



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

SEPARATE OPINION

of the Justice of the Constitutional Court
of the Republic of Latvia

Artūrs Kučs

in Riga, on 18 December 2019

in Case No. 2019-01-01

**“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”.**

1. On 5 December 2019, the Constitutional Court passed the judgement in case No. 2019-01-01 “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” (hereafter – the Judgement), terminated 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 submitted an application for adopting the other spouse’s child, with Article 96 of the *Satversme* of the Republic of Latvia, and recognised Para 1 of Section 163 (4), insofar it established the absolute prohibition with respect to persons, who submitted an application for adopting the other spouse’s child, as being incompatible with Article 110 of the *Satversme* of the Republic of Latvia.

The case was initiated on the basis of an application by the Supreme Court.

2. I concur with the conclusion that the contested norm, insofar it establishes the absolute prohibition with respect to persons, who submitted an application for adopting the other spouse’s child, is incompatible with Article 110 of the *Satversme*.

I dissent to the conclusion made in the Judgement that the contested norm does not cause and infringement on a person's rights, established in Article 96 of the *Satversme*.

My opinion is based on the arguments presented below. In substantiating my opinion, I shall use the abbreviations used in the Judgement.

3. It is concluded in Para 16.3.1. of the Judgement 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*. This conclusion is incompatible with the Constitutional Court's judicature and the opinions expressed in the legal doctrine.

3.1. It has been recognised in the Constitutional Court's judicature that the right to inviolability of private life, guaranteed in Article 96 of the *Satversme*, comprises also the right to inviolability of family life. This finding is substantiated by, mainly, two arguments. Firstly, the concept "private life" is often used as a broader designation, which comprises also the family life, inviolability of the home and correspondence. Secondly, it has been recognised in the legal science that the right to private life, the right to family life, the right to inviolability of the home and the right to inviolability of correspondence cannot be precisely delimited (*see Judgement of 23 April 2009 by the Constitutional Court in Case No. 2008-42-01, Para 8*).

Likewise, the Constitutional Court has noted that not only the State's obligation to refrain from interference into the private life but also the State's obligation to take the necessary actions to ensure these rights follow from the right to private and family life, included in Article 96 of the *Satversme* (*see Judgement of 2 December 2009 by the Constitutional Court in Case No. 2009-07-0103, Para 11*).

As noted in Para 16.3.1. of the Judgement, the legal familial relationship is created as the result of adoption. The contested norm provides that persons, who previously have been punished for a criminal offence, which is related to violence or threatening of it, may not be adopters. Thus, the contested norm impacts the right of these persons to form legal familial relationships. If a person, who has been previously punished for committing the aforementioned criminal offence, wishes to adopt his spouse's child, with whom he had cohabited for a long time, the contested norm

prohibits from consolidating legally the familial relationship that actually exists. Thus, the rights of these persons to private and family life, which are established in Article 96 of the *Satversme*, are restricted. Hence, I cannot concur with the conclusion made in the Judgement that the contested norm does not cause an infringement on Article 96 of the *Satversme*.

3.2. The right to family life is *expressis verbis* enshrined in Article 110 of the *Satversme*. However, this does not mean that this right is not included also in Article 96 of the *Satversme*. The same right may be protected by several articles of the *Satversme* (see *Judgement of 23 April 2009 by the Constitutional Court in Case No. 2008-42-01, Para 8*).

The content of the right to family life, included in Article 96 and Article 110 of the *Satversme*, is not identical. The protection for family life, included in Article 96 of the *Satversme*, is one of the elements of private life, whereas the right to the protection for family life, established in Article 110 of the *Satversme*, has the nature of both civil and political and social rights (see: *Danovskis E., Ruķers M., Lībiņa-Egnere I. 96. panta komentārs. Grām.: Balodis R. (zin. red.) Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: Latvijas Vēstnesis, 2011, 238. lpp.*). Article 110 of the *Satversme* comprises both civil and political and social and economic rights with respect to marriage, family, parents and children. The right to the inviolability of private life, defined in Article 96 of the *Satversme*, overlaps with the right to the inviolability of private life, established in Article 110 of the *Satversme*, insofar it applies to the civil right to the protection for family life, which follows from Article 8 of the Convention on Human Rights and Article 23 of the Covenant on Civil and Political Rights (see: *Dupate K., Reine I. 110. panta komentārs. Grām.: Balodis R. (zin. red.) Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: Latvijas Vēstnesis, 2011, 591. un 609. lpp.*).

Examination of the preparatory documents for Chapter VIII of the *Satversme* reveals that Article 110 of the *Satversme* is related more to civil and economic rights. For example, in several drafts of the *Satversme*'s chapter on human rights, the *Saeima* committee for drafting the second part of the *Satversme* of the Republic of Latvia – on human rights –, the right to private life, which is currently enshrined in Article 96 of

the *Satversme*, is included in the sub-chapter “Personal rights”, whereas the rights, currently established in Article 110 of the *Satversme*, are included in the sub-chapter “Social Rights” or “Economic, Social and Cultural Rights” (see, for example, *Minutes No.6 of the sitting of 14 April 1997 and Minutes No. 8 of the sitting of 28 April 1997 of the Committee of the Saeima of the Republic of Latvia for drafting the second part of the Satversme of the Republic of Latvia – on human rights*).

The Ministry of Justice submitted to the Cabinet proposals with respect to the draft chapter on human rights of the *Satversme*. The Ministry of Justice proposed including *expressis verbis* in Article 96 of the *Satversme* also the right to the family life and, in turn, to not refer to marriage and family in Article 110 but rather provide that everyone had the right to social protection. The Ministry of Welfare had proposed to word this article even more succinctly: “Everyone, in the case of social risk, has the right to the protection by the social security system” (see “*Letter of 14 July 1997 by the Ministry of Justice of the Republic of Latvia to the State Chancery “On the draft second chapter of the Satversme “On Human Rights”*”).

The *Saeima* committee for drafting the chapter on human rights of the *Satversme* examined also the proposals submitted by the Human Rights Institute of the Faculty of Law, the University of Latvia. The Institute noted that a person’s right to enter into marriage was protected by the right to private life, which already was enshrined in Article 96 of the *Satversme*. Whereas Article 110 of the *Satversme* defines the State’s obligation to create social conditions for supporting families and respecting the rights of the child; thus, it had to be specified (see, for example, *Minutes No. 18 of 29 September 1997 of the Committee of the Saeima of the Republic of Latvia for drafting the second part of the Satversme of the Republic of Latvia – on human rights*).

Thus, it can be concluded that, initially, the legislator had wished to enshrine the civil right to family protection in Article 96 of the *Satversme* but the social and economic rights – in Article 110. The understanding of fundamental rights has evolved both in the legal doctrine and in the application of these rights, and now Article 110 protects also the civil right to family life; however, this does not mean that this right is not protected by Article 96 of the *Satversme*.

Hence, the contested norm applies to the right to private and family life, included in Article 96 of the *Satversme*.

4. It is noted in Para 16.3.1. of the Judgement: 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 Convention on Human Rights. I subscribe to this finding in general; however, I consider that two situations should be differentiated between, to which this finding is applicable in different ways.

I consent that Article 8 of the Convention on Human Rights does not protect persons' right to create a family anew, *inter alia*, by adopting a child. However, the right to family life protects a family that has already been established (*see Judgement of 22 February 2002 by the European Court of Human Rights in Case "Frette v. France", Application No. 36515/97, Para 32*). Hence, in a situation, which the Applicant has to review, a person, by requesting permission to adopt a child, wants to enshrine legally the actually existing familial relationship. The State enjoys certain discretion in balancing the interests of individuals and of society. However, as noted also in Para 16.3.2. of the Judgement, in those cases, where familial ties have developed between the family and the child, the State has a positive duty to act in a way to strengthen these ties and establish such mechanisms for rights protection that would ensure the child's integration in the family (*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 118 and Para 119*).

Thus, although Article 8 of the Convention on Human Rights does not create a person's right to adoption, it creates for the State the positive obligation to protect the already existing familial ties.

5. A person's right, established in Article 96 of the *Satversme*, is not absolute and, in accordance with Article 116 of the *Satversme*, it can be restricted if the restriction has been established by law, has a legitimate aim and is proportional (*see Judgement of 2 December 2009 by the Constitutional Court in Case No. 2009-07-0103, Para 11*).

It is not disputed in the case that the contested norm had been established by law. The Applicant also upholds this. I subscribe to the conclusion made in Para 19.1. of the Judgement that the protection of the rights of the child is the legitimate aim of the contested norm.

The compliance of the contested norm with the proportionality principle in the context of Article 110 of *Satversme* is analysed in the Judgement. The Constitutional Court's findings regarding the proportionality of the contested norm are applicable also if the proportionality of this norm is examined in the context of Article 96 of the *Satversme*. Thus, the absolute prohibition, included in the contested norm, with respect to persons, who submit an application for adopting the other spouse's child, is appropriate for reaching the legitimate aim and the legislator has substantiated its necessity; however, the legitimate aim can be reached by alternative measures, envisaging exemptions to the absolute prohibition.

Thus, the contested norm is incompatible with the right to private and family life, included in Article 96 of the *Satversme*.

Therefore, Para 1 of Section 163 (4) of the Civil Law, insofar it establishes the absolute prohibition with respect to persons, who apply for the adoption of the other spouse's child, is to be recognised as being incompatible with Article 96 of the *Satversme* of the Republic of Latvia.

Artūrs Kučs