LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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SEPARATE OPINION

of the Justice of the Constitutional Court

Kaspars Balodis

in Riga, on 25 May 2016,

in Case No. 2015–14–0103

"On Compliance of Para 2 and Para 6 of Section 1, Section 4, Section 10, Section 18(1) of Law on Development and Use of the National DNA Database, as well as Para 2 and Para 13 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 "The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace", insofar as these apply to persons suspected, with Article 96 of the Satversme of the Republic of Latvia."

1. On 12 May 2016, the Constitutional Court passed a judgement in Case No. 2015–14–0103 "On Compliance of Para 2 and Para 6 of Section 1, Section 4, Section 10, Section 18(1) of Law on Development and Use of the National DNA Database, as well as Para 2 and Para 13 of the Cabinet of Ministers Regulation of 23 August 2005 No. 620 "The Procedure of Providing Information to be Included in the National DNA Database, as well as the Procedure for Collecting Biological Material and Biological Trace", insofar as these apply to persons suspected, with Article 96 of the Satversme of the Republic of Latvia" (hereinafter – the Judgement).

In providing reasoning for my opinion, I shall use the abbreviations used in the Judgement. The concept "contested norms" shall apply to all legal norms, with respect to compatibility of which with Article 96 of the *Satversme* case No. 2015–14–0103 was initiated.

The Constitutional Court held in the Judgement:

> 1) to terminate legal proceedings in the case in the part regarding compliance of Para 2 of Section 1 of DNA Law and Para 13 of the Regulation No. 620, insofar these apply to persons suspected, with Article 96 of the *Satversme*;
>
> 2) to recognise Para 6 of Section 1, Section 4, Section 10 of DNA Law and Para 2 of the Regulation 620, insofar these apply to persons suspected, as being compatible with Article 96 of the *Satversme*;
>
> 3) to recognise Section 18(1) of DNA law, insofar it applies to persons suspected, as being incompatible with Article 96 of the *Satversme* and invalid as of 1 January 2017.

2. I uphold the reasoning provided in the Judgement and the ruling by the Constitutional Court with respect to terminating legal proceedings in the part regarding compliance of Para 2 of Section 1 of DNA Law and Para 13 of the Regulation No. 620, insofar these apply to persons suspected, with Article 96 of the *Satversme*, as well as compliance of Para 2 of the Regulation No. 620 of the Regulation, insofar it applies to persons suspected, with Article 96 of the *Satversme*.

Likewise, I uphold the finding made in the Judgement that the biological material and DNA of a suspect is the personal data of a natural person, which fall within the scope of Article 96 of the *Satversme* and, in view of their sensitive nature, require special protection. It is validly recognised in Para 16.1.2. of the Judgement that such interpretation of the contested norms that allows taking biological material necessary for determining DNA profile from all subjects defined in Section 13 of DNA Law – the persons who have been granted the

status of a suspect in criminal proceedings, should be recognised as being compatible with reaching the purpose of DNA Law.

I do not uphold the conclusion made by the Constitutional Court regarding the need to continue legal proceedings in the case and examine also the compatibility with the *Satversme* of the other contested norms, i.e., Para 6 of Section 1, Section 4, Section 10 and Section 18 (1) of DNA Law, insofar these apply to persons suspected, because none of these norms had infringed upon the Applicant's fundamental rights.

3. It follows from the application and the case materials that the Applicant Lato Lapsa is a natural person, who by the decision adopted by the official directing criminal proceedings has been recognised as being a suspected person in criminal proceedings. The official in charge of the criminal proceedings – the senior inspector of the Security Police prepared a deed on taking biological material from the Applicant for determining his DNA profile and for storing it in the National DNA Database. The Applicant refused to provide the biological material and administrative record keeping was initiated with regard to this in accordance with Section 175^2 of the Latvian Administrative Violations Code. The City of Riga Central District Court ruled that the record keeping on the administrative violation had to be terminated and issued an oral reprimand to the Applicant for failing to satisfy in due time the legal demands made by a public official, who was performing investigative functions.

4. In Para 16.1.2. of the Judgement, the Constitutional Court has concluded that five of the contested norms, i.e., Para 6 of Section 1, Section 4, Section 10 and the first part of Section 18 of DNA Law, as well as Para 2 of Regulation No. 620 formed a united legal regulation, which was the basis for taking biological material from a suspect for determining his DNA profile an storing it in the National DNA Database.

Para 6 of Section 1 of DNA Law comprises a definition of what, in the meaning of this Law, should be considered as being comparable samples. Section 4 of DNA Law refers to stages in the procedure of determining the DNA profile, i.e., collecting and storing of information. Section 10 of DNA Law

determines the content of a unit of natural person's data to be included and stored in the National DNA Database. Section 18 (1) provides the duration of storing DNA profiles and information about suspects in the National DNA Database and procedure for deleting information from the database. Para 2 of the Regulation 620 refers to persons from whom samples of biological material are collected, *inter alia*, persons suspected.

The taking of biological material from the Applicant, which was performed on the basis of Para 2 of the Regulation No. 620, is one of the stages in the procedure of determining the DNA profile. It is validly noted in Para 16.1.2. of the Judgement that without taking the biological material, which is regulated by the contested Regulation No. 620, DNA genetic research, objectively, would be impossible. Likewise, the findings made in Para 17 of the Judgement can be upheld, i.e., that the procedure for determining the DNA profile includes a number of successive stages – taking the suspect's biological material, analysis of DNA to determine the DNA profile and storing the DNA profile in the National DNA Database.

To substantiate the conclusions regarding the united legal regulation, Para 16.1.2. of the Judgement describes the way in which Para 6 of Section 1, Section 4, Section 10 and Section 18 (1) of DNA Law, as well as Para 2 of the Regulation No. 620 serve to reach the purpose of DNA LAW– to establish the National DNA Database to be used to disclose criminal offences, to search for missing persons and to identify unidentified bodies (human remains), as well to determine and regulate the exchange of the results of DNA genetic analysis with foreign states and international organisations. However, neither the interconnection between separate legal norms nor the fact that these norms serve to reach the purpose of the law is a sufficient argument for recognising the respective norms as being a united legal regulation, in the meaning thereof adopted in the previous case law of the Constitutional Court.

In other judgements, the Constitutional Court has accurately and clearly indicated the particular features, because of which several norms that had been contested in the particular case, should be regarded as a united regulation. For example, in the judgement in case No. 2014–11–0103 "On Compliance of

Subparagraph "f" of Para 1 of Section 3(1), Section 19.1 of Natural Resources Tax Law, the Cabinet of Ministers Regulation of 14 January 2014 No.27 "Amendments to the Cabinet of Ministers Regulation of 19 June 2007 No.404 "Procedures for the Calculation and Payment of Natural Resources Tax and Procedures for the Issuance of Permits for Use of Natural Resources"" with Article 105 of the *Satversme* of the Republic of Latvia" the Constitutional Court reviewed the contested norms as a united regulation, because these in total established a person's obligation to pay a tax that had been calculated according to a certain methodology and, thus, restricted a person's right to property (*see Judgment of 25 March 2015 by the Constitutional Court in Case No. 2014–11–0103, Para 16*).

In the Judgement adopted in the reviewed case, the Constitutional Court has used the thesis regarding a united regulation only to find substantiation for examining such norms, which had not been even applied to the Applicant. On the basis of its conclusion regarding united legal regulation, the Constitutional Court has recognised in Para 16.3. of the Judgement that all contested norms included in the united regulation had caused an infringement upon the Applicant's fundamental rights.

The conclusion made in the Judgement regarding Para 6 of Section 1, Section 4, Section 10 and Section 18 (1) of DNA Law, as well as Para 2 of the Regulation No. 620 as a united legal regulations is the basis for the incorrect assessment made by the Constitutional Court regarding the scope of the violation of the Applicant's fundamental rights.

5. Both the *Saeima* and a number of persons summoned in the case had expressed the opinion that the contested norms had not caused to the Applicant direct and concrete violation of fundamental rights defined in Article 96 of the *Satversme* and that, therefore, legal proceedings in the case should be terminated.

If arguments are provided that could be the grounds for terminating legal proceedings in a case the Constitutional Court must examine these (*see, for example, Judgement of 19 October 2011 by the Constitutional Court in Case No. 2010–71–01, Para 11*).

5.1. Pursuant to 19^2 (1) of the Constitutional Court Law, any person, who holds that a legal norm, which is incompatible with a legal norm of higher legal force, infringes upon his or her fundamental rights defined in the *Satversme*, may submit a constitutional complaint to the Constitutional Court. Whereas Para 4 of Section 18 (1) in interconnection of Para 1 of Section 19^2 (6) of the Constitutional Court Law requires to provide in the application legal substantiation of the incompatibility of the contested norms with a legal norm of higher legal force. Moreover, it must be substantiated in the application also in what way this incompatibility causes an infringement upon the applicant's fundamental rights defined in the *Satversme*.

The Constitutional Court has noted that the term "infringe" has been included in the law with the aim of drawing a boundary between the constitutional complaint and *actio popularis* (*see Judgement of 22 February 2002 by the Constitutional Court in Case No. 2001–06–03, Para 2.4. of the findings*). In the meaning of the Constitutional Court Law, an infringement upon a person's fundamental rights is to be understood as a situation, where the contested norm causes adverse consequences directly to the applicant (*see Decision of 11 November 2002 by the Constitutional Court on terminating legal proceedings in case No. 2002–07–01, Para 3*). This means that a constitutional complaint may be submitted in those cases where, firstly, the infringement on fundamental rights is direct, concrete, and the contested norms affects the applicant directly, and, secondly, at the moment of submitting the application the infringement on the fundamental rights already exists (*see, for example, Judgement of 18 February 2010 by the Constitutional Court in case No. 2009–74–01, Para 12, and Decision of 11 November 2002 on terminating legal proceedings in case No. 2002–07–01*).

In the case of a constitutional complaint, it is important to establish, whether, indeed, the applicant's fundamental rights, established in the *Satversme*, have been violated (*see, Judgement of 15 April 2009 by the Constitutional Court in Case No. 2008–36–01, Para 9*). An act of applying the legal norm, which creates adverse consequences for the applicant, can be evidence of the

infringement itself (*see Judgement of 10 May 2013 by the Constitutional Court in Case No. 2012–16–01, Para 21.1.*).

5.2. It follows from the case materials, that only Para 2 of the Regulation No. 620 had been applied to the Applicant. The record keeping of an administrative violation with respect to the Applicant, pursuant to Section 175^2 of the Latvian Administrative Violations Code, was initiated exactly with respect to the refusal to provide biological material for establishing the DNA profile (*see Case Materials, Vol. 1, p. 24).* It has been recognised also in the Judgement that only Para 2 of the Regulation No. 620 had been applied to the Applicant (*see the Judgement, Para 16.3.*).

It has been recognised in the case law of the Constitutional Court that a person has the right to turn to the Constitutional Court only if a direct connection between the restriction upon the fundamental rights of this person and the legal norm that is contested in the application exists (*see Judgement of 18 February 2010 by the Constitutional Court in case No. 2009–74–01, Para 12*). The application and the case materials only confirm a direct connection between the restriction upon the Applicant's fundamental rights and Para 2 of the Regulation No. 620, which was applied to the Applicant in the case of an administrative violation. Therefore the Constitutional Court should have concluded in Para 16.3. of the Judgment that the Applicant's fundamental rights had been infringed upon only by Para 2 of Regulation No. 620.

5.3. However, there are no grounds to assert that the Applicant's fundamental rights had been violated by the four norms of DNA Law, with respect to which the legal proceedings in the case were continued. The Applicant refused to provide biological material for establishing the DNA profile, therefore these norms were not applied to him. Not confirmation was found that the aforementioned legal norms had caused an infringement upon the Applicant's fundamental rights.

The minimum reasoning is provided as to the way in which the united legal regulation had infringed upon the Applicant's fundamental rights, which, in the opinion of the Constitutional Court, is formed by the five contested norms. On the basis of the fact that Para 2 of the Regulation No. 620 had been applied to the

Applicant, the Constitutional Court has recognised in Para 16.3. of the Judgement that "[t]hus the Applicant belonged to the identified group of subjects, to which the contested norms were applied as a united regulation".

However, the limits of the restriction upon the Applicant's fundamental rights are defined by the fact that Para 2 of the Regulation No. 620 had been applied to him. The statement included in the Judgement of the Constitutional Court that the Applicant had entered into the scope of the contested norms as a united regulation, although he had avoided being applied this regulation, cannot be upheld (*see Para 16.3. of the Judgement*). In establishing the way, in which an infringement upon a person's fundamental rights is manifested in a case that has been initiated on the basis of a constitutional complaint, the Constitutional Court must take into account the actual situation of the person, rather than take as the basis arguments regarding which legal norms would be applicable to the person in which situation.

The infringement upon the Applicant's fundamental rights, defined in Article 96 of the *Satversme,* was caused solely by Para 2 of the Regulation No. 620.

5.4. The examination and adjudication of a constitutional complaint, in difference to the abstract review of legal norms, is not a measure that would serve only for the alignment of the legal system. It, first and foremost, serves for the protection of the fundamental rights of the submitter of the particular constitutional complaint. Therefore the Constitutional Court must examine the proportionality of the contested restrictions, individually, with respect to the submitter of the constitutional complaint (*see Judgement of 15 June 2006 by the Constitutional Court in case No. 2005–13–0106, Para 20.2.*).

Thus, the constitutional complaint primarily serves for the protection of the applicant's fundamental rights, and not for the alignment of the legal system. However, the Constitutional Court, in examining the constitutionality of the contested norms, which had not infringed upon the Applicant's rights at all, in the case under review acted as if the case had to be examined within the framework of the abstract constitutional review of legal norms.

Para 23.3.2. of the Judgement provides a detailed assessment of the proportionality of the restriction on fundamental rights included in Section 18 (1) of DNA Law. Only this contested norm, insofar it applied to persons suspected, was recognised as being incompatible with Article 96 of the *Satversme* because the Constitutional Court identified in this norm deficiencies with respect to storing and deleting the biological material and the DNA profile of persons suspected. The Constitutional Court in assessing compliance of the restriction on fundamental rights included in Section 18 (a) of DNA Law with the third criterion of proportionality, i.e., answering the question, whether the damage inflicted upon a person's rights and lawful interests outweighed the public benefit from the restriction on fundamental rights, has expressed, primarily, law policy considerations, which are linked to alignment of legal regulation. The Constitutional Court should not have examined compliance of Section 18 (1) of DNA Law with Article 96 of the *Satversme*, because this contested norm, similarly to Para 6 of Section 1, Section 4 and Section 10 of DNA Law had not inflicted upon the Applicant's fundamental rights defined in the *Satversme*.

Moreover, in the Substantive Part of the Judgment the Constitutional Court has made an obvious methodological inconsistency, by splitting "the united legal regulation", consisting of the five contested norms. The Court, *inter alia*, has decided that one of the norms constituting the united legal regulation. i.e., Section 18 (1) of DNA Law, is incompatible with Article 96 of the *Satversme*, whereas the others are compatible with it. If the Constitutional Court held that the contested norms comprised a united legal regulation, it should have been consistent and should have recognised as being incompatible with Article 96 of the *Satversme* the whole legal regulation, consisting of four norms of DNA Law and one norm of the Regulation No. 620, insofar it applied to persons suspected. The cause of this inconsistency is the concept of "united legal regulation" used in the Judgement, into which, without convincing arguments, all five contested norms have been included.

Therefore the Constitutional Court should have terminated legal proceedings in the case with respect to compliance of Para 6 of Section 1,

Section 4, Section 10 and Section 18 (1) of DNA, insofar these norms applied to persons suspected, with Article 96 of the *Satversme.*

Justice of the Constitutional Court K. Balodis