CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

Dissenting Opinion of the Justice of the Constitutional Court Ineta Ziemele in Case No. 2014-08-03
"On the Compliance of Para 555 of Annex 16 "Tariffs of Health Care Services for Preventive, Diagnostic, Treatment and Rehabilitation Services" to the Cabinet of Ministers Regulation of 17 December 2013 No. 1529 "The Procedure for Organising and Financing Health Care", insofar it does not Envisage a Tariff for Scheduled Delivery outside Inpatient Facilities, with the First Sentence of Article 91 of the Satversme of the Republic of Latvia".

1. The applicant – the Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) – requested recognising Para 555 of Annex 16 to Regulation of 17 December 2013 No. 1529 "The Procedure for Organising and Financing Health Care", insofar it did not envisage a tariff in the case of scheduled delivery outside inpatient facilities, (hereinafter – the contested norm) as being incompatible with the first sentence in Article 91 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

The Constitutional Court (hereinafter – the Court) in its Judgement of 12 February in Case No. 2014-08-03 (hereinafter – the Judgement) recognised that the women, to whom in case of schedule physiological labour assistance was provided within the framework of financing health care services ensured by the State, and women, to whom such obstetrical assistance was provided outside the aforementioned system, were under different circumstances and that these two groups were not comparable. Hence, the Court established that the contested norm complied with Article 91 of the Satversme.

Unfortunately, I cannot uphold a number of arguments advanced and conclusions made in the Judgement.

2. The Court points out that usually Article 91 of the Satversme must be assessed in interconnection with other fundamental rights (*see the second and the third paragraph in Para 10 of the Judgement*). Even though both the Ministry of Justice and summoned person S. Olsena pointed out that the issue of a woman's choice to give birth at an inpatient facility our outside it was also the issue of Article 96 of the Satversme or the right to respect for private life, the Court, nevertheless, decided to examine the Ombudsman's application regarding incompatibility with Article 91 of the Satversme in interconnection with Article 111 of the Satversme.

3. The Court holds: if Latvia's legal acts allow a woman's choice between scheduled physiological labour at an inpatient facility or at home, "receiving in both cases qualified medical assistance" (*see the sixth paragraph in Para 10 of the Judgement*), then Article 96 of the Satversme no longer should be examined in the case. Undoubtedly, it is difficult for the Court to examine the claim, if the applicant has not fully clarified in it, whether the principle of equality has been violated in the context of Article 96 of the Satversme or of any other article. However, in any case, the Court makes its own choice and has determined that it will not examine the issue, "whether a woman can exercise her rights that follow from Article 96 of the Satversme to choose a scheduled delivery outside an inpatient facility", but rather the model of financing obstetric care through the lens of Article 111 of the Satversme. The Court substantiates this choice with the theses that "the basis for examining the constitutionality of various aspects in the model for financing the system of health care is Article 111 of the Satversme" (*see the last paragraph in Para 10 of the Judgement*). Thus, the Court, having examined the extensive, but insufficiently accurate application, as well as explanations provided by the Cabinet of Ministers and the summoned persons, qualifies the case as a case of equal rights in the field of health care. As it is known, in accordance with the case law of the Court, the range of obligations that Article 111 of the Satversme imposes upon the State is relatively small.

4. The opinion of the Court that Article 111 of the Satversme may not impose unfeasible obligations upon the State can be upheld. Therefore, the case law of the Court until now with regard to the issue of the minimal health care, in principle, complies with the content and limits of this Article (*see the principles of judicature referred to in Para 11.1 of the Judgement*). However, this case does not deal with receiving any kind of medical services free-of-charge. This case should be distinguished from other cases linked to the minimum of health care that have been previously examined by the Court.

5. Within the framework of this case the Court had to address the issue of the interconnection of three Articles of the Satversme. I.e., the issue of the triangle of relationships between Article 91, Article 96 and Article 111 of the Satversme. The reason for this is the fact that in Latvia's legal system, in difference to some other European legal systems, taking into consideration certain conditions, a person's right to have delivery at home is recognised as the right to choose. In accordance to the case law of the European Court of Human Rights (hereinafter – ECHR), the right to choose the circumstances, under which to become parents, belongs to the content of the right to private life. In the case "*Ternovszky v. Hungary*" ECHR noted that in Hungary homebirths were not prohibited and "the choice to have delivery at home usually would mean the presence of health care specialist", nevertheless, legislation that does not promote the presence of the abovementioned specialists during such deliveries, even though they would want to provide the service needed during it, is to be considered as an interference with the exercise of the right to respect for private life (*see Judgement of 14 December 2010 by ECHR, Para 22*). ECHR also specified that homebirth, the right to which should considered as a mother's right to choose, implies that the mother is entitled to a legal and institutional environment that enables her choice (*see ibid. Para 24*).

The Latvian system of courts is characterised by openness to the binding norms and principles of international law. The Court has always interpreted Chapter 8 of the Satversme in close connection with Latvia's international commitments in the field of human rights, in particular, by taking into consideration the case law of ECHR and the fact that the interpretation of the European Convention for the Protection of Fundamental Human Rights and Freedoms provided by ECHR is binding upon Latvia. The content of

the right to private life may improve both as the result of actions taken by a national legislator and by improvements in the international human rights standard. Currently it is known that, pursuant to ECHR findings, the states, where a woman's right to choose, whether to have delivery at home or at inpatient facility is accepted, should evaluate, whether the system established in the state facilitates exercise of this right to choose. Hence, the Court had no grounds to limit itself to establishing that homebirths in Latvia were allowed.

6. Implementation of human rights should be real and effective. In the context of Article 96 of the Satversme it is not enough to conclude that rights exist and not even make an attempt to examine, in accordance with the methodology of this article, whether this right can be in reality and effectively exercised within the framework of the legal and institutional system established in the state. The answer to the question, why scheduled physiological labour outside an inpatient facility could not be paid for from the State budget on the same terms as physiological labour at a medical facility, is being reduced to the fact that the service provider has not prepared the necessary description of the medical technology. As regards this argument, the opinion of the Ministry of Justice can be upheld, i.e., that the Ministry of Health as the responsible ministry of the sector should participate in elaboration of the document. This obligation follows not only from the principle of good governance pointed out by the Ministry of Justice, but also from the fact referred to above that in Latvian legal system the right to choose scheduled labour outside an inpatient facility is recognised. To exercise fundamental rights, it must be ensured that the responsible institutions perform the duties that must be performed in order for these rights to be real. Otherwise, at least in a certain number of cases, pointed out by the summoned person S. Olsena, the parents, who want to exercise their right to choose, must themselves guarantee this right.

7. Therefore the finding of the Court cannot be upheld, i.e., that the necessary pre-requisites for implementing human rights have been met, since in the case of physiological labour the provision of health care services free-of-charge is ensured with the mediation of those medical facilities that have concluded an agreement with the National Health Service (*see Para 11.3 of the Judgement*). The meaning of the right to choose to have delivery at

home is not to have delivery at the 19 inpatient medical facilities referred to by the Court and, nevertheless, receive the necessary health care, so that the delivery would be as safe as possible.

8. Therefore one cannot uphold the Court's finding that women can be divided into two groups, depending upon their choice to receive obstetric assistance service at an inpatient facility or, as the Court states it, within the framework of health care system paid for by the State, or outside an inpatient facility, thus, outside the system created by the State. The Court holds as a normal phenomenon in Latvian health care system that a person makes a choice in favour of either a service paid for by the state or paid for by the person herself, and thus, people, who make one choice, and the people, who make the other choice, cannot be compared. In the context of Article 111 of the Satversme, in view of the rather broad margin of appreciation granted to the State in this article, such attitude taken by the Court, in principle, is not obviously ungrounded. However, this case differs from other cases linked to health care, as the case does not deal with any kind of choice of medical nature. As noted above, the legal system has developed also in the particular issue regarding the right to choose receiving obstetric assistance at an inpatient facility or outside it, and this choice has become an element of Article 96 of the Satversme. Thus, all women, who make a choice on this issue, are comparable. They are definitely equal and comparable in exercising their right to choose. The Court had to examine, whether, taking into account the principles of Article 96 and Article 11, the differential treatment implemented by the State could be recognised as being compatible with Article 91 of the Satversme. The case materials contained a relative extensive range of arguments that could have been sufficient for examining proportionality of differential treatment.

9. Not only each article of Chapter 8 of the Satversme, but also this Chapter itself is an internally interconnected and harmonious system. Therefore various aspects of human rights should be interpreted in a systemic way and in mutual harmony.

Riga, 26 February 2015 Justice of the Constitutional Court I. Ziemele