitutional Court in Case No. 2005-09-01, Para 8.2., and Judgement of 15 February 2018 in Case No. 2017-09-01, Para 9*). The State's obligation to foster economic, social and also legal protection of the family follows from the norms of the European Social Charter (*compare, see Judgement of 2 November 2006 by the Constitutional Court in Case No. 2006-07-01, Para 13.4.*).

The State's obligation to ensure legal protection to the family requires such legal regulation, which creates and maintains the legal framework of the familial relationships existing in social reality, determining the personal and financial relationships of the participants of these relationships. If the State does not envisage the legal framework for legal familial relationships then it is impossible to ensure the social and economic rights, included in Article 110 of the *Satversme*, to the participants of these legal relationships. On the one hand, the legislator enjoys discretion with respect to considerations in determining the content of this legal framework; however, on the one hand, this discretion is not unlimited (*compare, see Judgement of 18 April 2019 by the Constitutional Court in Case No. 2018-16-03, Para 15.1.*). The legal framework for familial relationships, established by the legislator, must comply with the general principles of law and other norms of the *Satversme*, the international and the

European Union law as well as, pursuant to the second sentence in the fifth paragraph of the Preamble to the *Satversme*, it should be aimed at creating a cohesive society.

**16.2.2.** It follows from the second and third sentence in the fifth paragraph of the Preamble to the *Satversme* that the family is the foundation of a cohesive and solidary society. The family is a social institution, which is based on the close personal links identified in the social reality, based on understanding and respect.

The European Court of Human Rights also has recognised: even in the absence of a biological link or legally recognised child-parent relationships, an actual familial relationship may exist between a child and a person, who has cared for the child, depending on whether they cohabit, the duration and quality of their relationship as well as the adult's role in the relationship with the child (*compare, see Judgement of 22 November 2010 by the European Court of Human Rights in Case "Moretti and Benedetti v. Italy", Application No. 16318/07, Para 48, and Judgement of 17 April 2012 in Case "Kopf and Liberta v. Austria", Application No. 1598/06, Para 37*). The existence of close personal ties between persons follows from a marriage concluded by them or the fact of kinship; however, in the social reality, close personal ties develop also in other ways, for example, as the result of actual cohabitation. The protection of the family, including an actual family, falls within the scope of Article 110 of the *Satversme*

Thus, the State's obligation to ensure legal protection to the family, *inter alia*, by introducing such legal regulation that defines the legal framework of familial relationships, is included in Article 110 of the *Satversme*.

**16.3.** The Applicant, essentially, holds that the contested norm is incompatible with Article 96 and Article 110 of the *Satversme* because the prohibition to become an adopter, included in it, denies legal protection in the form of adoption to the actual familial relationship, which has developed between the applicant in the administrative case, heard by the Applicant, and his spouse's children.

**16.3.1.** Adoption is a legal institution, through which a person accepts another person's child as his own, and it creates such personal and financial rights and obligations as kinship due to origin (*see the opinion of. Dr. iur. Kaspars Balodis in Case Materials, Vol. 2, p.60*). Hence, the legal familial relationship may be created as the result of adoption because the relationship of the adopter and the adoptee *a priori* are equalled to parent-child relationship. Moreover, the fact, whether the adopter and the adoptee have cohabited and close ties have already developed between them, is not always decisive (*see, for example, Judgement of 22 June 2004 by the European Court of Human Rights in Case "Pini and others v. Romania", Application No. 78028/01 and 28030/01, Para 143–148, Judgement of 20 May 2010 in Case "Kurochkin v. Ukraine", Application No. 42276/08, Para 37, and Judgement of 14 November 2013 in Case „Topčić-Rosenberg v. Croatia”, Application No. 19391/11, Para 38*).

At the same time, it should be taken into account that the European Court of Human Rights has recognised that a person's right to adopt a child does not follow from Article 8 of the European Convention on Human Rights (*see, for example, Judgement of 22 January 2008 by the European Court for Human Rights in Case "E. B. v. France", Application No. 43546/02, Para 41–42, and Judgement of 24 January 2017 in Case "Paradiso and Campanelli v. Italy", Application No. 25358/12, Para 141*). The result of adoption is providing a child with a family, not a family with a child (*see Judgement of 26 February 2002 by the European Court of Human Rights in Case "Fretté v. France", Application No. 36515/97, Para 42*). In specifying the norms of the *Satversme* in interconnection with the norms included in international human rights documents, harmony of these norms should be ensured. Hence, the right to adopt a particular child does not fall within the scope of Article 96 of the *Satversme* regarding the inviolability of private life, and Article 96 of the *Satversme* does not include the State's obligation to ensure it to a person.

Thus, the Constitutional Court concludes that the contested norm does not cause an infringement on a person's right to inviolability of private life, included

in Article 96 of the *Satversme*; therefore, pursuant to Para 6 of Section 29 (1) of the Constitutional Court Law, legal proceedings in this part of the case should not be continued.

**16.3.2.** It follows from the second part of Article 8 of the Council of Europe of 24 April 1967 European Convention on the Adoption of Children that the objective of adoption is to ensure to the child a stable and harmonious living environment. The State should ensure, to the extent possible, that a child grows up in such an environment (*compare, see Judgement of 16 May 2019 by the Constitutional Court in Case No. 2018-21-01, Para 16.2.*). Thus, in those cases, where an actual familial relationship has developed between the child and the adult, the State should provide the legal protection to ensure that, with the child becoming integrated into the family, this relationship could continue developing, at the same time taking into account the best interests of the child (*compare, see Judgement of 28 June 2007 by the European Court of Human Rights in Case “Wagner and J. M. W. L. v. Luxembourg”, Application No. 76240/01, Para 119*). Such obligations of the State with respect to legal protection for the family are included also in Article 110 of the *Satversme*. I.e., the State has the obligation to ensure legal protection to the family, *inter alia*, creating the legal framework of adoption and, thus, defining the grounds for a legal familial relationship. The existence of such legal framework is one of the ways, in which the legislator may fulfil not only the obligation set in the second sentence of Article 110 of the *Satversme* to help, in particular, children left without parental care but also to ensure legal protection to those families, which are based on the actual familial relationship between an adult and his spouse’s child.

Since the basic question in the pending case – i.e., the question regarding the State’s action in establishing prohibition for a person to adopt his spouse’s child – applies exactly to the obligation to protect the family, included in Article 110 of the *Satversme*, *inter alia*, to ensure to the family legal protection in the area of adoption, the Constitutional Court will examine, whether the State has fulfilled this obligation

**Hence, the legal proceedings in the part of the case regarding the compliance of the contested norm with Article 96 of the *Satversme* must be terminated, and the Constitutional Court will examine, whether the State, by adopting the contested norm, has fulfilled its obligation, established in Article 110 of the *Satversme*, to ensure to a family legal protection in the area of adoption.**

17. To examine in the present case, whether the State has fulfilled its obligation, included in Article 110 of the *Satversme*, to ensure legal protection to a family in the area of adoption, the Constitutional Court must verify firstly, whether the legislator has introduced measures to ensure legal protection to a family in the area of adoption; secondly, whether these measures have been introduced appropriately, i.e., whether the general principles of law derived from the basic norm of a democratic state governed by the rule of law and other norms of the *Satversme* have been complied with (*compare, see Judgement of 23 November 2015 by the Constitutional Court in Case No. 2015-10-01, Para 14*).

18. To verify, whether the legislator has introduced measures to ensure to a family legal protection in the area of adoption, the Constitutional Court must establish, whether and how the legislator has set the legal regulation on adoption.

18.1. Section 31 (1) of the Law on the Protection of the Children's Rights provides: in order to ensure a familial environment for the development of the child, adoption is supported. Whereas pursuant to the second part of the aforementioned section, the legal grounds for adoption are defined in the Civil Law but the procedure of Adoption – the Cabinet Regulation.

It follows from the Civil Law that adoption is a process, as the result of which the child – the adoptee – becomes a member of the family of an adult, who has reached a certain age, – the adopter, and the adopter acquires custody rights (*see the first, the second and third part of Section 163 and the first part of Section 172 of the Civil Law* ). With respect to the adopter and his relatives, the

adopted child and his successors acquire the legal status of a child born in a marriage with respect to the personal and also financial relationships (*see Section 173 (1) of the Civil Law*). Moreover, adoption is possible only if it is in the best interests of the child and there are grounds to believe that a genuine child-parent relationship will develop between the adopter and the adoptee (*see Section 162 of the Civil Law*). The substance of adoption is establishing a parent-child relationship between the adopter and the adoptee, the adoptee acquiring the legal status of the adopter's biological child (*see the opinion of. Dr. iur. Kaspars Balodis in Case Materials, Vol. 2, p. 60*).

**18.2.** The procedure for adopting children is determined by the Cabinet Regulation of 30 October 2018 No. 667 "Procedure of Adoption" (hereafter – Regulation No. 667). However, at the time when the contested norm was applied in the administrative case, examined by the Applicant, the procedure of adoption was determined by the Cabinet Regulation of 11 March 2003 No. 111 "Procedure of Adoption" (hereafter – Regulation No. 111).

The procedure of adoption begins when a person submits an application to the Orphans' and Custody Court (*see Para 12 of Regulation No. 111 and Para 17 of Regulation No. 667*). After the receipt of the application, the Orphans' and Custody Court researches this person and his family, *inter alia*, the Orphans' and Custody Court assesses also the relationships between the family members, verifies the person's living conditions and also requests information about the person included in the Criminal Records Register (*see Para 18 of Regulation No. 111 and Para 22 and Para 23 of Regulation No. 667*). Upon concluding the research, the Orphans' and Custody Court makes a decision to recognise the person as being an adopter (*see Para 20 of Regulation No. 111 and Para 24 of Regulation No. 667*). If the person is recognised as being an adopter, he can continue the adoption process and care and supervision of the child for the term up to six months, while the Orphans' and Custody Court researches the adopter's family (*see Section 162 (2) of the Civil Law, Para 31 of Regulation No. 111 and Para 41 and Para 46 of Regulation No. 667*). At the end of the care period, the Orphans' and Custody Court summarises the results of researching

the family, prepares its opinion, whether adoption into the adopter's family is in the best interests of the child, and makes a respective decision (*see Section 169 (5) of the Civil Law, Para 32 of Regulation No. 111 and Para 49 of Regulation No. 667*). If the Orphans' and Custody Court decides that adoption is in the interests of the child it, simultaneously with the decision, issues to the adopter the child's documents for submitting to the court (*see Para 34 of Regulation No. 111 and Para 50 of Regulation No. 667*). The adoption is considered as having occurred as of the moment when it has been approved by the court (*see Section 170 (1) of the Civil Law*). After approval of the adoption, the Orphans' and Custody Court regularly assess the care and supervision of the child in the family (*see Para 39 of Regulation No. 111 and Para 53 of Regulation No. 667*).

The Constitutional Court finds that the legal regulation included in Regulation No. 111 and Regulation No. 667 is similar; however, Regulation No. 667 envisages special legal regulation with respect to the adoption of the child of a potential adopter's spouse in a situation, where the child lives in the potential adopter's family. I.e., the Orphans' and Custody Court, in examining the compatibility of the potential adopter, at the same time also examines his relationship with the child to be adopted and decides, whether adoption is in the best interests of the child (*see Para 28 of Regulation No. 667*). In such a case, the child is not placed separately in the pre-adoption care and the Orphans' and Custody Court may recognise the person as being an adopter and establish that adoption is in the child's best interests.

**18.3.** In the adoption process, the contested norm is applied when the Orphans' and Custody Court researches the person and his family, *inter alia*, requesting information about the person included in the Criminal Records Register. If the Orphans' and Custody Court receives information that a person has been punished for a criminal offence that is related to violence or threatening of it, in accordance with the contested norm, it adopts the decision on the person's incompatibility with the status of an adopter (*see opinions of the*

*Latvian Association of Employees of Orphans' and Custody Courts, Case Materials, Vol. 2, p. 82).*

Although the contested norm prohibits some persons from acquiring the status of an adopter and adopting a child, the Civil Law, the Law on the Protection of the Children's Rights and the Cabinet Regulation on the procedure of adoption, issued on the basis of it, comprise legal regulation that envisages the possibility for a person to adopt his spouse's children and define the personal and financial relationships between the said person and the child. Thus, the legislator has established legal regulation aimed at ensuring legal protection for the actual familial relationship between a person and his spouse's children.

**Thus, the legislator has introduced measures to ensure legal protection to a family in the area of adoption.**

19. To verify, whether the legislator has introduced measures for ensuring legal protection to a family in the area of adoption properly, the Constitutional Court will verify, whether the legislator has abided by the general legal principles derived from the basic norm of a democratic state governed by the rule of law and other norms of the *Satversme*.

The Applicant questions the compliance of the contested norm with the proportionality principle. The Constitutional Court has recognised that the obligation of all state institutions to abide by the proportionality principle in their work follows from the basic norm of a democratic state governed by the rule of law. It provides that the relationship between the actions of the state power, which restrict a person's rights and legitimate interests, and the aim that the state power reaches by these actions, should be, in general, reasonable (*see Judgement of 14 December 2018 by the Constitutional Court in Case No. 2018-09-0103, Para 14.3*).

19.1. The *Saeima* notes that the contested norm is aimed at protecting the children's rights. The prohibition included in it has been established with the aim of protecting the adoptee against domestic violence (*see the written reply by the Saeima in Case Materials, Vol. 1, p. 28*).

The first part of Article 19 of the United Nations Convention of 20 November 1989 on the Rights of the Child (hereafter – the Convention on the Rights of the Child) provides that the State Parties must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child. The contested norm is part of the legislative measures, referred to above, that the legislator has introduced to ensure the protection of children against violence (*see the written reply by the Saeima in Case Materials, Vol. 1, p. 22*).

Thus, the aim of the prohibition included in the contested norm is protecting the rights of children, i.e., other persons' rights.

**19.2.** The Applicant does not question the fact that the aim of the restriction included in the contested norm is the protection of children's rights; however, it notes that the prohibition included in the contested norm is absolute. I.e., it is valid until the end of the respective person's life and does not envisage assessment on case-by-case basis (*see the application in Case Materials, Vol. 1, p. 5*). Several summoned persons also express a similar opinion (*see the opinion of the Ombudsman, Dr. iur. Valentija Liholaja and Dr. iur. Kaspars Balodis in Case Materials, Vol. 2, pp. 44, 53 and 58*).

Both the Constitutional Court and the European Court of Human Rights have examined absolute prohibitions [*see, for example, Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, as well as the Judgement of 6 November 2005 by the European Court of Human Rights in Case "Hirst (no. 2) v. The United Kingdom", Application No. 74025/01, Para 82, and Judgement of 22 April 2013 in Case "Animal Defenders International v. The United Kingdom", Application No. 48876/08, Para 106*]. The Constitutional Court already has recognised that a prohibition, which applies to each person belonging to a certain group, does not allow exemptions and is established for life, is to be considered as being absolute (*see Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01,*

*Para 12.3.*). Similarly, it is indicated in the judicature of the European Court of Human Rights that legal regulation, which must be applied irrespectively of the circumstances of the particular case, is absolute by nature (*see, for example, Judgement of 10 April 2007 by the European Court of Human rights in Case “Evans v. the United Kingdom”, Application No. 6339/05, Para 89*). Thus, it follows from the judicature of both courts: to establish that the prohibition included in a legal norm is absolute, it must be examined, firstly, whether it applies to all persons belonging to a certain group, i.e., whether it envisages individual assessment of each particular case, thus allowing exemptions, and, secondly, whether it has been established for a certain period or for life.

The prohibition to become an adopter, included in the contested norm, applies to all persons, who have been punished for a criminal offence related to violence or threatening of violence. It does not allow exemptions. Moreover, this prohibition has been established for life – it is valid for an unlimited period of time, also after the criminal record has been extinguished or removed. Hence, the prohibition included in the contested norm is absolute.

It follows from the above that, in the particular case, the legislator has fulfilled its obligation, included in Article 110 of the *Satversme* to ensure legal protection to a family in the area of adoption, *inter alia*, establishing such legal regulation on adoption, which comprises the absolute prohibition, included in the contested norm. However, due to the strictly restrictive nature of the absolute prohibition, its compliance with the proportionality principle is of decisive importance.

**Hence, the Constitutional Court will examine, whether the absolute prohibition, included in the contested norm, complies with the proportionality principle.**

**20.** To assess, whether the absolute prohibition, included in the contested norm, is proportional, the Constitutional Court must clarify, first and foremost, whether the aim of the absolute prohibition, included in the contested norm, can be reached by this norm.

The absolute prohibition, included in the contested norm, ensures that the person, who has committed a criminal offence, which is related to violence or threatening of it, cannot become an adopter. The Applicant holds that the aim of the prohibition – protection of the children’s rights – can be reached by this measure, chosen by the legislator (*see the application in Case Materials, Vol. 1, p. 5*). However, the Ombudsman notes that the prohibition, included in the contested norm, does not reach its aim if a person, who has been punished for a criminal offence that is related to violence or threatening of violence, is the spouse of the child’s parent, i.e., if the child lives together with this person, irrespectively of the fact, whether this person has the right to become the adopter of the child (*see the Ombudsman’s opinion in Case Materials, Vol. 2, p. 45*

The legislator fulfils its obligation, included in Article 110 of the *Satversme* and the first part of Article 19 of the Convention on the Rights of the Child, to protect all children against violence, by developing a complex set of measures. For example, a person is made liable for violence against a child as provided for in law (*see Section 51 (1) of the Law on the Protection of the Rights of the Children*), all persons have the obligation to report to the competent institution about violence against a child (*see Section 51 (3) of the Law on the Protection of the Rights of the Children*), a child can be separated from the family if he is under the threat of violence in it (*see Para 1 Section 27 (1) of the Law on the Protection of the Rights of the Children*), persons, who have been punished for criminal offences, which are related to violence or threatening of violence, cannot become guardians or host families (*see Section 242 (5) of the Civil Law and Para 1 of Section 45<sup>3</sup> (2<sup>1</sup>) of the Law on the Protection of the Rights of the Children*). The absolute prohibition, included in the contested norm, is part of the totality of measures referred to above. Thus, the contested norm is aimed at protecting the child against violence.

Moreover, it should be taken into account that, as the result of adoption, the adoptee acquires the legal status of the adopter’s biological child both in personal and financial relationships, whereas the adopter acquires the custody rights with respect to the adoptee (*see Para 18.1. of this judgement*).

The Civil Law provides that custody is the parents' rights and obligation to take care of the child and his property and to represent the child in his personal and financial relationships. This care includes taking care of the child, supervision of the child and the right to determine his place of residence. Caring for the child means providing for the child, taking care of, educating and upbringing the child, whereas supervision of the child – caring for the child's safety and prevention of threats caused by a third person. This means that if the legal custody relationship exists, the child has the right to receive the care from the person who ensures the custody. This person helps the child to prepare for independent life in society and raises him in the spirit of peace, human dignity, tolerance, freedom, equality and solidarity, promoting his full development (*compare, see the seventh recital in the Convention on the Rights of the Child*). At the same time, upbringing the child and preparing him for independent life in society include the efforts to achieve that he abides by the restrictions on behaviour, complying with the social norms accepted in society. Thus, a person, who has custody over the child, can set restrictions on individual freedom that are binding upon the child. Moreover, in accordance with Section 181 (2) of the Civil Law, a person, who has custody, has also the right and the obligation to maintain a personal relationship and direct contact with the child.

The absolute prohibition, included in the contested norm, does not allow that a person, who has been punished for the criminal offence, referred to in the contested norm, would become an adopter or would acquire the right to custody over the adoptee. Hence, the absolute prohibition, included in the contested norm, not only does not allow that a child would have to subject to such measures of upbringing that are introduced by a person, with respect to whom, in legislator's opinion, a risk is present that he might treat the child violently, but also that this person might maintain a personal relationship and direct contacts with the child. Preventing a situation like this is aimed at protecting the child against violence and respecting the rights of the child.

**Thus, the absolute prohibition, included in the contested norm, is appropriate for reaching its aim.**

**21.** The Constitutional Court's competence includes verification, whether the legislator, in establishing the absolute prohibition for a certain group of persons, has considered, whether, in the particular case, no alternative measures exist that would be less restrictive on persons' fundamental rights, included in the *Satversme* (compare, see *Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 19*).

In examining the proportionality of the absolute prohibition, the Constitutional Court must verify also, whether the legislator:

1) has substantiated the need for absolute prohibition;

2) has examined the substance of the absolute prohibition and the consequences of its application;

3) substantiated that if exemptions to this absolute prohibition were envisaged it would be impossible to reach its aim in the same quality (compare, see *Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 19*).

**22.** To substantiate the need for the absolute prohibition, included in the contested norm, the *Saeima* notes in its written reply: by defining the categories of those criminal offences, the persons sentenced for the commitment of which cannot be granted the right to apply for the adopter's status, the legislator already has chosen the most lenient measures for reaching the aim of the absolute prohibition (see the written reply by the *Saeima* in *Case Materials, Vol. 1, p. 28*).

The absolute prohibition, included in the contested norm, in its current wording, was included in the Civil Law by the law of 29 October 2015 "Amendments to the Civil Law", which entered into force on 3 December 2015. However, substantially, it was included in the Civil Law already with the law of 29 November 2012 "Amendments to the Civil Law", which entered into force on 1 January 2013. The annotation to the draft law, on which the aforementioned law is based, shows that Section 163 of the Civil Law was amended, by

including the contested norm into it, with the aim of defining the circle of persons, who may not be adopters, in the interests of the child's security (*see annotation to the draft law submitted to the Saeima on 8 June No. 386/Lp10 "Amendments to the Civil Law"*).

The examination of the draft law No. 386/Lp10 "Amendments to the Civil Law", which was submitted to the 10<sup>th</sup> convocation of the *Saeima* on 8 June 2011, pursuant to the second part of Paragraph 39 of the *Saeima* Rules of Procedure, was continued by the 11<sup>th</sup> convocation of the *Saeima*, examining draft law No. 53/Lp10 "Amendments to the Civil Law" (*see the transcript of the sitting of the Saeima of 10 November 2011*). The wording of the contested norm was discussed at the sitting of the Legal Committee of the 11<sup>th</sup> convocation of the *Saeima* on 22 February 2012. It follows from the audio recording of this sitting that the absolute prohibition, included in the contested norm, was taken over from Section 72 of the Law on Protection of the Rights of the Children, which defines, which persons may not work in particular institutions, where children are staying (*see the audio recording of the sitting of the Legal Committee of the 11<sup>th</sup> convocation of the Saeima on 22 February 2012 in Case Materials*).

The legislator substantiates the need to establish the absolute prohibition by stating that criminal offences, which are related to violence or threatening of it, are exactly the ones that could cause special risk, to which a child may not be subject (*see also the written reply by the Saeima in Case Materials, Vol. 1, p. 28*).

Thus, the legislator has substantiated the necessity of including the absolute prohibition in the contested norm.

**23.** Upon establishing absolute prohibition, the legislator has the obligation to examine, whether such prohibition is needed in the particular scope and also assess the consequences of applying such prohibition (*compare, see Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 19.2.*).

**23.1.** The absolute prohibition to acquire the status of an adopter, included in the contested norm, applies to every person, who has been punished for a criminal offence that is related to violence or threatening of it. Moreover, this prohibition has been established for life – it is in force for an unlimited period also after the criminal record has been extinguished or removed.

Summoned person *Dr. iur. Valentija Liholaja* notes that the special part of the Criminal Law comprises 60 sections with direct references to violence or threats of it as the feature of the basic constituent elements or qualified constituent elements of a criminal offence or violence can be presumed on the basis of the content of the particular section's disposition. These criminal offences may threaten various interests that are protected by the Criminal Law, for example, life, health, inviolability of the home, personal freedom, sexual inviolability, morals, property, general security and public order, the procedure of governance. They may differ also as to their qualification, which, pursuant to Section 7 of the Criminal Law, is determined in accordance with the nature and harm to the interests of a person or society. Moreover, violence can be manifested not solely as the infliction of physical pain to the victim but also as actions without inflicting physical pain, by restricting the victim's movements or mobility, by tying him up or isolating in closed premises, holding, pushing, pushing off or applying physical force otherwise. Violence may be manifested also as inebriating a person or leading to the state of unconsciousness (helplessness) by using narcotic, psychotropic, powerful or other intoxicating substances (*see the opinion of Dr. iur. Valentija Liholaja in Case Materials, Vol. 2, pp. 50–57*).

The legislator has the right, abiding by the general legal principles and other norms of the *Satversme* as well as the international and the European Union law, to apply special legal regulation to certain societal groups. I.e., upon examining all circumstances of the particular area of law, the legislator may adopt such legal regulation that does not ensure absolute individualisation and is equally applicable to objectively comparable, albeit different cases (*see, for example, Judgement of 20 May 2011 by the Constitutional Court in Case*

*No. 2010-70-01, Para 19*). However, in determining the absolute prohibition, included in the contested norm, which is based on a broad range of criminal offences and is not restricted in time, the legislator had the obligation to examine the scope and the consequences of applying this prohibition.

In the present case, it should be taken into account that, in legal relationships that affect the child and in all actions pertaining to the child, his rights and best interests take the priority. The legislator should ensure that the adopted regulatory enactments provide the best possible protection for the child's lawful interests. Moreover, a child's rights and lawful interests are affected not only when a decision has to be made directly with respect to the child but also in cases, where the decisions may be applicable to the child or may not affect the child directly. Recognising any other priority without a serious reason and justification is inadmissible (*see Judgement of 16 May 2019 by the Constitutional Court in Case No. 2018-21-01, Para 16.2.*).

Although the absolute prohibition, included in the contested norm, first and foremost, applies to the person, who applies for an adopter's status, it affects directly also the interests of the child, i.e., the adoptee. Pursuant to Article 21 of the Convention on the Rights of the Child, the State has the obligation to ensure that the child's interests are the main consideration in the adoption process. Thus, the legislator, in examining the substance of this absolute prohibition, had the obligation to assess and to substantiate that the prohibition set for an unlimited term for every person, who has been punished for a criminal offence related to violence or threatening of it, to become an adopter complies with the best interests of the child in all cases.

In developing legal regulation that pertains to the child, the legislator has the obligation to assess its impact on the rights of the affected children and clearly indicate that it complies with the best interests of the child. In this regard, the legislator must substantiate that the best interests of the child have been taken into account. I.e., the legislator must indicate:

- 1) what exactly is considered as being the best interests of the child in the process of developing the particular legal regulation;

2) what are the criteria, on which the assessment of the best interests of the child is based;

3) how the best interests of the child have been weighed against other considerations [see: *UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para. 6c*].

It follows from the preparatory materials for the contested norm and the written reply by the *Saeima* that, in adopting the contested norm, the *Saeima* had considered that protection against violence was the best interests of the potential adoptees.

The Constitutional Court also recognises that, pursuant to the first part of Article 19 of the Convention on the Rights of the Child, the State has the obligation to protect every child against violence and that the absolute prohibition, included in the contested norm, is aimed at fulfilling this obligation. At the same time, the State must ensure, to the extent possible, that a child grows up in a familial environment (*see Judgement of 16 May 2019 by the Constitutional Court in Case No. 2018-21-01, Para 16.2.*). Moreover, to ensure that the child's best interests are respected, this family needs the State's legal, economic and social protection, pursuant to Article 110 of the *Satversme*. Both the child's right to protection against violence and the child growing up in a familial environment are such considerations regarding protection of the rights of the child that are of equal priority and comply with the best interests of the child [compare, see: *UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para. 4*]. In those cases, where these considerations clash, they need to be balanced in order to find a solution to the situation that would comply with the best interests of the child (*see: ibid, para. 81*).

However, the preparatory materials for the law of 29 November 2012 "Amendments to the Civil Law" do not allow ascertaining that, with respect to

situations, where a person submits an application for the adoption of the other spouse's child, the legislator had balanced the rights of the child regarding protection against violence and to growing up in a familial environment, which, in accordance with Article 110 of the *Satversme*, is entitled to legal, economic and social protection by the State. I.e., that the legislator had examined and substantiated that, also in cases, where a person submits an application for the adoption of the other spouse's child and an actual familial relationship has already developed between this person and the spouse's child, the absolute prohibition, included in the contested norm, would comply with the best interests of the child.

By the law of 29 October 2015 "Amendments to the Civil Law", the contested norm was expressed in the wording that is currently in force, deleting from Para 1 of Section 163 (4) the indication that the criminal offences, referred to in the contested norm, had been committed intentionally. However, the preparatory materials for this draft law neither allow ascertaining that the legislator had assessed and substantiated that the absolute prohibition would comply with the best interests of the child in all cases.

**23.2.** In establishing absolute prohibition, the legislator must ascertain that the legal consequences caused by this prohibition are proportional (*see Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 19.2.2.*).

In establishing absolute prohibition for a previously punished person to acquire the status of an adopter, not only the fact that a person has a criminal record is important but important are also the criteria that characterise this person – for example, a person's attitude towards the crime that was once committed, the lifestyle after committing the crime and the person's actual relationship with the spouse's child. It should also be taken into account that a person's attitude towards the criminal offence he once committed and also the system of values may change over time (*see Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 19.2.2.*). The fact alone that a person has been punished for a criminal offence, which is related to

violence or threatening of it, is not always sufficient grounds for establishing that this person poses a threat for society in the long-term. Criminological research shows that, within seven to ten years of being in the community without re-offending, for the majority of persons with a criminal record the risk of re-offending decreases to the level of risk posed by persons without a criminal record (*see the information provided by the State Probation Service in Case Materials, Vol. 2, pp. 71–72*). Pursuant to Para 5 of Section 35 (2) of the Criminal Law, one of the aims of punishment is preventing committing of criminal offences. Moreover, by the Criminal Law, the Sentence Execution Code of Latvia, the Law on the State Probation Service and other regulatory enactments, the legislator has introduced into the Latvian legal system a system for the re-socialisation and probation of punished persons, aimed at preventing re-offending, *inter alia*, promoting adjustment of the punished persons' social behaviour. The existence of this system *per se* already means that a person's behaviour may change over time.

The preparatory materials for the contested norm do not allow the Constitutional Court to ascertain that the legislator had examined, whether also in such cases, where a person submits an application for the adoption of the other spouse's child and an actual familial relationship has already developed between this person and the spouse's child, the best interests of the child are respected in the best possible way by the absolute prohibition, i.e., the legislator had assessed the need not only to protect children against violence but also to ensure, to the extent possible, that they grow up in a familial environment. However, the Constitutional Court cannot ascertain that the legislator had assessed, whether and how the behaviour of a person, who has been previously punished for a criminal offence, which is related to violence or threatening of it, could change over time.

Hence, the legislator has not ascertained that the scope and the legal consequences of the absolute prohibition, included in the contested norm, are proportional.

**24.** Absolute prohibition is admissible if the legislator has substantiated that if an exemption to this absolute prohibition were allowed its aim could not be met in equal quality. I.e., in establishing absolute prohibition, the legislator must verify that the absolute prohibition is the only measure for reaching its aim (*compare, see Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 19.3.*). The legislator may establish absolute prohibition only in such a case.

**24.1.** The Constitutional Court must verify, whether the legislator, in establishing the absolute prohibition for each person, who has committed a criminal offence, related to violence or threatening of it, has ascertained that an exemption to this prohibition would not allow reaching the aim in equal quality.

The Constitutional Court has already recognised that exemptions to absolute prohibition may be different, for example, both regulation that allows individual assessment in certain cases and exemptions, precisely defined in the law, as well as regulation that requires regular reviewing of the prohibition. The choice of the most suitable solution falls within the legislator's discretion (*see Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 19.3.*).

**24.2.** The Applicant points to several possible exemptions to the absolute prohibition, included in the contested norm, that would allow reaching its aim in equal quality.

Section 163 (5) of the Civil Law provides: to detect suitability for adoption, the Orphans' and Custody Court, in compliance with the procedure of adoption defined by the Cabinet, conducts research of the potential adopter's family for no longer than six months. In this process, the Orphans' and Custody Court researches the potential adopter and his family, which, in the case where the child to be adopted already lives in this particular family, includes also research of the relationship between the child and the potential adopter (*see Para 18.2. of this judgement*). Moreover, pursuant to Para 13.6 and Para 18.3. of Regulation No. 111 and Para 17.6., Para 23.3., Para 23.4. and Para 23.7. of Regulation No. 667, in the process of adoption, the Orphans' and Custody Court

not only requires information about the potential adopter from the Register of Criminal Records but also uses documents issued by the general practitioner, psychologist, psychiatrist and addiction specialist, which, *inter alia*, prove the suitability of the potential adopter's personality for the status of an adopter. For example, the psychiatrist indicates in his statement, whether the person has mental health disorders, and also includes information on the presence of special (psychiatric) contra-indications, *inter alia*, also information on the risk of aggressive and violent behaviour [see the Ombudsman's opinion in Case Materials, Vol. 2, p. 46; see also Ministru kabineta noteikumu projekta Nr. TA-2164 „Adopcijas kārtība” sākotnējās ietekmes izvērtējumu (anotāciju). Available: [tap.mk.gov.lv](http://tap.mk.gov.lv)]. In examining the opinions received from the experts and the information obtained through the research of the potential adopter's family, the Orphans' and Custody Court, pursuant to Section 162 (1) of the Civil Law, must ascertain in each particular case, whether adoption, indeed, complies with the best interests of the child, assessing, *inter alia*, also whether the adoptee could not be subject to violence as the result of adoption.

Thus, legal norms establish a mechanism, through which the Orphans and Custody Court may assess the individual circumstances of each particular case to ascertain, whether the personality of persons, who have been previously punished for committing a criminal offence, which is related to violence or threatening of it, does not indicate a risk of violence and threat to the child to be adopted, following from it. I.e., in the case, where the child to be potentially adopted already lives in the family of the potential adopter, the Orphans' and Custody Court may examine at the same time both the personality of the potential adopter and his relationship with the child, using also the opinions of the psychologist and other experts (*see the application in the Case Materials, Vol. 1, p. 8*). However, even the possibility of an individual assessment does not guarantee at all to the person the right to acquire the status of an adopter.

The Orphans' and Custody Court already now has the obligation to research the family life, the personality of the potential adopter and the documents, prepared with respect to him by medical experts, as well as to

assesses, whether each particular situation complies with the best interests of the child. Moreover, pursuant to Section 171 (1) of the Civil Law, the adoption is approved by a court, which also has to verify, whether adoption complies with the best interests of the child. Thus, the possibility to assess, whether a person, who once has been punished for a criminal offence, which is related to violence or threatening of it, may become an adopter, would reach the aim of the absolute prohibition, included in the contested norm, – protecting the rights of children – in the same quality. Thus, the State’s obligation, included in the first part of Article 19 of the Convention on the Rights of the Child, to protect each child against violence, would be fulfilled also if a person, who, although previously punished for a criminal offence referred to in the contested norm, by his attitude, behaviour and conduct, *inter alia*, in the relationship with the potential adoptee, has proven that he does not pose a risk for the adoptee’s safety, could become the adopter of the other spouse’s child.

It follows from the above, that the aim of the absolute prohibition, included in the contested norm, could be achieved in equal quality by alternative measures, i.e., by providing exemptions to this prohibition; however, the legislator had not considered it. Hence, the absolute prohibition, included in the contested norm, is incompatible with the proportionality principle.

**Thus, the contested norm, insofar it establishes the absolute prohibition with respect to persons, who apply for the adoption of the other spouse’s child, is incompatible with Article 110 of the *Satversme*.**

25. Pursuant to Section 32 (3) of the Constitutional Court Law, a legal norm, which has been recognised by the Constitutional Court as being incompatible with a legal norm of higher legal force, is to be considered as being void as of the date when the Constitutional Court’s judgement is published, unless the Constitutional Court has provided otherwise. Pursuant to Para 11 of Section 31 of the Constitutional Court Law, the Constitutional Court may indicate in its judgement the date, as of which the legal norm, which has been

recognised as being incompatible with a legal norm of higher legal force, becomes void.

It follows from the Constitutional Court's judicature that, in examining a case initiated on the basis of an application by a court, it must always assess the effect its judgement would have on the respective administrative case (*see Decision of 20 June 2018 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2017-19-01, Para 7*). Moreover, in the case of an application by an administrative court, *inter alia*, the subject of the claim in the particular administrative court is important. If the claim pertains to the issuing of a favourable administrative act, the administrative court will apply the legal norms that are in force at the time of adjudicating the case (*see, for example, Judgement of 3 February 2012 by the Department of Administrative Cases of the Supreme Court Senate in Case No. SKA-46/2012, Para 8*).

The administrative case, heard by the Applicant, has been initiated with respect to issuing of a favourable administrative act (*see the application in the Case Materials, Vol. 1, p. 8*). However, the Applicant requests recognising the contested norm as being invalid as of the date when the Orphans' and Custody Court applied it to the applicant in the administrative case it is hearing, i.e., from 20 January 2016. Recognition of the contested norm as being void from the aforementioned date is said to be necessary to ensure effective protection of the rights of the child in the hearing of the case (*see the application in the Case Materials, Vol. 1, p. 9*).

The Constitutional Court already has recognised that, in deciding on the date, as of which the contested norm (act) becomes void, it must be taken into account that its task is to eliminate infringement on persons' fundamental rights to the extent possible (*see Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 25, and Judgement of 16 April 2015 in Case No. 2014-13-01, Para 22*). In the present case, this finding by the Constitutional Court is applicable to those persons, who already have started defending their rights by general legal remedies and to whom the contested norm has been applied.

Thus, to protect the fundamental rights of those persons, who have started defending their rights by general legal remedies and in whose processes of defending their rights the best interests of the involved children need to be assessed, with respect to these persons, the contested norm becomes void as of the date when it was applied to them by the Orphans' and Custody Court. Whereas with respect to other persons the contested norm becomes void from the date when the judgement is published. The Constitutional Court notes that, in both cases, both at the administrative court and the court of general jurisdiction, Article 110 of the *Satversme* as well as findings included in this judgement are directly applicable.

### **The Substantive Part**

On the basis of Para 6 of Section 29 (1) and Sections 30–32 of the Constitutional Court Law, the Constitutional Court

#### **held:**

**1. To terminate legal proceedings in the case in the part regarding the compliance of Para 1 of Section 163 (4) of the Civil Law, insofar it established the absolute prohibition with respect to persons, who submit an application for the adoption of the other spouse's child, with Article 96 of the *Satversme* of the Republic of Latvia.**

**2. To recognise Para 1 of Section 163 (4) of the Civil Law, insofar it established the absolute prohibition with respect to persons, who submit an application for the adoption of the other spouse's child, as being incompatible with Article 110 of the *Satversme* of the Republic of Latvia.**

**3. With respect to persons, who have started defending their rights by general legal remedies, to recognise Para 1 of Section 163 (4) of the Civil**

**Law, insofar it established the absolute prohibition with respect to persons, who submit an application for the adoption of the other spouse's child, as being incompatible with Article 110 of the *Satversme* of the Republic of Latvia and void as of the date when it was applied to them by the Orphans' and Custody Court.**

The judgement is final and not subject to appeal.

The judgement enters into force on the day of its publication.

Chairperson of the court hearing

I. Ziemele