THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGEMENT
on Behalf of the Republic of Latvia
in Riga on 7 November 2019
in Case No. 2018-25-01

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 Andris Otto's application,

on the basis of Article 85 of the *Satversme* of the Republic of Latvia and Para 1 of Section 16, Para 11 of Section 17 (1), as well as Section 19^2 and Section 28^1 of the Constitutional Court Law,

at the court hearing of 8 October 2019 examined in written procedure the case

"On Compliance of Section 50^4 of the Sentence Execution Code of Latvia with Article 91 of the *Satversme* of the Republic of Latvia".

The Facts

1. On 23 December 1970, the Supreme Soviet of the Latvian SSR adopted the Corrective Labour Code of the Latvian SSR. The decision by the Supreme Soviet of the Latvian SSR of 29 August 1991 "On the Application of Legal Acts of the Latvian SSR in Latvia" provided that the Corrective Labour Code of the Latvian SSR was to be regarded as the Corrective Labour Code of

Latvia until a new Code was drafted. On 30 December 1994, the law, adopted on 15 December of the same year, "Amendments to the Corrective Labour Code of Latvia" entered into force, by which the title of the Code was expressed in the current wording – the Sentence Execution Code of Latvia (hereafter – the Code). Likewise, regulation on the progressive serving of a sentence and sentence serving regimes were added to the Code. Section 50^4 , which regulates the regime for serving the sentences in closed prisons, was also added to the Code.

Section 50^4 of the Code has been amended several times. Since 21 December 2017, it has been in force in the following wording:

"Men who have received a custodial sentence for the commission of a serious or especially serious crime and convicted persons who have been transferred from a partly-closed prison due to gross or systematic regime violations shall serve their sentences in closed prisons.

Increased security and maximum surveillance of convicted persons shall be ensured in closed prisons.

[*The third par was deleted by the law of 11 November 2004*]

Convicted persons shall begin to serve a sentence at the lowest regime level. After placement in a prison, they must serve at least one fourth of the imposed sentence at this level. If a convicted person has served one fourth of the imposed sentence in pre-trial arrest and a sentence execution place and meets the conditions referred to in Section 50^3, Paragraph four of this Code, he or she may be transferred from the lowest to the medium level of the sentence serving regime upon a decision of the evaluation committee. The person must serve at least one fourth of the imposed sentence at the medium level of the sentence serving regime and the remaining part - at the highest level of the sentence serving regime. If a convicted person has served one half of the imposed sentence in pre-trial arrest and in a sentence execution place and meets the conditions referred to in Section 50^3, Paragraph four of this Code, he or she may be transferred to the highest level of the sentence serving regime upon a decision of the evaluation committee. By a decision of the evaluation committee, he or she may be transferred from the highest level of the sentence serving regime to a partly-closed prison, if the convicted person meets the conditions referred to in Section 50^3, Paragraph four of this Code or released early in accordance with the procedures laid down in law.

Persons convicted under a sentence for the deprivation of liberty for life (life imprisonment) shall begin to serve the sentence at the lowest level. After placement in a prison, they must serve at least seven years at this level. If a convicted person has served at least seven years of the imposed sentence in a pre-trial arrest and a sentence execution place and meets the conditions referred to in Section 50^3, Paragraph four of

this Code, he or she may be transferred from the lowest to the medium level of the sentence serving regime upon a decision of the evaluation committee. He or she shall serve at least 10 years of the imposed sentence at the medium level of the sentence serving regime and the remaining part - at the highest level of the sentence serving regime. A convicted person at the highest level of the sentence serving regime may be conditionally released from serving his or her sentence early in accordance with the procedures laid down in law.

[*The third par was deleted by the law of 18.06.2015*]

Convicted persons serving their sentence at the highest level of the sentence serving regime in a closed prison have the right:

1) to have six long-duration visits from twelve to twenty-four hours and six short-duration visits from one to two hours per year;

2) [*Deleted by the law of 11 November 2004*];

3) make purchases in the prison shop for the sum of money in the amount of one minimum monthly wage stipulated by the Cabinet;

4) to have three telephone conversations per month;

5) to use a personal television and a transistor radio (without voice recording functionalities);

6) from the time of rising in the morning until night-quiet to be in a specified area outside the cell;

7) to wear personal clothing or clothing of a specified type;

8) to wear a short haircut;

9) to independently visit the prison medical clinic, shop, dining facility and library during times provided for by the daily procedures;

10) to participate in sports, cultural and religious events.

Convicted persons serving their sentence in a closed prison at the medium level of the sentence serving regime have the right:

1) to have four long-duration visits from eight to sixteen hours and six short-duration visits from one to two hours per year;

2) [*Deleted by the law of 11.11.2004*];

3) to make purchases in the prison shop for an amount of money which does not exceed three fourths of the minimum monthly wage stipulated by the Cabinet;

4) have two telephone conversations a month;

5) to exercise the rights set out in Paragraph seven, Clauses 5-10 of this Section.

Convicted persons serving sentence at the lowest level of the sentence serving regime in a closed prison have the right:

1) to have three long-duration visits from six to twelve hours and four short-duration visits from one to two hours per year;

2) [*Deleted by the law of 11.11.2004*];

3) through prison personnel, to make purchases in the prison shop four times per month for a total amount of money which does not exceed one half of the minimum monthly wage stipulated by the Cabinet;

4) to have one telephone conversation per month;

5) to have walks or to participate in sports games in the open air for at least one hour per day;

6) through prison personnel, to receive (exchange) books in the prison library;

7) during the time provided for in the daily schedule, to watch television broadcasts in a room arranged outside the cell in the presence of prison personnel;

8) to attend religious services in the prison chapel and meet with a clergyman in private;

9) with permission of the administration, to wear personal clothing.

The right referred to in this Section to wear personal clothing, to independently visit the prison medical clinic, shop, dining facility and library, and to participate in events outside the separate prison unit shall not apply to persons convicted under a sentence for the deprivation of liberty for life (life imprisonment) who serve their sentence in a separate closed prison unit with reinforced supervision.

In addition to the rights referred to in this Section, persons convicted under a sentence for the deprivation of liberty for life (life imprisonment) who serve their sentence in a separate closed prison unit with reinforced supervision have the right to communicate with their relatives and other persons via a video call without the presence of a representative of the prison:

1) when serving the sentence at the highest level of the sentence serving regime - the right to an hour-long video call three times per month;

2) when serving the sentence at the medium level of the sentence serving regime - the right to an hour-long video call two times per month;

3) when serving the sentence at the lowest level of the sentence serving regime - the right to an hour-long video call once a month.

In addition to the rights referred to in this Section, the convicted foreign citizens and convicted persons whose permanent place of residence is not Latvia have the right to communicate with relatives, their spouse and other persons via a video call two times per month for a time period of up to 15 minutes without the presence of a representative of the prison."

Whereas Section 50^{5} of the Code defines the regime for serving the sentence in partly closed prisons. Pursuant to the first part of this Section, women convicted for intentionally committed crimes, men for intentionally committed less serious crimes, men for committing a serious or especially serious crime if they have not attained eighteen years of age by the time the crime was committed start serving their sentences in partly-closed prisons.

2. **The applicant** – **Andris Otto** (hereafter – the Applicant) – holds that Section 50^{4} of the Code is incompatible with Article 91 of the *Satversme* of the Republic of Latvia (hereafter – the *Satversme)* because it defines a different sentence serving regime for men.

The applicant has been recognised as being guilty of committing an especially serious crime and has started serving custodial sentence in a closed prison on the lowest level of sentence serving regime.

It is noted in the application that adult men and women, who have committed equally serious crimes and have received custodial sentences for the term of the same length, are two groups of prisoners who are in similar and comparable circumstances. By providing for different initial prison regimes for men and women in Section 50^{4} and Section 50^{5} of the Code, men are subject to greater restrictions on fundamental rights than women. It is alleged that such differential treatment is retained for the whole duration of prison sentence, except for the last one fourth of it. The restrictions on fundamental rights that men are subject to are said to affect, first and foremost, the right to private life; however, the consequences can be felt also with regard to other rights, e.g., the right to education and the right to health. Also, society is said to suffer from such

differential treatment because the spouses and children of imprisoned men can talk to them over the phone and meet them less frequently.

The differential treatment had been established by law, which had been adopted, promulgated and published in the procedure set out in regulatory enactments. It is said to be worded with sufficient clarity, allowing the addresses to understand their rights and obligations. The purpose of execution of sentences is to achieve resocialisation of the sentenced person, whereas the purpose of imprisonment – protecting the rights of other persons and public safety. However, it is alleged that Section 50^{4} of the Code not only does not facilitate but even hampers reaching of these aims if the family members of the imprisoned men have been given fewer possibilities to communicate with them. By providing for different initial regimes for serving the sentence (and resocialisation), only such considerations that would substantiate that differences exist between convicted men and women which require establishing different regimes could serve as the legitimate aim. It is maintained that, in the particular situation, the differential treatment is not in any way linked to women's ability to carry and give birth to children or any other anatomical differences between men and women. Neither can the differential treatment be justified by the need for additional resources, e.g., to organise a visit. Hence, the differential treatment established in Section 50^{4} of the Code is said to lack a legitimate aim.

The legislator is said to enjoy broad discretion in the area of penal policy; however, discrimination is said to exceed the limits of this broad discretion. Gender as the criterion for differential treatment is said to be absolutely inadmissible in the context of penal policy. It follows from the application that easements should be granted to convicted women only in connection with pregnancy and childbirth, as well as during the post-partum period. The applicant holds that, in the particular situation, differential treatment can be prevented only by equalling the rights of the discriminated group, i.e., the convicted men, to the rights of the non-discriminated group, i.e., those of convicted women.

After familiarising himself with materials in the case, the Applicant expressed the opinion that parental duties were equally characteristic of both men

and women and both fathers and mothers had equal rights to fulfil them. The actual risk was said to be individual, depending upon each imprisoned person and is being assessed; however, presently it does not affect the sentence serving regime. Therefore, the *Saeima*'s statements regarding the difficulties in ensuring for convicted men the same number and length of visits as for women is said to be unjustified because the premises for both short-duration and long-duration are predominantly not used; moreover, one had to pay for the long-duration visit in accordance with the price-list established by the Cabinet.

3. The institution, which issued the contested act, – **the *Saeima*** – holds that Section 50^4 of the Code complies with Article 91 of the *Satversme*. Substantially, the Applicant is said to contest the first part of Section 50^4 of the Code, therefore the written reply substantiates only the compliance of this norm with Article 91 of the *Satversme*.

There are 10 prisons in Latvia, and in eight of them adult men serve custodial sentences. Whereas the majority of sentenced women serve their sentences in one prison – the partly-closed Iļģuciems Prison, a small number of women has been placed also in the partly-closed prison ward, open prison ward and the centre for addictions of Olaine Prison. On 20 January 2019, approximately eight per cent or 230 of all prison inmates were women. The absolute majority of these women have committed property related crimes or such crimes that are related to illegal circulation of narcotic substances and serve custodial sentences up to 10 years.

Differential treatment, which is based on a person's gender, is said to be admissible if there are objective and reasonable grounds for it. Formally, men and women who have been convicted for a serious or an especially serious crime, which they have committed as adults, are in comparable circumstances. However, this comparison is said to be incorrect because objective differences exist between men and women, which the legislator may not ignore. However, the *Saeima* has provided further substantiation to justify the differential

treatment by taking into account the case law of the European Court of Human Rights to compare these groups of inmates.

Both in Latvia and in other countries, women who are serving their sentences in prisons are considered to be one of the special groups of inmates, to the needs of which the State must pay special attention. This obligation of the State is linked both to the fact that the number of imprisoned women is much smaller than that of imprisoned men and, traditionally, the prisons had been adapted to the needs of men, as well as to the fact that the majority of women had been given custodial sentences not for violent crimes but for property-related or narcotics-related crimes. Hence, women are considered to be a category of less dangerous inmates.

By placing convicted persons in prisons of different types, their special needs must be taken into account. Such needs are not contested with respect to, for example, convicted minors. The *Saeima* believes that, in this case, the approach that is appropriate for the gender needs should be ensured to women. It has been noted also in the doctrine: to ensure that women's specific needs are met, institutions that administer prisons must develop and apply such policy for classifying and placing inmates that would take into account the gender particularities of the convicted persons. Currently, in placing the convicted women, globally, conditions that characterise a large part of these women are not taken into account, *inter alia*, parental obligations, previous experience of violence and the risk caused by convicted women. Different procedure for serving the sentence is said to be linked to the fact that the possibility for women to maintain relationships with the family and social contacts is much more limited because there is only one prison in Latvia where women serve custodial sentences.

Contrary to the Applicant's view, organisation of the execution of the custodial sentence follows not only from the physiological differences between men and women but also the different degree of dangerousness, significant differences in social circumstances and previous experience as well as the different impact that isolation and other conditions related to increased security

leave upon men and women. The differences in security requirements are said to follow also from the data regarding the use of addiction causing substances in prisons. For example, in 2018, 22 per cent of imprisoned men and only two per cent of women had used alcohol. The use of addiction causing substances not only substantially hampers reaching the aim of the custodial sentence but also influences security and order within the prison.

The *Saeima* does not contest that the Code provides for a different procedure, in which persons who belong to the aforementioned comparable groups begin serving their sentences. Undeniably, the sentence serving regime in a closed prison, where men begin serving their sentences, is much stricter than in a partly-closed prison, where women begin serving their sentences. The Code envisages different conditions for the convicted persons depending on both the type of prison and the level of the regime for serving the sentence.

The *Saeima*, referring to a study conducted by the International Centre for Prison Studies, notes that different security rules are needed in male and female prisons because the crimes committed by women are less often related to violence, moreover, men and women behave differently in prison. Hence, the Latvian legislator has taken into account the different circumstances of women as a separate group of inmates, as well as the different general characteristics and has decided to place women in a partly-closed prison where it is possible to ensure to them better conditions for serving the sentence.

The differences in the sentence serving regimes and the scope of rights and obligations that depend on them are said to be indissolubly linked not only to security risks but also to the progressive execution of the sentence. The legislator is said to enjoy broad discretion in matters of penal policy, *inter alia*, in determining the regime for serving the sentence. Moreover, the scope of rights and obligations within the system of sentence execution is said to depend also on the resources available within it, which are understood not only as financial resources but also, for example, accessibility of premises for organising the long-duration visits or the human resources needed to ensure security and order. Hence, a united sentence serving regime for specific categories of inmates is said

to be linked to the need to organise the procedure of sentence execution effectively, ensuring to all convicted persons, who are serving their sentences on the respective level of regime, equal possibilities to exercise their rights set out in the law.

The *Saeima* notes in its written reply that the judgement of 10 January 2019 by the European Court of Human Rights in the case "Ēcis *versus* Latvia" applies not to the sentence- serving regime *per se* but to a particular aspect of it – the possibility to leave the prison temporarily. Therefore, the findings expressed in this judgement could not be applied to the present case.

Another important condition in the case is said to be the fact that equal treatment of men and women, who had been imposed a custodial sentence for a serious or an especially serious crime, which they had committed as adults, would, most probably, mean significant worsening of conditions for women, in particular. The Applicant wants to have equal treatment ensured by allowing men to start serving their sentences in a partly-closed prison. However, satisfaction of this demand would, first and foremost, endanger the safety and order needed in the prison, which is a pre-condition for effective sentence execution. Whereas ensuring equal treatment by placing women in a closed prison would be contrary to the State's obligation to ensure that execution of sentences is organised in a way that is appropriate for gender needs. The small number of women that would comply with the many regimes for executing sentences would also significantly hinder effective organisation of sentence execution. Hence, if equal treatment were formally ensured it, most probably, would lead to less effective execution of custodial sentences for women.

In view of the above, it should be recognised that the restriction established in Section 50^4 of the Code has objective and reasonable grounds and this restriction protects the rights of other persons – women who have been given custodial sentences, and it is proportional.

4. The summoned person – the Ministry of Justice – holds that Section 50^4 of the Code complies with Article 91 of the *Satversme*.

Several international documents recognise women as a special category of prisoners and they include requirements that must be taken into account in executing custodial sentences imposed upon women. These requirements pertain both to the sentence serving regime and security procedures, as well as the order in which the convicted women meets her relatives and the frequency of such meetings, as well as to other matters pertaining to the execution of a custodial sentence. Moreover, the "The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders", approved by the resolution of the General Assembly of the United Nations Organisation (hereafter – the UN) No. 65/ 229 of 21 December 2010 (hereafter – the Bangkok Rules) provide that taking into account the specific needs of women with the purpose of ensuring equality between men and women cannot be considered to be discrimination. It is recognised in these rules that the sentence serving regime should be such as to facilitate and support the contacts between the imprisoned women and their relatives, in particular, with children, and to ensure, within its framework, resocialisation measures appropriate for imprisoned women, as well as measures that facilitate their integration into society after the sentence has been served. Whereas security measures and the sentence serving regime should be less severe, i.e., commensurate with the danger caused by imprisoned women.

In view of imprisoned women's special needs, the execution of custodial sentences given to women cannot be organised within the same infrastructure and the same procedure, in which the execution of sentences for men is ensured. Women need appropriate infrastructure with an appropriate sentence serving regime, measures of security and resocialisation. The procedure for serving sentences in Iļģuciems Prison, within the framework of the existing infrastructure, has been adjusted, to the extent possible, to the special needs of imprisoned women.

Allegedly, the differential treatment envisaged in Section 50[4] of the Code is needed to implement the overarching principle of a socially responsible state. Abiding by this principle, by ensuring that the custodial sentence is served in accordance with the needs of imprisoned women, the lower risk for society that

they pose and the women's role, still existing in society, in caring for children and the family, is said to be the legitimate aim for the different sentence serving regimes established for men and women in the Code. The restriction is said to be suitable for reaching the legitimate aim, as well as the only more lenient measure that can be ensured within the system and infrastructure of prisons, existing currently in Latvia, to ensure the procedure for serving a custodial sentence that would comply with international documents and imprisoned women's needs.

The compliance of Section 50^4 of the Code with Article 91 of the *Satversme* should be examined by taking into account the social reality and the aim to ensure to the convicted women such procedure for executing a custodial sentence that would take into account the specific needs of these women, which recently is given growing attention both internationally and in the area of executing criminal sentences. The fact that, actually, women are the main caregivers for children and other family members, means that measures for promoting gender equality are still needed in reality. The Ministry of Justice, referring to the European Commission's "Reflection document on the social dimension of Europe", notes that "gender equality remains far from reality" because gender-related stereotypes still exist.

In view of the current social reality in the area of gender equality, it should be recognised that the benefit that society gains from setting different sentence serving regimes for men and women who have been convicted for committing a serious or an especially serious crime outweighs the damage inflicted upon the interests of convicted men. However, with changes in the social reality, the differences in the procedure for serving a custodial sentence set in the Code, depending upon the convicted person's gender, would need to be reviewed.

The Ministry of Justice informs that innumerable substantial amendments had been introduced to the Code over the last 20 years to make the regulation included therein compatible with the international legal acts in the area of enforcing criminal sentences. Moreover, since 2007, the Standing Working Group om the Policy of Enforcing Criminal Sentences has been functioning in

the Ministry of Justice, its task is to ensure improvements to the Code. The work on drafting a new law On Execution of Criminal Sentences is also underway.

5. The summoned person – the Ombudsman – holds that Section 50^4 of the Code, insofar restrictions on a person's right to inviolability of private life follow from it, is incompatible with Article 91 of the *Satversme*.

Pursuant to the case law of the European Court of Human Rights, imprisoned men and women are to be considered as being groups of persons who are in comparable circumstances, unless any additional circumstances cannot be established (e.g., pregnancy). The scope of imprisoned persons' rights in closed and partly-closed prison is said to differ considerably. The differences, in particular, pertain to restrictions on the right to inviolability of personal life, which apply to contacts with the outside world and relatives. The Ombudsman notes, referring to the Recommendation of the Committee of Ministers of the Council of Europe of 11 January 22006 on the European Prison Rules (hereafter – the European Prison Rules), that restrictions on communication should not depend on the imprisoned person's gender but the risk that he or she might cause, as well as their conduct and other factors.

In the meaning of various international documents, women, undoubtedly, have specific needs that follow from a woman's physiological and biological particularities, and these needs, definitely, should be taken into account and satisfied. Pregnant women and new mothers need special treatment. The number of women who have received custodial sentences is small, and therefore it is more possible that their rights are disproportionally restricted. For example, it might be difficult to ensure separate premises for men and women or it may happen that women are placed further away from their place of residence and family. However, Latvia is a comparatively small country, and the only female prison is located in the capital city Riga, which can be reached from any place in Latvia within a couple of hours. Moreover, sometimes also the sentenced men are placed far away from home, although there are more male prisons.

With respect to the arguments provided by the *Saeima* that women commit violent crimes less frequently, have greater suicidal tendencies and have suffered from violence more often, the Ombudsman notes that each person, their personality and the risks connected to them should be individually assessed and that general research cannot serve as the legal grounds for restricting a person's fundamental rights only because of their gender. Allegedly, it follows from the Ombudsman's observations that men are more prone to violating the rules of sentence serving regime than women, therefore security- and health-related risks are greater with respect to them. However, men also happen to be emotionally very sensitive and a very high risk of self-harming and suicide is characteristic of some groups of imprisoned men. Therefore, unless the matter is special physiological needs of women, it would not be correct to envisage for women, who have been sentenced for committing a serious or an especially serious crime, more rights in the execution of sentence only due to their gender, *inter alia*, and , in particular, the rights to private life, compared to men who have been sentenced for committing a similar crime. The issues of security and surveillance could be an exception, because, in this aspect, lesser restrictions for women could be justified and proportional.

The Ombudsman, referring to the judicature of the European Court of Human Rights, points out that there should be very serious reasons for recognising gender-dependent differential treatment as being compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention). Differential treatment is admissible only in a very limited scope if the particular situation can be justified by the biological gender particularities (for example, special support to mothers linked to childbirth and caring for the infant, but not for raising the child, since these are also the rights and obligations of the father). No objective and reasonable grounds can be discerned for defining different scope of rights for men and women who had been sentenced for committing crimes of similar severity during the period of serving the custodial sentence.

The aim of the progressive execution of a sentence is to achieve a balance between the convicted person's conduct in prison, their degree of resocialisation and the regime applicable to this person. In recent years, the focus in sentence execution is put on the convict's resocialisation. Several specialists work with convicted persons, assessing each of them individually. The Code also provides for an individual assessment of each sentenced person and gradual progression with the framework of sentence serving regimes, in accordance with their conduct in the prison and the degree of resocialisation, without emphasising any of the genders in particular. However, this is not the grounds for changing the sentence serving regime defined for the sentenced person in law.

In Latvia, each sentenced person, upon commencing to serve the sentence, should be defined an appropriate sentence serving regime, on the basis of comprehensive assessment, developed by experts, which, *inter alia*, would include individual needs. For example, pregnant women should be given unlimited time for outdoor walks, more possibilities to meet the father of the child, etc.

In the particular situation, the State should make the effort to improve the situation of all imprisoned persons rather than worsen the current situation of imprisoned women. The entire system of sentence execution should be based on individual assessment but reducing the scope of imprisoned women's rights would be inadmissible.

6. The summoned person – the Prison Administration – holds that Section 50 ^{4} of the Code complies with Article 91 of the *Satversme*.

Women who serve custodial sentences in prisons should be considered as one of the special groups of prisoners, to the needs of which the State should pay special attention due to several reasons, *inter alia*, the relatively small number of such women. The structure of crimes committed by women also is said to differ significantly from the structure of crimes committed by men, i.e., women predominantly commit property related criminal offences and comparatively few violent offences. Hence, in the majority of cases the criminal offences committed

by women do not cause significant risks to society and it should be taken into account in executing the custodial sentences given to women.

Pursuant to the Code, the scope of rights for convicts who serve their sentence in a partly-closed prison is slightly larger compared to convicts who serve their sentence in a closed prison. The main differences pertain to the frequency and length of visits and phone calls. Both in closed and partly-closed prisons the convicts serve their sentences in closed cells and the level of surveillance does not differ significantly – the surveillance is constant in prisons of both types.

Whereas the living space allocated for each convict and the number of convicts per cell do not depend so much on the type of prison but on the infrastructure of the particular prison, free places in cells and compatibility of convicts. As regards satisfaction of material and daily needs, the Code does not provide for differences between the closed and partly-closed prison. The norm of living space per convict, who serves the sentence in a prison (irrespectively of the type of prison), may not be less than four square meters, but in single-use cells – less than nine square meters.

The Prison Administration informs that, in 2016, 1009 convicted men started serving their sentences in a closed prison on the lowest level of sentence serving regime, 1181 men in 2017, and 985 men in 2018. Whereas in a partly-closed prison, on the lowest level of sentence serving regime 172 women started serving their sentences in 2016, 143 – in 2017, and 130 women in 2018.

In 2018, 2313 men completed serving custodial sentences, who, in total, had committed 5136 violations of the sentence serving regime, of which 1804 had been gross and systemic. Whereas 228 women, who had completed serving their sentences, had committed 183 violations of the sentence serving regime, of which 59 had been gross and systemic.

No differences in resocialisation of men and women follow from regulatory enactments. Namely, both convicted men and convicted women, as well as minors of both genders participate in resocialisation measures in accordance with the individually developed resocialisation plan, which is based

on the outcomes of the convict's risks and needs assessment, in accordance with the Cabinet Regulation of 9 April 2013 No. 191 "Procedure for Implementing Resocialisation of a Convicted Person". However, resocialisation plans have different modules because the criminal offences committed by men and women differ. Likewise, men and women behave differently, and this has been confirmed by criminological research. A woman's criminological profile is said to depend on her lifestyle, employment, social position and roles in society. Another particularity in the execution of sentences imposed upon women is that they are in prison together with their children. Reinforcement of the mother's role, development of the skills that have already been acquired and mastering of new skills is part of the aims and particularities of the execution of the sentence imposed upon women and of resocialisation. In view of the above, also the regimes for serving custodial sentences, where men and women start serving their sentences, should be different.

7. The summoned person – the State Probation Service – upholds the opinion expressed in the *Saeima's* written reply that women and men have different needs in the framework of executing criminal sentences.

In 2018, the State Probation Service completed research "Recidivism of Probation Clients Committing Criminal Offences: Comparison of Cohorts of 2013 and 2016". The research sample included all probation clients who had entered the probation system in the particular period: 3793 men and 777 women.

The share of men and women included in the sample points to significant differences between two groups – women are sentenced less often than men for committing criminal offences and constitute only 17 per cent of the total number of probation clients. The research also has proven that women reoffended less often than men. New criminal proceedings had been initiated against 22.7 per cent of women – probation clients, and in 14 per cent of cases had been initiated during the first year of entering the probation system (against men – probation clients, 38.4 per cent and 23.3 per cent, respectively).

Likewise, women less frequently than men commit criminal offences involving violence or threat of violence and less frequently commit such criminal offences repeatedly. 521 probation clients had been sentenced for criminal offences involving violence or threats of it, of these 466 (89.4 per cent) had been men and only 55 (10.6 per cent) – women. Whereas new criminal proceedings regarding a criminal offence involving violence or threat of it have been initiated with respect to 23 female probation clients or 2.96 per cent of the women included in the research sample and against 281 male probation clients or 7.4 per cent of men included in the research sample.

It had been established in the research, conducted in 2018, "Recidivism of Persons Sentenced for Committing a Sexual Crime in Committing Criminal Offences" that women commit criminal offences against morals and sexual integrity less frequently than men, and the sexual crimes committed by them are rarely sexually motivated and linked to violence.

The State Probation Service holds that men and women should be considered as being different groups, in view of the risks caused by these groups and the possibility of committing criminal offences in the future. Thus, men and women are said to differ objectively, and these differences should be taken into account in planning and organising work with convicts.

The women have not been separated as a special group of probation clients in the normative acts that regulate the functioning of the State Probation Service and in the internal methodological materials because the work with all probation clients is based on their individual needs. Namely, the risk of recidivism and criminogenic needs are given a scientifically valid assessment for each probation client. Their obligations during the period of supervision, appropriate for their individual needs, as well as the intensity of supervision, the set of control and support measures are determined in accordance with this assessment. To ensure effectiveness of probation measures and facilitate the probation client's motivation to abandon antisocial behaviour, their psycho-emotional condition, health status, circumstances of social environment, age and many other special considerations, also gender-related, are taken into account in

the individual work with the probation clients. However, the State Probation Service is of the opinion that the needs of men and women, in the context of execution of criminal sentences and organisation of effective process of resocialisation, are sufficiently different to develop in the future such probation services that would be especially adapted to women's resocialisation needs.

8. The summoned person – association "THE LATVIAN CENTRE FOR HUMAN RIGHTS" – notes that there are objective circumstances why the regime for serving a custodial sentence is different for men and women.

One of the basic aims of a custodial sentence is said to be resocialisation of the person, i.e., totality of measures that help the convicted person to return to public life after serving the sentence with as little damage done to their integrity as possible and with a lower risk of reoffending. Resocialisation risks *per se* are said to be gender-neutral; however, the tools for implementing them should be individualised, otherwise formalism outweighs the value of reaching the legitimate aim.

Resocialisation of various groups of persons demands different measures, depending on the actual reality in the respective state and society. In Latvia, the situation relating to women's role in society, prejudice against women, discrimination in the labour market and domestic violence have been quite extensively researched and recognised as being problematic. For example, the data of 2011 show that there are 588 thousand families in Latvia, of which 29 per cent – single-mother families, but only three per cent – single-father families. Moreover, single-parent families are more subject to the risk of poverty.

The regime for serving a custodial sentence is said to be based on the totality of several factors; however, none of these factors nor all of them in conjunction may be contrary to fundamental legal principles and *ius cogens* norms. Also the adoption of the Bangkok Rules *per se* proves the consensus among the states regarding the need to envisage for women special procedure of imprisonment.

The Applicant, substantially, wants to achieve easements for convicted men and not worsening of the conditions for convicted women. The prohibition to envisage different procedure for serving the sentence for men and women could be recognised as being legally justified only if, first of all, it has been proven that men's and women's resilience factors regarding suffering (also moral) and tension do not differ and that the procedure for serving the sentence does not impact women's reproductive abilities; secondly, there is no link between the procedure for serving a custodial sentence and a person's abilities to resocialise; *inter alia*, return to the labour market; thirdly, in the respective society, after serving the sentence, women are not stigmatised more than men.

Women should be considered as being a special category of prisoners, insofar the differences apply to the regime for serving the custodial sentence. Differential treatment of men and women in the execution of a custodial sentence, indeed, had been institutionalised; however, this differential treatment is said to have a legitimate aim – caring for women's future and their resocialisation. Measures for reaching the aim are said to be proportional, insofar these do not envisage unjustified disproportional differences between men and women in their private life at the time when they serve their sentences for similar criminal offences. In Latvia, life after serving a custodial sentence is objectively harder for women than for men. The State has no right to ignore this fact; however, it also may not place men in the role of outcasts. For example, the State should ensure the possibility to attend the funeral of one's father, mother or child to the convicted persons, irrespectively of their gender or the criminal offence they have committed. Also, the rights of convicted men to education and health should be promoted and more extensive possibilities to communicate with the outside world should be envisaged in all sentence serving regimes. To eliminate excessive differences, the State should re-examine the restrictions set for each sentence serving regime, verifying the need for them in a democratic society and compatibility with the interests of sustainable development.

9. The summoned person – Violeta Brokāne, the former Head of Resocialisation Department of the Iļģuciems Prison – points out that regulatory enactments do not envisage differences in the way resocialisation is organised and implemented with respect to men and women.

The process of resocialisation of persons with custodial sentences is a totality of such measures for correcting social behaviour and of social rehabilitation with the aim of promoting the convict's lawful conduct and creating in them the understanding of socially positive values. V. Brokāne does not have at her disposal studies that would allow judging objectively about women as a special category of convicts and differences between both genders related to resocialisation of persons.

10. The summoned person – Jurijs Kasatkins, the Head of the Resocialisation Department of the Riga Central Prison – believes that the arguments regarding women as a special category of convicts are valid.

J. Kasatkins, referring to findings made in various studies, notes that imprisoned men and women have similar factors that cause stress; however, the women's unique role, i.e., that of a mother and separation from children creates additional stress. Environmental factors also have a more negative impact upon women, and, in general, imprisonment causes more suffering to women compared to men.

11. The summoned persons – ***Dr. med.*** **Gundega Knipše, Professor of the Faculty of Medicine, the University of Latvia, and** ***Dr. biol.*** **Līga Plakane, Associate Professor of the Faculty of Biology, the University of Latvia** – note that, notwithstanding the anatomical, physiological and mental differences, the sex or belonging to a defined sex should not be the decisive criterion for the application of various regimes of imprisonment.

Sexual differences or sexual dimorphism means division of human beings into two sexes: male and female. On the level of body, the sexual dimorphism is reflected in the primary and secondary sex characteristic and is genetically

determined. Sexual characteristic start developing already during the stage of embryonal development, and final formation of the sexual characteristics occurs at the end of puberty period. In an adult, anatomical sex dimorphism manifests itself in all organs and organ systems. For example, differences can be found in the skeletal structure of a man and a woman, in the development of muscles and in the localization of adipose tissue.

Moreover, the regulation of all bodily functions – vegetative, somatic, psychic and sensory – at both the neural and hormonal levels is said to be gender different. Men and women react differently to acute or chronic psychosocial stress, so there is a possibility of a different response, which is manifested in behaviour. Women are more sensitive to social stressors; however, they are more tolerant of stress compared to men.

12. The summoned person – ***Dr. med.*** **Normunds Limba, Docent at the Department of Human Physiology and Biochemistry, the Faculty of Medicine, Riga Stradins University**, – points out to a number of differences in the structure and function of the male and female bodies, which also lead to different needs with respect to living and working conditions.

Women, especially in the reproductive age, have higher hygienic and other similar needs, a slower metabolism, and therefore are more sensitive to cold, have lower blood pressure and a higher heart rate. In turn, men have more developed muscles, but Y chromosome genes together with the sex hormone testosterone determine male aggression. Thus, men have higher destructive abilities than women.

The biggest differences between a man and a woman are said to be found in the cardiovascular, bone and muscle, as well as the immune systems, and they are largely determined by the effects of the sex hormones - oestrogen and testosterone. The regulation and functions of many organs are also different. Studies have also shown the effects of sex hormones on vascular tone, fat metabolism, blood clotting, water and electrolyte balance in the body. Women are more resistant to most diseases than men. On the other hand, the fact that the

average life expectancy is higher for women than for men can be explained by stronger immunity.

13. The summoned person – ***Dr. med.*** **Artūrs Utināns, Docent at the Department of Psychosomatic Medicine and Psychotherapy, the Faculty of Medicine, Riga Stradins University** – notes that there are no scientific grounds for emphasizing differences in the context of how men and women perceive a custodial sentence, restrictions related to it and resocialisation.

With regard to gender differences in perception, thinking and behaviour, the most authoritative branch of science at present is said to be neuroscience, which studies the neurobiology of the brain with the latest methods of neurovisualization. The findings of recent studies show that differences in brain and perception between the genders can be statistically established but are insignificant.

Individual differences between persons are said to be much greater than the average statistical differences between genders . There are many man with "feminine" responses and many women with "masculine" responses. Research suggests abandoning such designations as "masculine characteristics" or "feminine characteristic" or "male brain" and "female brain". It should be taken into account that the biological differences between the brain of men and women are determined also by the social environment, *inter alia*, upbringing and social notions regarding the differences between the male and female thinking. However, the main difference between men and women is only the particularities in the area of sexual reproduction, which have formed through biological evolution.

Not only imprisoned women but also imprisoned men need socialisation and resocialisation. Resocialisation of men should be highlighted more than previously because recent research shows that brain is flexible, i.e., it has the ability to change either in one or another direction under the impact of social factors. Decreasing the possibility of recidivism is said to depend not only on the

police control but rather on the social integration of persons who have served their sentences.

A. Utināns holds that the arguments, included in the *Saeima's* written reply, that particularities of women's psyche justify the differential treatment in the execution of a custodial sentence, established by Section 50^4 of the Code, are not scientifically valid. Emphasising the differences between imprisoned men and women is said to be an outdated tradition, based, possibly, on financial considerations. The substance of the case is neither the fact that women, predominantly, are sentenced for less serious offences. The main issue, on its merits is, how to prevent sexual discrimination in the execution of a custodial sentence in the case of similar criminal offences. The *Saeima's* argument that imprisoned women were subject to a higher risk of mental illnesses and suicide is said to be invalid as well. Also men develop mental disorders in prison, and many of these are more characteristic of men. Mental health prevention system is needed in both female and male prisons.

14. The summoned person – ***Dr. iur.*** **Ilona Kronberga** – holds that there are objective circumstances why the regime for the execution of a custodial sentence set for men and women should be different.

To reach the aims of criminal punishment, the rights of a convicted person are restricted in accordance with the procedure of executing the sentence, defined in the Code, and the resocialisation needs of the convicted person. The enumeration of the principles of executing a criminal sentence, included in the Code, is not exhaustive, such principles have been included also in international and regional legal acts. Allegedly, these documents envisage, *inter alia*, special principles in executing sentences with respect to women and that satisfying the special needs of women cannot be regarded as discrimination.

It is contended that there are several circumstances why a different regime for executing a sentence should be applied to women; moreover, it should be appropriate for women's security risks and, at the same time, facilitate reaching the aims of sentence execution. Such circumstances are, for example, the

dangerousness of convicts, the wish to reform, need to have contacts with relatives, response to isolation and other measures related to increased security, also, previous experience of violence, women's special needs, the different reasons why women end up in prison, the low share of convicted women. It also should be taken into account that prisons, both in terms of the layout of premises and daily living conditions, as well as resocialisation programmes are basically organised to meet men's needs. With respect to convicted women, special care should be taken to ensure that they retain ties with their families.

For women, gender appropriate execution of a custodial sentence is said to mean taking of particular actions to decrease discrimination of women due to the fact that there are significantly less imprisoned women than imprisoned men; introduction of a style of prison administration that meets women's needs; the ability to recognise and satisfy the different needs of imprisoned women. Moreover, formal understanding of the equality of imprisoned men and women is not enough to guarantee women's rights in practice.

The Findings

15. The Applicant requests reviewing the compliance of the entire Section 50^4 of the Code with Article 91 of the *Satversme*. He considers that this Section provides for discriminating rules on serving a custodial sentence for convicted men who, while being adults, have committed a serious or an especially serious crime compared to convicted women who, while being adults, had committed a similarly serious crime. The *Saeima*, in turn, is of the opinion that the differential treatment of convicted men and women follows only from the first part of Section 50^4 of the Code.

Section 50^4 of the Code defines the categories of convicts who serve their sentences in a closed prison, namely: men who have received a custodial sentence for the commission of a serious or especially serious crime, as well as convicted persons who have been transferred from a partly-closed prison due to gross or systemic regime violations (*see the first part of Section* 50^4 *of the Code)*,

and also that increased security and maximum surveillance are ensured in closed prisons (*see the second part of Section 50 ^{4}of the Code*). This Section also defines the course of serving the sentence in a closed prison (*see the fourth part of Section 50 ^{4}of the Code*), as well as the convicts' rights on the highest, medium, lowest level of sentence serving regime in a closed prison (*see the seventh, eighth and nineth part of Section 50 ^{4}of the Code*). Whereas the fifth, tenth and eleventh part of Section 50 ^{4} of the Code apply to convicted persons who have been sentenced with deprivation of liberty for life (life imprisonment), and the twelfth part of this Section provides for additional rights to convicted foreign citizens and the convicted whose permanent place of residence is not Latvia.

Hence, Section 50^{4} of the Code as united legal regulation determines the sentence serving regime for men, who serve a custodial sentence in a closed prison, envisaging, *inter alia*, the rights and obligations of convicts, restrictions, the procedure of surveillance and guarding, as well as the course of serving a sentence. Therefore, the Constitutional Court will review the compliance of entire Section 50^{4} of the Code with Article 91 of the *Satversme*.

16. Article 91 of the *Satversme* provides: "All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind."

Article 91 of the *Satversme* comprises two closely interlinked principles: the equality principle – in the first sentence of the Article, and the principle of prohibition of discrimination – in its second sentence (*see Judgement by the Constitutional Court on 14 September 2005 in Case No. 2005-02-0106, Para 9.3.*).

The Constitutional Court has recognised that the objective of the equality principle is to ensure that such requirement of a state governed by the rule of law as comprehensive effect of law on all persons and application of law without privileges whatsoever is implemented (*see Judgement by the Constitutional Court of 2 February 2010 in Case No. 2009-46-01, Para 7*). The equality principle allows and even demands differential treatment of persons who are in

different circumstances, as well as allows differential treatment of persons who are in similar circumstances if there are objective and reasonable grounds for it (*see, for example, Judgement by the Constitutional Court of 13 May 2005 in Case No. 2004-18-0106, Para 13 of the Findings*).

The principle of prohibition of discrimination, in turn, supplements, specifies and helps to apply the equality principle in concrete situations. The Constitutional Court has concluded that the substance and aim of prohibition of discrimination is to prevent restrictions on a person's fundamental rights and eradicate unequal treatment if it is based on an admissible criterion (*see Judgement by the Constitutional Court of 23 November 2015 in Case No. 2015-10-01, Para 15*).

Differential treatment is based on various criteria. Depending on the specificity of the particular criterion as well as actual facts of the case the justifiability of using a criterion may differ. Namely, there are criteria, the use of which cannot be justified, as well as such criteria, the use of which in certain cases can be justified (*see Judgement by the Constitutional Court of 29 June 2018 in Case No. 2017-28-0306, Para 9*).

The Applicant holds that Section 50^4 of the Code (hereafter also – the contested norm) envisages differential treatment of convicted persons, based on the gender criterion. In view of the reasoning provided in the application and other materials in the case, the Constitutional Court will examine the compliance of the contested norm with entire Article 91 of the *Satversme*. Therefore it should be established, whether gender is a criterion that falls within the content of this Article of the *Satversme*.

17. The criteria that are the prohibited grounds for discrimination are not mentioned *expressis verbis* in Article 91 of the *Satversme*. The Constitutional Court, in specifying the content of Article 91 of the *Satversme*, has already pointed out that such criteria may be, e.g., gender, race, nationality, religious beliefs, affiliation with a certain social group (*compare, see Judgement by the Constitutional Court of 29 April 2008 in Case No. 2007-25-01, Para 7.1., and Judgement of 23 November 2015 in Case No. 2015-10-01, Para 15).*

Likewise, the Constitutional Court has concluded: to determine, which criteria fall within the content of Article 91 of the *Satversme*, *inter alia*, such principle that characterises the Latvian legal system as its openness to international law should be used (*see Judgement by the Constitutional Court of 23 April 2019 in Case No. 2018-12-01, Para 21*). In specifying the norms of the *Satversme* in conjunction with the provisions included in international human rights documents, solutions that ensure harmony between these norms should be looked for (*compare, see Judgement by the Constitutional Court of 29 June 2018 in Case No. 2017-28-0306, Para 10*).

The Constitutional Court has pointed out that Article 91 of the *Satversme* prohibits discrimination of persons on the grounds, which, *inter alia*, are included in Article 26 of the International Covenant on Civil and Political Rights (*see Judgement by the Constitutional Court of 13 May 2005 in Case No. 2004-18-0106, Para 5.1. of the Findings*). This Article provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Convention also prohibits discrimination, i.e., pursuant to its Article 14, the enjoyment of the rights and freedoms set forth in the Convention must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It should be taken into account that Article 14 of the Convention functions only in conjunction with other rights guaranteed in the Convention.

Hence, it follows from the international human rights provisions binding upon Latvia that gender is to be considered as being one of the prohibited criteria.

Thus, gender is one of the criteria falling within the content of Article 91 of the *Satversme*.

18. In examining, whether the contested norm complies with Article 91 of the *Satversme*, the Constitutional Court must establish:

1) whether and which persons (groups of persons) are in similar and according to certain criteria comparable circumstances;

2) whether the contested norm establishes similar or differential treatment of these persons;

3) whether this treatment has been established by a legal norm adopted in the procedure set out in regulatory enactments;

4) whether there are objective and reasonable grounds for such treatment (*see, for example, Judgement by the Constitutional Court of 29 June 2018 in Case No. 2017-28-0306, Para 11*).

19. The Constitutional Court has recognised: to determine, whether and which groups of persons are in similar and comparable circumstances, the common feature of these groups should be found (*see Judgement by the Constitutional Court of 4 December 2003 in Case No. 2003-14-01, Para 12*).

Two situations are never entirely identical. Therefore, a situation that shares one or several features with the situation to be examined must be selected for comparison (*see, for example, Judgement by the Constitutional Court of 4 January 2007 in Case No. 2006-13-0103, Para 7*). However, common features *per se* do not always serve as a sufficient argument to establish that two groups of persons are in similar and comparable circumstances. The Constitutional Court must also examine whether there are no important considerations indicating that such groups of persons are not similar and comparable circumstances (*see, for example, Judgement by the Constitutional Court of 9 April 2013 in Case No. 2012-14-03, Para 17.2.*).

The Applicant holds that men and women who have committed similarly serious crimes and who have received custodial sentences of similar length are in similar and comparable circumstances. The *Saeima*, in turn, points to objective differences between men and women, i.e., that each group has its own characteristics and needs, therefore these groups can be compared only formally.

Summoned persons *Dr. med.* N. Limba, *Dr. med.* G. Knipše and *Dr. biol.* L. Plakane point to anatomical, physiological and mental differences between men and women, whereas *Dr. med.* A. Utināns draws the Constitutional Court's attention to the fact that, in terms of thinking, perception and behaviour, differences between genders are smaller than those between particular individuals. The Ministry of Justice and the Ombudsman, referring, *inter alia*, to the judicature of the European Court of Human Rights, note that convicted men and women are in similar and comparable circumstances (*see Case Materials, pp. 84, 85, 110, 115, 127 and 130*).

The European Court of Human Rights, examining a violation of Article 14 of the Convention in conjunction with other Articles of the Convention, has recognised that all persons who have been convicted for similar or comparable crimes are in an analogous situation (*see Judgement by the Grand Chamber of the European Court of Human Rights of 24 January 2017 in Case "Khamtokhu and Aksenchik v. Russia", Applications No. 60367/08 and 961/11, Para 68, and Judgement by the European Court of Human Rights of 10 January 2019 in Case "Ēcis v. Latvia", application No. 12879/09, Para 80 and 81*).

The Constitutional Court concludes that, within the framework of the present case, men and women who, while being adults, have committed a serious or an especially serious crime, have received a custodial sentence and are serving their sentences (hereafter also – convicted men and women) are in similar and comparable circumstances.

In defining the comparable groups of persons it also should be taken into account that the convicted women who are pregnant or breastfeed a child are not in similar and comparable circumstances with the aforementioned persons. Therefore, legal acts envisage special rights to them.

Hence, men and women who, while being adults, have committed a serious or an especially serious crime, have received a custodial sentence and are serving their custodial sentences are to be considered as being groups of persons who are in similar and according to certain criteria comparable circumstances.

20. Since the convicted men and women are in similar and comparable circumstances, it must be established whether the contested norm envisages differential treatment of these groups of persons.

20.1. The Constitutional Court has concluded that deprivation of liberty – keeping a person imprisoned coercively – is a type of punishment linked to restrictions on a person's fundamental rights, predominantly – the right to freedom. The convicted person is isolated from the accustomed environment and lifestyle, social contacts. The restrictions that are established in connection with the execution of the custodial sentence cause physical and psychological burden for the convicted person, therefore these cannot exceed those that are necessary due to the nature of the type of punishment received and the sentence serving regime (*see Judgement by the Constitutional Court of 6 February 2006 in Case No. 2005-17-01, Para 6*).

The rules and procedure for executing a custodial sentence as well as the convicts' legal status are regulated, first and foremost, by the Code, as well as the Cabinet Regulations, issued on the basis of it, *inter alia*, Regulation of 30 May 2006 No. 423 "Internal Regulations of an Institution for Deprivation of Liberty", Regulation of 19 December 2006 No. 1022 "Provisions on the norms of material provision for the nutritional and household needs of prisoners", Regulation of 9 April 2013 No. 191 "Procedures for the implementation of resocialisation of the convicted person", and Regulation of 2 June 2015 No. 276 "Procedures for the Implementation of Health Care for Arrested and Convicted Persons". Likewise, the Prisons Administration Law also must be taken into account in the execution of a custodial sentence.

Pursuant to Section 13 (1) of the Code, custodial sentences are executed in closed prisons, partly-closed prisons, open prisons, as well as in juvenile correctional institutes. Closed, partly-closed and open prison sections can be organised at an institution for deprivation of liberty. Chapter Seven of the Code "Regimes in Prisons" sets out, *inter alia*, which convicts serve their sentences in

which prisons, as well as their obligations, rights and restrictions on each level of sentence serving regime.

It follows from the contested norm and Section 50^5 of the Code that men who, while being adults, had committed a serious or an especially serious crime and have received custodial sentences serve their sentence in a closed prison, whereas the convicted women, which, while being adults, have committed a serious or an especially serious crime, serve their sentence in a partly-closed prison. Hence, a different sentence-service regime has been envisaged for convicted men and women and, thus, also the scope of rights and restrictions set for the convicts differs.

20.2. The type of prison, where the serving of a custodial sentence begins, determines, *inter alia*, the further course of sentence execution. Latvia has the progressive execution of a sentence, which, pursuant to Section 50^1 (1) of the Code, is based on the differentiation of convicts within the framework of one type of prison and regime, as well as on the transfer of convicts from one type of prison to another type of prison, depending on the share of sentence served and the convict's behaviour.

Serving of the sentence starts on the lowest level of sentence serving regime (*see the third part of Section 50^1 of the Code*). When at least one-fourth of the custodial sentence has been served, the convicted man, on the basis of a decision by the evaluation committee, may be transferred from the lowest level of sentence serving regime in a closed prison to the medium level, and when the second one fourth of the sentence has been served – to the highest level of sentence serving regime in a closed prison, where he has to stay for the remaining part of his sentence; however, he may be transferred also to a partly-closed prison (*see the fourth part of Section 50^1 of the Code*). Whereas a convicted woman, after one fourth of the received sentence has been served on the basis of a decision by the evaluation committee, may be transferred from the lowest level of sentence serving regime in a partly-closed prison to the highest level, but when the second one fourth of the sentence has been served – to the open prison (*see the third and the fifth part of Section 50^1 of the Code*).

Hence, a convicted woman who has served half of her sentence, theoretically, already may be transferred to an open prison. A convicted man, however, after serving half of his sentence, may have reached only the highest level of sentence serving regime in a closed prison and may be transferred to the highest level of sentence serving regime in a partly-closed prison after an undefined period of time.

Pursuant to Section 50^6 of the Code, the sentence serving regime in an open prison is comparatively easier and less restrictions have been imposed on a convict, for example, the convicted person is placed in hostel-type premises where he can receive visitors, use a personal computer with Internet access and a personal mobile phone, shop in a prison shop and receive parcels and deliveries without restrictions, and work outside prison.

20.3. The differences in the scope of rights and restrictions set for the convicted men and women need to be examined separately, although they also are linked to the placement of convicts in different prisons and different sentence serving regimes.

The Constitutional Court has pointed out that the Code, by establishing several sentence serving regimes, defines also different scopes of rights and level of resocialisation (*see Judgement by the Constitutional Court of 9 June 2011 in Case No. 2010-67-01, Para 10.1.*). These differences are even more pronounced with respect to the scope of convict's rights and restrictions in different prisons. These differences are the most obvious with respect to restriction set for convicted men and women in communication with their family, as well as financial restrictions. The Constitutional Court has concluded that these restrictions fall within the scope of rights established in Article 96 of the *Satversme* (*compare, see, Judgement by the Constitutional Court of 18 May 2017 in Case No. 2016-12-01, Para 13.1. and Para 13.2.*).

Section 45 (1) of the Code provides that the convicts have the possibilities to meet their relatives and other persons without the presence of a representative of the prison in accordance with the procedures and to the extent laid down in the Code: for short-duration visits – from one to two hours in order to facilitate

maintenance and renewal of socially useful contacts; for long-duration visits – from six to forty-eight hours in order to facilitate maintenance of kinship and family contacts. Whereas pursuant to Section 49 (5) of the Code, convicted persons may have, at their own expense or at the expense of their addressee, such number of phone conversations as is specified in the relevant prison and corresponds to the level of sentence serving regime.

Pursuant to the contested norm, the convicted men, who start serving their sentence on the lowest level of sentence serving regime in a closed prison, have the right to three long-duration visits (from six to twelve hours) and four short-duration visits (from one to two hours) per year, as well as to have one phone call per month (*see Para 1 and Para 4 of the ninth part of Section 50⁴ of the Code*). Whereas the convicted women, who start serving their sentence on the lowest level of sentence serving regime in a partly-closed prison, have the right to five long-duration visits (from twelve to twenty-four hours) and four short-duration visits (from an hour and a half to two hours) per year, as well as to have an unlimited number of phone calls (*see Para 1 and Para 3 of the eight part of Section 50⁵ of the Code*).

The convicted men, who serve their sentence on the medium level of sentence serving regime in a closed prison, have the right to four long-duration visits (from eight to sixteen hours) and six short-duration visits (from one to two hours) per year, as well as to have two phone calls per month, whereas on the highest level of sentence serving regime – six long-duration visits per year (from twelve to twenty-four hours) and six short-duration visits (from one to two hours), kas well as three phone calls per month (*see Para 1 and Para 4 of the seventh part and Para 1 and Para 4 of the eighth part of Section 50⁴ of the Code*). Whereas the convicted women, who serve their sentence on the highest level of sentence serving regime in a partly-closed prison, have the right to eight long-duration visits (from twenty-four to forty-eight hours) and eight short-duration visits (from an hour and a half to two hours) per year, as well as to make an unlimited number of phone calls (*see Para 1 and Para 3 of the seventh part of Section 50⁵ of the Code*). Moreover, the Code also provides for the rights of the

convicted women on this level of sentence serving regime , with the permission by the head of the prison, to leave the prison temporarily up to five days in connection with the death or life-threatening disease of a close relative (*see the first part of Section 49^2 of the Code*).

The Code also establishes different restrictions on the financial rights of convicted men and women, i.e., the legal regulation on how often and for what kind of amount the convicted men and women can make purchases from the prison shop differs. On the lowest level of sentence serving regime in a closed prison, the convicts may make purchases from the prison shop for the total amount that does not exceed half of the monthly wages defined by the Cabinet, whereas on the medium level of sentence serving regime in a closed prison and the lowest level of sentence serving regime in a partly-closed prison, for the amount that does not exceed three-fourths of the minimum monthly wages (*see Para 3 of the eight part and Para 3 of the nineth part of Section 50^4 of the Code, as well as Para 2 of the eighth part of Section 50^5*). Whereas on the highest level of sentence serving regime in a closed and partly-closed prison all convicts may make purchases for the amount equal to one minimum monthly wages (*see Para 3 of the seventh part of Section 50^4 and Para 2 of the seventh part of Section 50^{5}of the Code*).

The way in which a convict may receive health care services and acquire education outside the prison depends on the sentence serving regime they are in. The other rights envisaged to the convicted persons by the Code, *inter alia*, to be outside the cell, to wear personal clothes, the right to receive parcels or deliveries, as well as restrictions are the same for men and women.

Thus, depending on the type of prison where the convicted person starts serving the sentence, the further execution of the sentence occurs, within the framework of progressive execution of a sentence, and, accordingly, the scope of rights and restrictions set for convicted men and women differs in each sentence service regime, first and foremost, with respect to the convicts' right to have contacts with their relatives.

Hence, the contested norm envisages differential treatment of persons who are in similar and comparable circumstances.

21. Differential treatment should be established by a legal norm adopted in a procedure set out in regulatory enactments, i.e., "in accordance with law" (*see, for example, Judgement by the Constitutional Court of 16 May 2019 in Case No. 2018-21-01, Para 15.2.*).

The contested norm was included in the Code by the law, adopted by the *Saeima* on 15 December 1994 "Amendments to the Corrective Labour Code of Latvia".

The contested norm has been amended repeatedly. *Inter alia*, Section 50[4] (1) of the Code was amended by the Cabinet Regulation of 7 January 2000 No. 5, which had been issued in the procedure set forth by Article 81 of the *Satversme*, valid at that time. It follows from the information available from the *Saeima's* legislative database that the Cabinet submitted this regulation on 11 January 2011 as a draft law to be reviewed by the *Saeima*. Pursuant to the Rules of Procedure of the *Saeima*, the draft law was reviewed in three readings and was adopted in the third reading on 8 June 2000. On 27 June 2000, the amendments were promulgated in the official journal "*Latvijas Vēstnesis*" and entered into force on 11 July 2000. The contested norm in its current wording has been in force since 21 December 2017.

Participants in the case and the summoned persons agree that the contested norm has been adopted in the procedural order defined in the *Satversme* and the Rules of Procedure of the *Saeima,* has been promulgated and is publicly accessible in compliance with statutory requirements and is worded with sufficient clarity to allow a person to understand the content of the rights and obligations following from it and to foresee the consequences of its application. Neither has the Constitutional Court developed any doubts in this regard.

Hence, the differential treatment envisaged in the contested norm has been established by law.

22. The criterion, on which the differential treatment to be examined in the present case is based, is gender, therefore, in assessing, whether there are objective and reasonable grounds for such treatment, *inter alia*, the historical context of the development in the understanding of women's rights and gender equality should be taken into account.

22.1. Until the beginning of the 21st century, in the majority of states of the world women were not regarded as being full-fledged members of society and society, in general, was patriarchal. Certain stereotypes regarding the role of men and women in society had become consolidated in society, which partially have survived till the present. Traditionally, the women's role has been linked to the upbringing of children and caring for the family (*see The Initial Report of the Republic of Latvia on implementation of the Convention of 18 December 1979 on Elimination of All Forms of Discrimination against Women in the period until 1 January 2002, Para 22*). Women had less opportunities to exercise their rights compared to men. *Inter alia*, the prevailing understanding of women's rights in society is illustrated also by the granting of electoral rights to women. Although the emancipation of women in Europe began already in the first half of the 20th century, in several West European countries, women acquired electoral rights only at the end of the century (*see: Birke R., Sachse C. Menschenrechte und Geschlecht im 20. Jahrhundert. Historische Studien. Göttingen: Wallstein, 2018, S. 7–12*).

The UN General Assembly, taking into account that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family was the foundation of freedom, justice and peace in the world, on 10 December 1948, adopted the Universal Declaration of Human Rights, which was one of the first steps in establishing international human rights standards. The universal principle that all human beings are born free and equal in dignity and rights has been enshrined in its Article 1. Over time, this principle, like the entire system of human rights protection, developed, and, in the second half of the 20th century, contemporary society understood that certain societal groups,

inter alia, women were more vulnerable and less protected than other members of society. Therefore states have the obligation to act – take certain measures to improve the situation of these persons.

22.2. To promote measures needed to eliminate discrimination against women in all its forms and manifestations, on 18 December 1979, the UN adopted a special document aimed at protecting the rights of women, i.e., the Convention on the Elimination of All Forms of Discrimination against Women (hereafter – Convention on the Elimination of Discrimination against Women). Pursuant to Article 1 of this Convention, the term "discrimination against women" means any distinction, exclusion or restriction made on the basis of sex which impair or nullify the recognition, enjoyment or exercise by women, irrespectively of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field.

Article 2 of the Convention on the Elimination of Discrimination against Women provides that the State Parties condemn discrimination against women in all its forms and undertake, *inter alia*, to embody the principle of the equality of men and women in their national constitutions and to ensure the practical realisation of this principle, to adopt appropriate legislative and other measures prohibition all discrimination against women, as well as to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Latvia accessed the Convention on the Elimination of Discrimination against Women on 14 April 1992.

22.3. The principle of prohibition of discrimination is included also in documents of advisory nature applicable directly to prison inmates. The Constitutional Court has recognised that the State, in adopting legal regulation pertaining to imprisoned persons, to the extent possible, should follow the recommendations developed by the UN and the Council of Europe in this area (*see, for example, Judgement by the Constitutional Court of 20 December 2010 No. 2010-44-01, Para 10*).

Para 2 of the Minimum Standard Rules for the Treatment of Prisoners, approved by the resolution of the UN General Assembly No. 70/175 on 17 December 2015, and Para 13 of the European Prison Rules provide that these rules must be applied objectively, without allowing discrimination for any reasons, including sex. Both these documents also set the requirement to place different groups of prisoners, *inter alia*, men and women, separately (*see Para 11 of the UN Minimum Standard Rules for the Treatment of Prisoners, and Para 18.8. of the European Prison Rules*).

Hence, gender is one of the prohibited criteria for discrimination, which has been established as the result of the historical development of women's rights and gender equality.

23. The human rights provisions binding upon Latvia and the practice of their application establish the states' rights and sometimes also obligations to envisage special measures for the protection of such groups that are affected by inequality.

23.1. Pursuant to the first part of Article 4 of the Convention on the Elimination of Discrimination against Women, State parties may adopt special measures aimed at accelerating *de facto* equality between men and women, and these are not to be considered as being discriminatory.

The European Court of Human Rights, in turn, has recognised that states may treat comparable groups differently to remedy a "*de facto* inequality" between them, and in certain circumstances it may be considered an infringement that the State does not seek to remedy this inequality by differential treatment (*see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 12 April 2006 in Case "Stec and Others v. the United Kingdom", Applications No. 65731/01 and 65900/01, Para 51*). Hence, differential treatment that has been created by implementing special measures to improve the conditions of a group of persons and ensure protection of these persons' rights, at the same time remedying *de facto* inequality that had occurred historically, may be justified in some cases.

23.2. It follows from legally binding and advisory international documents that women are to be considered as being a group of prisoners in need of special protection.

The Bangkok Rules recognise women as being one of the groups of prisoners in need of special protection and with distinct needs (*see Preamble to the Bangkok Rules*). These Rules pertain to various aspects in the execution of sentence, *inter alia*, issues relating to the allocation of convicted women, their classification, health care, contacts with the outside world. The special principle regarding execution of sentences for women follows from Para 1 of the Bangkok Rules, i.e., prohibition of discrimination and the fact that the distinctive needs of women should be taken into account in the execution of the sentence, e.g., the need to serve the sentence as close as possible to the place of residence, personal hygiene needs and gender appropriate health care. Para 26 of the Bangkok Rules provides that women prisoners' contact with their families, including their children, and their children's guardians and legal representatives must be encouraged and facilitated by all reasonable means. Whereas Para 41 sets forth that in the risk assessment and classification of convicted women the generally lower risk posed by women prisoners to others, as well as the particularly harmful effects that high-security measures and increased levels of isolation can have on women prisoners should be taken into account. It is also underscored that it is important to implement resocialisation measures that match women's gender-specific needs. Moreover, it follows from Para 1 of the Bangkok Rules that the taking into account of the distinct needs of women prisoners to ensure gender equality is not to be regarded as discriminatory.

Whereas the European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life (hereafter – the Resolution) points to the "specific nature" of women's prisons, asking Member States to incorporate gender equality into their penal policy, as well as to take greater account of women's specific needs (*see Para 8 and Para 9 of the Resolution*). Member States are encouraged to adopt flexible rules on women's right to contacts with

their family members (*see Para 23 of the Resolution*). Moreover, Para 26 of the Resolution states that many women in prison are single mothers who may lose contact with their children, sometimes irreversibly. It is also stated in the Explanatory Statement to the Resolution that women have different needs with respect not only to hygiene, maternity care and gynaecological health but also to psychological health because quite often the convicted women have experienced violence or had other traumatic experience.

One of the reasons mentioned as to why women should be considered a group of prisoners in need of special protection is the fact that the number of imprisoned women is relatively low. This leads to several problems, e.g., a small number of prisons suitable for women, and they serve their sentences far from home or in conditions that are not appropriate for their needs (*see: UN Office on Drugs and Crime Handbook "Women and Imprisonment", 2nd edition, pp. 15–16. Available: https://www.unodc.org/documents/justice-and-prison-reform/women_and_ imprisonment_-_2nd_edition.pdf*).

Hence, women are to be considered as a group of prisoners in need of special protection, and they have distinctive needs, which the State must take special care to satisfy, in organising the execution of a custodial sentence.

23.3. On the territory of Latvia, the regulation, pursuant to which men and women who have committed similarly serious crimes serve their sentences in prisons of different regimes, has been operating since the time of the Soviet occupation. I.e., in the penal rights of the USSR, the principle that men serve their sentence for committing a similarly serious crime in prisons with harsher regime, but women – in prisons with more lenient regime was applied. This principle was included also in the Corrective Labour Code of the Latvia SSR, which entered into force on 1 April 1971.

Following the restoration of Latvia's independence, this law continued to be in force as the Corrective Labour Code of Latvia, but later – the Sentence Execution Code of Latvia. Numerous amendments have been introduced to the Code, aimed at transforming the system of execution of sentences, established during the period of Soviet occupation. However, the principle that men and

women serve the sentence for committing a similarly serious crime (serious or especially serious) in prisons with different regimes was retained.

The *Saeima* points out that the different sentence serving regimes for men and women, who have to be considered as being a special group of prisoners, have been established intentionally and conditions that are more appropriate for women in serving their sentence in a partly-closed prison have been envisaged for women. The *Saeima* justifies the need for a more lenient sentence serving regime for women, *inter alia*, by the need to facilitate contacts between the convicted women and their families, in particular, their children, and also by the fact that women are less dangerous to others, commit crimes that involve violence or threats of violence less often, and often have had traumatic experience. The State has established a special prison, adjusted to the needs of convicted prisons, i.e., the Iļģuciems Prison in Riga, where all convicted women serve their sentences.

Hence, the differential treatment of convicted men has occurred because the State had implemented special measures to ensure the rights of convicted women and to reduce the gender inequality that has developed historically.

24. The Constitutional Court already found that the principle that a more lenient sentence serving regime is envisaged for women has, essentially, operated for almost 50 years. There have been frequent amendments to the contested norm and to other norms of the Code, however, the legislator has not abolished this principle.

Article 4 of the Convention on the Elimination of Discrimination against Women provides that the special measures aimed at accelerating *de facto* equality between men and women should in no way entails as a consequence the maintenance of unequal or separate standards and must be discontinued when the objectives of equality of opportunity and treatment have been achieved. Therefore, the legislator must verify regularly whether the special group still needs the special protection.

The European Court of Human Rights also has concluded that, over time, the situation might change and the moment may come when the special measures, implemented by the State, to protect the rights of a special societal group are no longer necessary and justified. Namely, at some point the benefit gained from the measures implemented by the State to improve women's condition no longer outweigh the harm inflicted on men by their differential treatment (*compare, see Judgement by the Grand Chamber of the European Court of Human Rights on 12 April 2006 in Case "Stec and Others v. the United Kingdom", Applications No. 65731/01 and 65900/01, Para 62*).

Hence, to review, in the present case, whether the contested norm complies with Article 91 of the *Satversme*, the Constitutional Court must verify, whether there are still objective and reasonable grounds for establishing a different sentence serving regime for convicted men, *inter alia*, a different scope of rights and restrictions, compared to convicted women.

25. The legislator enjoys broad discretion in developing penal and penal execution policy. *Inter alia*, the legislator, taking into account the needs of and risks caused by various groups of prisoners, as well as other considerations, has the right to determine which groups of convicts serve their sentences in which prisons, the rights and restrictions of convicts, as well as the procedures for surveillance and guarding at all levels of sentence serving regimes. However, the legislator's discretion in developing penal policy is restricted by the *Satversme* and general principles of law, *inter alia*, the equality principle.

Pursuant to Section 35 (2) of the Criminal Law, the purpose of punishment is, *inter alia*, to protect the public safety, to restore justice, to punish the offender for the committed criminal offence and to resocialise the punished person. The Constitutional Court has concluded that the purpose of executing a custodial sentence is applying effectively to the convicted person all elements of punishment within the term envisaged in the court's judgement, thus ensuring his resocialisation and lawful conduct after release from serving the custodial

sentence (*see Judgement by the Constitutional Court of 9 June 2011 in Case No. 2010-67-01, Para 11.1.*).

The person guilty of the criminal offense is sentenced by a court in accordance with the Criminal Law. Pursuant to the second and third part of Section 46 of this Law, in determining the type of punishment, the nature of and harm caused by the criminal offence committed, as well as the personality of the offender are taken into account, whereas, in determining the amount of punishment, the circumstances mitigating or aggravating the liability are taken into account. Moreover, in certain cases, the court may also impose a punishment, which is less than the minimum limit for the relevant criminal offence defined in law (*see Section 49 of the Criminal Law*). Section 7 of the Criminal Law provides, *inter alia*, which crimes are to be considered as being serious crimes and which – as being especially serious crimes.

However, the sentence serving regime, in which the convicted person will have to serve their sentence depends not only on the seriousness of the crime committed but also on the convicted person's gender.

26. It follows from the application that the Applicant basically sees the differential treatment of convicted men and women in the different restrictions on the right to private life, which have been established by the contested norm and Section 50^5 of the Code. The Constitutional Court also has concluded that the differences in the scope of rights defined for convicted persons mainly affect the possibilities to lead private life (*see Judgement by the Constitutional Court of 18 May 2017 in Case No. 2016-12-01, Para 13.1.*).

The Constitutional Court has also recognised that the *Satversme* is a united whole and the legal norms included therein are closely interconnected. To establish the content of these norms more comprehensively and objectively, they must be interpreted in conjunction with other norms of the *Satversme* (*see, for example, Judgement by the Constitutional Court of 16 December 2005 in Case No. 2005-12-0103 , Para 13*).

The right to private life falls within the scope of Article 96 of the *Satversme.* The primary aim of this right is to allow a person to develop their personality, suffering minimal interference by the State or other persons. Namely, the right to private life includes the right to establish and develop relationships with other persons, in particular, in the emotional sphere, to perfect and develop one's personality (*see Judgement by the Constitutional Court of 18 December 2009 in Case No. 2009-10-01, Para 11*).

The rights of the family, parents and the child are enshrined in Article 110 of the *Satversme*. The right to family life means the right to maintain relationships with family members. An important elements of the family life is the possibility for parents and children to enjoy each other's company (*see Judgement by the Constitutional Court of 23 April 2009 in Case No. 2008-42-01, Para 10*). The Constitutional Court has recognised that the State must protect all families, by referring to the Preamble to the *Satversme*, which consolidates the idea that the family is the foundation of cohesive society and that each individual takes care of oneself, one's relatives and the common good of society by acting responsibly towards other people and future generations (*see Judgement by the Constitutional Court of 27 June 2016 in Case No. 2015-22-01, Para 13*). The Constitutional Court also underscores that is also closely linked to the child's right to grow up in a family.

Moreover, the finding has been consolidated in the Constitutional Court's judicature than in legal relations that affect a child and in all actions relating to child their rights and best interests take the priority. Any action or decision that pertains to the child must be taken and made in such a way, insofar possible, as to respect the child's interests and ensure their rights. Moreover, the principle of the priority of the child' s rights must be complied with also if the decision is not directed towards them but could be applied to the child or affect them indirectly. This principle applies to all three branches of state power – the legislative, executive, and the judicial power. This means than not only the court and other institutions should make their decisions on the basis of the child's interests but also the legislator must ensure that the adopted or amended regulatory

enactments would provide the best possible protection for children's interests. Recognising any other priority without a serious reason and justification is inadmissible (*compare, see Judgement by the Constitutional Court of 22 December 2005 in Case No. 2005-19-01, Para 11, and Judgement of 16 June 2016 in Case. 2015-18-01, Para 11.2. and Para 18.3.*).

The rights of imprisoned persons to communicate with their family members and other persons are restricted in compliance with the purpose of imprisonment (*compare, see Judgement by the Constitutional Court of 2 December 2009 in Case No. 2009-07-0103, Para 12*). However, the State's obligation to help the person to maintain relationships with persons close to them during the period of imprisonment follows from a person's right to private and family life. Due to imprisonment, a person's possibilities to maintain contacts and relationships with other persons decrease, therefore the State should make effort, insofar possible, to decrease such negative consequences of imprisonment (*compare, see Judgement by the Constitutional Court of 23 April 2009 in Case No. 2008-42-01, Para 10*). Moreover, the legislator is obliged, upon deciding on issues of human rights protection, to define such legal regulation that sets in balance various interests relating to human rights protection (*see Judgement by the Constitutional Court of 20 December 2010 in Case No. 2010-44-01, Para 9*).

By restricting the imprisoned person's right to communicate with the family, simultaneously, also the family member's rights to communicate with the imprisoned person are restricted. Thus, in examining the contested norm, the Constitutional Court must take into account that it affects not only the rights of the convicted man but also the rights of his family members and that the parent-child relations require special protection.

27. The importance of maintaining the ties between the convicted persons, irrespectively of their gender, and their families, in particular, the children, has been highlighted in international documents..

It follows from Para 24.1. and Para 24.4. of the European Prison Rules that prisoners must be ensured the possibility to meet their family members to

maintain and develop family relations in as normal a manner as possible. Likewise, prisoners must be ensured the possibility to communicate with their family members and other persons, as often as possible, by letter, phone or by using other forms of communication.

Whereas Pursuant to Para 16 of the Recommendation of the Committee of Ministers of the Council of Europe to Member States concerning children with imprisoned parents of 4 April 2018 CM/Rec(2018) (hereafter – the Recommendation), the allocation of an imprisoned parent to a particular prison should be done in the best interests of their child to facilitate maintaining child-parent contact, relations and visits without undue burden either financially or geographically. Likewise, the Member States are recommended to make arrangements to facilitate an imprisoned parent, who wishes to do so, to participate effectively in the parenting of their children, if it is in the child's best interests (*see Para 27 of the Recommendation*). Moreover, Para 30 of this document provides for taking special measures to encourage imprisoned parents to maintain regular and meaningful contact and relations with their children, thus safeguarding their development. Restrictions imposed on contact between prisoners and their children may be implemented only exceptionally, for the shortest period possible, in order to alleviate the negative impact the restriction might have on children and to protect their right to an emotional and continuing bond with their imprisoned parent.

The need to strengthen the convicted persons' relationships with their families has been set as a priority also in the Cabinet's decree of 24 September 2015 No. 580 "On the Guidelines on Resocialisation of Prisoners for 2015–2020". One of the policy objectives, included in this document, is increasing the share of those convicted persons who, during serving the custodial sentence, renew ties with their family and relatives. Facilitating convicted persons' socially positive relationships with the family and returning to – this is one of the lines of actions indicated in the guidelines. It is indicated in the document, by referring to foreign studies, that lack of family's support and

relationships with the family is one of the main factors why a person is inclined to criminal actions.

Summoned person *Dr. med.* A. Utināns underscores that social integration of convicted men is very important to decrease reoffending after serving the sentence and returning to freedom (*see Case Materials, p. 128*). It follows from the information provided by the State Probation Service, in turn, that men – probation clients – most often reoffend (*see Case Materials, p. 123*).

The European Court of Human Rights also has concluded that, pursuant to contemporary European penal policy, the aim of imprisonment is the rehabilitation of prisoners and that strengthening of family ties is essential for social reintegration and rehabilitation of all prisoners, irrespectively of their gender (*see Judgement by the European Court of Human Rights of 10 January 2019 in Case "Ēcis v. Latvia", Application No. 12879/09, Para 92*).

Thus, in the context of resocialisation and reintegration into life after release from prison, retaining relationships with the family is equally important for both convicted women and convicted men.

28. Recent decades have seen radical deconstruction of classical gender roles within the European cultural space (*see: Reder M. Philosophie pluraler Gesellschaften. 18 umstrittene Felder der Sozialphilosophie. Stuttgart: Kohlhammer, 2018, S. 135*). Namely, in a democratic state governed by the rule of law, with the consolidation of understanding of equality between men and women, the stereotypes or perceptions of the traditional roles of each gender, also in the family, have changed significantly. For example, presently it is no longer questioned that the father and the mother have equal rights to bringing up children, and the importance of father in the child's development is underscored.

It is emphasised also in the Preamble to the Convention on the Elimination of Discrimination against Women that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women and that men and women share the responsibility for the upbringing of children. Moreover, Article 5 of this

Convention defines the State Parties' obligation to take appropriate measures to ensure that the common responsibility of men and women in the upbringing and development of their children is recognised and that the interest of the children is the primary consideration in all cases.

The European Court of Human Rights has recognised that gender-based differential treatment needs particularly serious grounds and that references to traditions existing in the particular state, general assumptions or the attitude prevailing in society cannot be considered to be sufficient justification (*see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 24 January 2017 in Case "Khamtokhu and Aksenchik v. Russia", Applications No. 60367/08 and 961/11, Para 78.*).

It has been recognised also in the legal doctrine that differential treatment, based on the gender criterion, cannot be justified by the traditional social roles of both genders (*see: Levits E. 91. panta komentārs. Grām.: Balodis R. (zin. red.) Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: Latvijas Vēstnesis, 2011, 112. lpp.*).

Moreover, although there are significant anatomical and physiological differences between the genders, also the most recent neuroscience research admits that the opinion regarding pronounced gender differences in perception, thinking and behaviour is outdated. Summoned person *Dr. med.* A. Utināns underscores that the differences in the brain and perception between the genders are insignificant and that in terms of character traits, perception, emotions, thinking and behaviour men and women are very similar and that differences between individuals, irrespectively of their gender, are greater. Also, in terms of socialisation, similarities between persons of both genders are much greater than the statistically observable differences (*see Case Materials, pp. 126–128*).

Thus, the convicted persons, irrespectively of their gender, may perceive differently the custodial sentence and restrictions related to it, as well as resocialisation.

29. Equality between men and women has been recognised in the Latvian legal system, *inter alia*, also in matters related to marriage and family relationships.

29.1. Regulatory enactments provide equally for the mother's and father's responsibility, rights and obligations in caring for and upbring the child. Pursuant to the Civil Law, both parents exercise their power jointly. Whereas, for example, regulatory enactments on state social benefits and easements intended for families provide that any of the parents may receive them. The exception to it is the maternity benefit, which only a woman can receive for the period of pregnancy and childbirth leave, as well as the paternity benefit, which can be received by a man for a 10 days long leave in connection with the birth of a child.

The Constitutional Court already noted that, in the present case, not only the rights and interests of the convicted men but also those of his family members, in particular, those of the children, should be taken into account. Pursuant to the Code, the convicted men have fewer possibilities to contact their relatives compared to convicted women. Accordingly, also the children of convicted men have fewer possibilities to meet their father than the children of convicted women – with their mother.

It also should be taken into account that the majority of men who have received custodial sentences serve them in closed prisons. Namely. On 31 December 2018, from among 2289 adult imprisoned men, 1921 of the convicted persons were serving their sentences in closed prisons (*see Ieslodzījuma vietu pārvaldes publicējamā statistika, 2018. gads. Available: http://www.ievp.gov.lv/index.php/publikacijas/ statistika*). Thus, the differential treatment that follows from the contested norm affects a significant number of persons – convicted men and their family members.

29.2. The arguments that the *Saeima* stated to justify the application of a more lenient regime to convicted women could be applied also to at least part of the convicted men. For example, many of them have families and children, and there are also such who are bringing children alone single-handedly or are

the only breadwinners in the family among the convicted men. Likewise, many of the convicted men have not committed crimes involving violence or threats or violence and part of the convicted men have had previous traumatic experiences. However, they have to serve the custodial sentence for committing a serious or an especially serious crime in a closed prison and have to spend almost the entire period of imprisonment in a stricter regime compared to women who have committed an equally serious crime.

On the basis of the Code and the Cabinet Regulation of 9 April 2013 No. 191 "Procedure for Implementing Resocialisation of a Convicted Person", as part of resocialisation, an individual risk and needs assessment is conducted in prisons for each prisoner with the aim to determine for each convicted person individual and appropriate means of resocialisation to be applied to decrease the level of risk of antisocial behaviour and reoffending. Pursuant to Para 13 of the Cabinet Regulation referred to above, the assessment results are recorded in a questionnaire, including in it, *inter alia*, information about the motivation and circumstances of the criminal offence, the convicted person' s behaviour in prison, education, work experience, family status, social relationships, and lifestyle. Thus, currently the needs and risks of each individual are identified and assessed in preparing the resocialisation plan. However, in the current system for sentence execution, it is impossible to take them into account in full by determining for each convicted person the applicable sentence serving regime, rights, and restrictions.

In the framework of the present case, the Constitutional Court reviews the differential treatment of convicted men in the context of measures, implemented by the State, aimed at protecting the rights of convicted women. The Constitutional Court concluded that the legal regulation that envisaged a stricter sentence service regime for men, only on the basis of the gender criterion, without taking into account the individual needs and risks of each convicted person, and also the different rights and restrictions following from it (in particular, restrictions on the right to private life), compared with convicted women, did not ensure that the rights of convicted men were respected. It also

does not ensure to the families of convicted men the same protection as to the families of convicted women and, *inter alia*, infringes upon the best interests of the convicted men's children.

29.3. The *Saeima* points to possible practical difficulties, as well as financial and other kinds of investment that could be required to change the existing order. Currently, for example, it is said to be impossible to envisage for all convicted men as many and as long visits as the Code envisages for the convicted women.

In creating the system for execution of sentences, the legislator must take into account, *inter alia*, the resources available in the state. However, the Constitutional Court has concluded that, with respect to the rights of convicted persons, the State has no right to derogate from fulfilling its basic duties by referring to considerations of economic nature if, as the result, the minimum requirements regarding the protection of human rights are not met (*compare, see Judgement by the Constitutional Court of 20 December 2010 in Case No. 2010-44-01, Para 15*). Thus, the legislator may not use considerations of economic nature to substantiate why such regulation that envisages differential treatment of convicted men has not been reviewed.

Hence, the differential treatment of convicted men, envisaged in the contested norm, lacks objective and reasonable grounds.

Consequently, the contested norm is incompatible with Article 91 of the *Satversme*.

30. The Constitutional Court has recognised that the legislator enjoys broad discretion in selecting the most suitable regulation for implementing the fundamental rights set out in the *Satversme.* The Constitutional Court may not substitute the legislator's discretion by its own opinion on the most rational solution (*see, for example, Judgement by the Constitutional Court of 19 December 2011 in Case No. 2011-03-01, Para 20, and Judgement of 2 May 2012 in Case No. 2011-17-03, Para 16*). At the same time, the legislator must take into account that convicted women is a group of convicted persons

requiring special protection and whether and what kind of special measures are needed for the protection of this group of prisoners must be regularly examined. Neither it is the task of the Constitutional Court to point out particular solutions to the execution of sentences because the legislator is the first who has to consider new legal regulation on the system of execution of custodial sentences in compliance with the *Satversme* and international human rights provisions.

The Constitutional Court draws the attention of the *Saeima* also to the conclusions made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter – the Committee). Namely, in assessing the situation in the Latvian prisons, the Committee has noted, *inter alia*, that the frequency of visits is not sufficient for prisoners in closed prisons, in particular, for those who serve their sentence on the lowest level of the sentence serving regime. The Committee calls upon the Latvian authorities to increase significantly the number of visits allowed for prisoners (*see Report of the Committee of 29 June 2017 No.. CPT/Inf(2017)16 on the visit to Latvia from 12 to 22 April 2016, Para 92 and 93*).

Hence, pursuant to the statement made in the Committee's report, such restrictions on the right to communication with other persons, which currently have been set in closed prisons, are inadmissible with respect to any category of prisoners.

31. 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 invalid as of the moment when the Constitutional Court's judgement is published, unless the Court has provided otherwise. In exercising the right granted to it in the aforementioned norm, the Constitutional Court must ensure, to the extent possible, that the situation which might occur as of the moment when the contested norm becomes invalid would not infringe upon persons' fundamental rights, guaranteed in the *Satversme*, as well as would not inflict significant damage upon the interests of the State or society. Namely, the law not

only authorises the Constitutional Court but also imposes responsibility upon it to ensure that its judgements would ensure legal stability, clarity and peace in the social reality (*see Judgement by the Constitutional Court of 16 December 2005 in Case No. 2005-12-0103, Para 25, and Judgement of 12 April 2018 in Case No. 2017-17-01, Para 24*).

The Applicant has not requested recognising the contested norm as being invalid as of the moment when the infringement occurred or any other past moment. The Constitutional Court takes into account that the contested norm regulates a matter related to serving a criminal sentence, which is of essential importance within the entire national legal system. If the contested norm were to be recognised as being invalid as of the day when the Constitutional Court's judgement is published or any other past moment then, on the one hand, no legal norm would regulate which categories of prisoners serve their sentences in a closed prison and, on the other hand, in which sentence serving regime men who have received custodial sentences for committing a serious or an especially serious crime serve their custodial sentences.

Hence, in the particular situation it is necessary and admissible that the norm, which is incompatible with the *Satversme*, remains valid for some time to give the legislator the possibility to amend the existing legal regulation or adopt new one that would be compatible with the *Satversme* (*compare, see, for example, Judgement by the Constitutional Court of 10 February 2017 in Case No. 2016-06-01, Para 36, and Judgement of 15 May 2018 in Case No. 2017-15-01, Para 23*).

To adopt new legal regulation, the legislator needs a reasonable period of time because the respective changes must be aligned with the entire policy of sentence execution. Moreover, until the new legal regulation enters into force, continuity in the execution of sentences must be ensured. Hence, if the contested norm is repealed, the judgement cannot be given general retroactive force, nor can the contested norm be recognised as being invalid as of the date when the Constitutional Court's judgement enters into force.

The Substantive Part

On the basis of Sections 30–32 of the Constitutional Court Law, the Constitutional Court

held:

to recognise Section 50[4] of the Sentence Execution Code of Latvia, insofar the differential treatment of men established therein lacks objective and reasonable grounds, as being incompatible with Article 91 of the *Satversme* of the Republic of Latvia and invalid as of 1 May 2021.

The judgement is final and not subject to appeal.

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

Chairperson of the court hearing I. Ziemele