



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Riga October 11, 2004

## JUDGMENT in the name of the Republic of Latvia

in case No. 2004 – 02 – 0106

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, justices Gunārs Kūtris, Romāns Apsītis, Aija Branta, Ilma Čepāne, Juris Jelāgins and Andrejs Lepse

under Article 85 of the Republic of Latvia Satversme (Constitution) as well as Articles 16 (Items 1 and 6), 17 (Item 8 of the first part) and Article 28<sup>1</sup> of the Constitutional Court Law

on the basis of the claim by the State Civil Rights Bureau

on September 21 at the Court session in written proceedings reviewed the case

**”On the Compliance of Article 155 (part six) of the Civil Law with the First Sentence of Article 110 of the Republic of Latvia Satversme (Constitution) and Article 4 of the European Convention on the Legal Status of Children Born Outside of Wedlock”.**

### **The establishing part**

1. Determination of affiliation of children in the Republic of Latvia is regulated by the Civil Law. Initially the second part ”Rights and Obligations as Between Parents and Children” of Part One – Family Law – was regulated in two sub-chapters. The first sub-chapter refers to determination of affiliation of children born of a marriage, but the second – to determination of affiliation of children born outside of marriage. Article 154 of the Civil Law envisages that the descent of a

child born outside of a marriage from a father shall be based on the acknowledgement or by the judgment of a court.

2. On December 12, 2002 the Saeima (Parliament) adopted amendments to the Civil Law. The amendments envisage renunciation from division of children into those born of a marriage and those born outside of a marriage. Thus the structure of the second chapter "Rights and Obligations as Between Parents and Children" was changed. At the present moment the norms on determination of paternity of a child are united in one sub-chapter. Article 154 of the Civil Law determines: if the mother of the child is not married or if the court has established that the husband of the mother is not the father of the child, determination of paternity of the child shall be based on the voluntary recognition of it or by the judgment of the court. Besides, Article 155 of the Civil Law was supplemented by part six, in accordance with which "the father of the child, who is married to another woman, may submit a claim for recognition of paternity only with the consent of his spouse".
3. On May 15, 2003 the Saeima with the Law "On the European Convention and the Legal Status of Children Born Out of Wedlock" adopted and confirmed the October 15, 1975 European Convention on the Legal Status of Those Children, who are Born out of Wedlock (henceforth – the Convention). In the Republic of Latvia it is in effect since October 2, 2003. Article 4 of the Convention determines: "The voluntary recognition of paternity may not be opposed or contested insofar as the internal law provides for these procedures unless the person seeking to recognize or having recognized the child is not the biological father".
4. **The submitter of the claim** – the State Human Rights Bureau – requests to declare the sixth part of Article 155 of the Civil Law, namely, "the father of the child, who is married to another woman, may submit a claim for recognition of paternity only with the consent of his spouse" (henceforth – the opposed norm) as unconfornable with the first sentence of Article 110 of the Republic of Latvia Satversme (henceforth – the Satversme) as well as with Article 4 of the Convention.
  - 4.1. The submitter of the claim holds that the opposed norm is at variance with the first sentence of Article 110 of the Satversme, namely with the statement that the State shall protect and support marriage, the family, the rights of parents and rights of the child. Besides, the duty of the State to protect the rights of children is specified in Article 6 (the first part) of the Law on Protection of the Rights of the Child, which determines that "in legal relations,

concerning the child, rights and interests of the child shall prevail”. The submitter of the claim stresses that it is inadmissible to protect the rights of some people, at the same time violating the rights of the others, especially as it is in this case when the property rights of a person of age are opposed to the rights of the child. Even if the man has children born in wedlock, the children born in the wedlock shall not be more protected than the children born out of wedlock.

4.2. The submitter of the claim holds that the opposed norm envisages that the spouse of the husband, who is the father of the child born out of wedlock, and who wants to voluntarily recognize the paternity of it, has the right of contesting a voluntary recognition for this or that reason. Thus it is at variance with Article 4 of the Convention, which provides that voluntary recognition of paternity may be contested only if the person seeking to recognize or having recognized the child is not the biological father. To the viewpoint of the submitter it follows from Article 4 of the Convention that the above provision concerns both the objections voiced before recognition of paternity and after recognition of paternity. The submitter of the claim points out that the opposed norm disproportionately violates the rights of the child.

5. The institution, which has passed the opposed act – **the Saeima** - in its written reply points out that the opposed norm is not consonant with the first sentence of Article 110 of the Satversme and Article 4 of the Convention.

5.1. First of all it is pointed out in the explanatory report of the European Council on Article 4 of the Convention that this Article preserves the possibility of opposing or contesting a voluntary recognition, when the person seeking to recognize or who had recognized the child is not the biological father ( *see Explanatory Report on the Convention on the Legal Status of Children Born out of Wedlock, Council of Europe, Art.4: <http://conventions.coe.int/treaty/EN/Reports>, May 10, 2004*). The Saeima points out that the legislator, when adopting the opposed norm, has conceded the possibility, that the spouse knows or may know facts, proving that the man is not or cannot be the biological father of the child. The Saeima stresses that the legislator has not determined the right of the mother of the child to maintain that the father of the child is the only real father of the child. For substantiating its viewpoint the Saeima makes use of the argument that ” there are cases when the mother of the child is not certain who the biological father of the child is. Therefore the situation may arise when for her one of the men may be more desirable as the father of the child than the biological father of the child. Besides, the man

who is told that he is the father of the child may not know anything about doubt”. When elaborating the above norm, the Saeima has taken into consideration that laws determine restrictions to recognition of voluntary paternity also in other states, e.g. Belgium and France.

- 5.2. Secondly, they hold that the opposed norm is in the interest of both – the child and the family. When adopting the norm, the provision of Article 110 of the Satversme, namely – that the State shall protect and support marriage, the family, the rights of parents and rights of the child, has been observed.

To their mind the opposed norm does not restrict the possibility of undertaking the liabilities of parents, as in accordance with Article 181 of the Civil Law the child experiences the right to personal relationships and direct contact with any of the parents (interrelation right). It is the duty and the right of both parents to maintain personal relationships and direct contacts with the child. This provision shall be applied even if the child is separated from one or both parents. In the same way the child shall not be denied the right to care, as - in conformity with Article 177 of the Civil Law - the parents have a right and a duty to look after the life and welfare of children. There is no necessity to hold that a person, who wishes to voluntarily recognize paternity, will not provide the child with maintenance.

It is stressed in the written reply that the objective of the opposed norm is to determine paternity by the court in case of a dispute on the biological father of the child.

- 6. The Secretariat of the Minister of Special Duties in Family and Child Matters (at the moment – the Ministry of Children and Family Matters),** when answering to the questions asked by the Constitutional Court, points out that the opposed norm does not restrict the interests of the child, because in cases, when the father of the child is married to another woman, the right of the child to maintain personal relationships and direct contacts with any of the parents (interrelation right) as well as the right of receiving food is preserved, as voluntary securing of the above rights does not depend on the determination of paternity.

The Ministry stresses that the norm incorporated in the sixth part of Article 155 of the Civil Law ensures conformity with the provision determined in Article 84 of the Civil Law: marriage creates an obligation on the part of a husband and a wife to be faithful to each other, to live together, to take care of each other and to jointly ensure the welfare of their family. It is also envisaged in Article 85- in the event of differences of opinion, spouses shall endeavor to reach an agreement, but for the resolution of disputes, they may apply to the court.

## **The concluding part**

7. The opposed norm determines that the father of the child, who is the married husband of another woman, may submit the application on recognition of paternity only with the consent of his spouse. Article 4 of the Convention envisages that in case if the internal law provides for these procedures of voluntary recognition, recognition of paternity may not be opposed or contested unless the person seeking to recognize or having recognized the child is not the biological father

To assess whether the opposed norm complies with the norm of the above Convention, one has to ascertain:

- 1) whether in Latvia Article 4 of the Convention is in effect;
- 2) whether "non-consent" of the spouse in the meaning of the sixth part of Article 155 of the Civil Law is the same as "appeal" or "contesting" in the understanding of Article 4 of the Convention.

- 7.1. Article 1 of the Convention determines that "each Contracting Party undertakes to ensure the conformity of its law with the provisions of the Convention".

Article 14 of the Convention determines that any state, at the time of signature or ratification of the Convention, may make reservations in respect of the provisions of Articles 2 to 10 of the Convention.

The Convention is in effect in twenty one Member States, and four states have made reservations in respect of the provisions of Article 4. For example, the Polish legal acts determine that in case of voluntary recognition of paternity the consent of the mother of the child, his legal representative or the child himself, if he has attained the age of majority, is needed.

By referring to these legal norms, Poland, retaining the right not to apply Article 4 of the Convention till September 23, 2006, has made a reference in respect of the provisions of the Convention.

Latvia, when ratifying the Convention, has made no reservations, therefore it has undertaken the duty of implementing the norms, included in the Convention.

- 7.2. In accordance with the Explanatory Report of the Council of Europe in Article 4 of the Convention are incorporated the terms "to oppose" and "to contest" because several States make use the procedure of opposition, other States – that of contestation, still other States – both of them.

From the above one may deduce that statement of objection, mentioned in the Convention, may be expressed in any form regardless of the term used in national legal acts. Therefore one may agree with the viewpoint, expressed in the Saeima written reply that non-consent of the spouse means contesting of the paternity.

It follows from Article 4 of the Convention that prohibition envisaged by this norm refers to objections, which have been expressed both – before recognition of the paternity, and after recognition of paternity. The text "seeking to recognize or having recognized the child" shows it. Thus Article 4 of the Convention prohibits voicing statements of objection, i.e., oppose or contest voluntary recognition of paternity both before and after determination of paternal affiliation of a child.

**Thus in the meaning of Article 4 of the Convention, the consent of the spouse, determined in the sixth part of Article 155 of the Civil Law shall be regarded as "contestation".**

8. As has been determined by the Convention, statements of objection against voluntary recognition of paternity may be raised, that is – recognition of paternity may be contested only if the person, who seeks recognition or has recognized the child, is not the biological father. As regards Article 4 of the Convention, the Council of Europe in its Explanatory Report points out that the question of those persons or authorities who may oppose or contest a voluntary recognition is not dealt with by the Convention; this question is left to the internal law. Thus the legislator experiences the right to envisage both – the possibility of contestation, determining the range of persons, who may do it and in certain cases - in order to protect and secure the interests of the child – to prohibit the person to contest paternity. The legislator has to assess, which persons shall be granted the right and who may be granted it [see "*White Paper*" on *Principles Concerning the Establishment and Legal Consequences of Parentage*, Committee of Experts on Family Law (CJ-FA) of the Council of Europe, 15.01.2002, Part A <http://www.coe.int/family>].

The first part of Article 155 of the Civil Law determines that "acknowledgement of paternity shall occur when the father and mother of a child submit a joint application". Thus in case, if the mother does not agree to voluntary recognition of paternity, she – just by refusing to submit the joint application – may cause obstacles for voluntary recognition of paternity (i.e. – she may contest voluntary recognition of paternity).

The seventh part of Article 155 determines that "recognition of paternity requires the consent of the child if he or she has attained twelve years of

age". Thus also the child, who has attained twelve years of age may oppose voluntary recognition of paternity and not agree to it.

In conformity with the sixth part of Article 155 of the Civil Law, the spouse of the child's father may contest voluntary recognition of paternity.

One cannot agree with the statement expressed in the Saeima written reply that paternity is presumption on paternal affiliation of the child (i.e. that the father is the biological father), therefore his spouse – in conformity with this norm - may contest recognition of paternity only on the basis of the fact that the other spouse is not the biological father of the child.

Paternity is legal relationship of the father with the child (*see the Dictionary of legal terms - Riga: Nordik, 1998, p.192*). It means social and legal recognition of the father and the child. Legal paternity and biological paternity, which is a medical issue, should not be confused. Legal paternity is directed towards reaching balance between the "biological truth", which reflects biological and genetic paternity and "social relations between parents and children", which refer to person, who lives together with the child and takes care of him/her (*see "White Paper" ...Part A*). The process of determination of paternity in cases, when for medical fecundation generative cell of the donor has been used can serve as an obvious example.

As the Civil Law does not envisage reasons, cases or circumstances when the persons mentioned in Article 155 may express non-consent for voluntary recognition of paternity, **all – the mother of the child, the spouse of the father of the child and the child itself if he/she has attained the age of 12 may disagree with recognition of paternity for any reason.** Thus the norm of the Law gives the possibility of creating obstacles for voluntary recognition of paternity (i.e. for contesting voluntary recognition of paternity), if the contestant holds that the person, who seeks to recognize the child, is not the biological father of the child as well as in other cases.

9. From the summary of the draft Law "Amendments to the Civil Law" follows that when elaborating the draft Law the norms of Convention have not been taken into consideration as "the draft Law has been elaborated in conformity with the requirements of international agreements binding on Latvia ( European Convention on Implementation and Acknowledgement on Guardianship of Children and Re-establishment of Guardianship of Children; the Hague Convention on the Legal Civil Aspect of International Kidnapping; UNO Convention on Balancing of the Rights of Children).

Ungrounded is the Saeima argument on the compliance of the opposed norm with the Convention, referring to laws of other States, namely French and Belgium laws, which to their mind determine restrictions to voluntary recognition of paternity. The Convention on the Status of Children Born out of Wedlock is in effect neither in Belgium, nor in France.

- 10.** The first sentence of Article 110 of the Satversme determines: "The state shall protect and support marriage, the family, the rights of parents and rights of the child". It laconically formulates what the State protects, but does not specify ways of implementation of the protection. Interpreting the fundamental rights, enshrined in the first part of Article 110 of the Satversme, one has to simultaneously take into consideration the norms, included in international human rights instruments and practice of their application.
  
- 11.** Article 110 of the Satversme envisages protection of the interests of the child. Article 3 (the first part) of the UNO Convention on the Rights of the Child determines the priority of the rights of the child. The duty of the State to protect the rights of the child is specified in the Law on Protection of the Rights of the Child. Article 6 (the first part) of it determines that in legal relationships, which concern the child, the rights and interests shall prevail. The second part of the same Article adds to it the statement that " all the activities with regard to children, regardless whether they are carried out by the State or municipal institutions, public organizations or other physical or legal entities, which are engaged in child care as well as courts and other law enforcement institutions shall secure priority of the interests of the child".

It follows from the above that in legal relationships, concerning the child, in all the activities the rights and interests of the child shall prevail. It means that not only the courts and other institutions shall adopt their decisions on the basis of the interests of the child, but the legislator has also to observe it, so that the adopted or amended normative acts would protect the interests of the child in the best possible way.

- 12.** The Civil Law envisages that paternity may be established by presumption, voluntary recognition of paternity or judicial decision. Article 157 of the Civil Law establishes in which cases paternity is determined by the court, e.g. if the spouse does not agree with voluntary recognition of paternity, in its turn persons, mentioned in Article 158 may submit the claim for determination of paternity to the court.

On the basis of Article 20 (part four) of the Law on the Protection of the Rights of the Child, cases, which are connected with securing the rights

or interests of the child by the court, including cases on determination of the paternity of children, shall be extraordinary reviewed. In accordance with the data of the Ministry of Justice "Statistical Report on the Length of Reviewing Civil Cases" in 2003 cases on determination of the affiliation of children at the courts of the first instance at an average are reviewed in 4,8 months. The Saeima in its written reply points out that determination of paternity by the court is not too lengthy and therefore does not create detriment to the interests of the child. In its turn voluntary recognition of paternity may occur by registering the birth of the child, after the registering the birth of the child or even before it. Thus in case, if there are no obstacles for voluntary acknowledgement of paternity it may be secured that at the moment of registering the birth of the child, both parents are determined.

In the "White Paper", elaborated in 2002 by the Council of Europe Committee of Experts on Family Law, when speaking about the principles on acknowledgement of paternity and its legal consequences, it is stressed that it is in the best interests of the child, first of all to establish parentage as from the moment of the birth and, secondly, to give stability over time to the established parentage.

Well-grounded is the viewpoint, expressed in the Saeima written reply, that the opposed norm does not restrict the possibility of the father to undertake parental responsibilities "de facto", i.e., to take care about the child and protect him/her, to maintain personal relationship etc. However, parental responsibilities are not the only legal consequences, which arise with the establishment of paternity. Article 7 of the UNO Convention on the Rights of the Child determines that the child – from the moment of birth – has the right of obtaining the surname. While the paternity has not been established, the child may not have his/her father's surname, even if the parents want it.

Thus to the moment of establishing paternity, several rights are denied to the child and that is at variance with his/her interests. As the court practice testifies, establishment of paternity by the court may continue for several months. Thus, even though the father of the child wants to voluntarily recognize paternity, for four months or longer in the documents of the child only the mother's name is indicated. Besides, one may agree with the statement of the State Human Rights Bureau that the opposed norm may lessen the will of the father to voluntarily recognize paternity. Thus, the number of children, who have no father, may increase. And that may deny the child several rights and is at variance with his/her interests.

**Thus to the moment of establishing paternity, the rights of the child are restricted.**

13. The Saeima in its written reply points out that the norm, included in the sixth part of Article 155 of the Civil Law protects both – the interests of the child and the interests of the family. One could deduce from the above the opposite: if the prohibition to oppose or contest voluntary recognition of paternity, determined in the Convention, were observed, i.e. – if the father were able to recognize paternity without the consent of the spouse, then it would be held that the State does not protect marriage and family.

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes that " Everyone has the right to respect for his private and family life". The second part of the Article determines: " there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary [...] for the protection of the rights and freedoms of others." Thus, if the norm, which allows the father of the child, who has marital ties with another woman, voluntary and without the consent of his spouse recognize paternity is considered as an obstacle in exercising the right to a family life, then it should be established whether the restriction is justifiable and ,namely, whether it:

- is envisaged by the law;
- is necessary for the protection of the rights and freedoms of the others.

- 13.1. As has been mentioned before, prohibition to oppose or contest voluntary recognition of paternity is determined by the Convention with regard to children born out of wedlock. Latvia has ratified the Convention without making any reservations and thus it has undertaken the duty of observing the norms and principles, also the norm determined by Article 4, of the Convention.
- 13.2. Encouraging of voluntary recognition of paternity (accordingly – decrease of the possibilities of opposing or contesting of voluntary recognition of paternity) is in conformity with the rights and freedoms of the child and promotes the protection of the interests of the child, as it improves the status of children, born out of wedlock and balances the legal status of children born out of wedlock and that of the children born of a marriage. The prohibition to oppose voluntary recognition of paternity is necessary to protect the rights of the child.

**Thus, when determining the prohibition of opposing and contesting voluntary recognition of paternity, rights to family life may be violated. In its turn this violation is admissible if it complies with the second part of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.**

**14.** In conformity with the interpretation by the European Court of Human Rights (henceforth – ECHR) on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning determination of paternity "respect for family life implies, first of all, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family" (*see ECHR Judgment in case "Marckx v. Belgium", §31; and in case Johnston v. Ireland", §112*).

However, the concept "family life" in the understanding of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not refer solely to marriage-based relationships and may encompass other de facto "family" ties, where the parties are living together outside of marriage (*see §44 of ECHR in case Keegan v. Ireland*). Article 214 of the Civil Law determines that "in the narrow sense of its definition, a family consists of the spouses and their children while they are still part of a common household", however ECHR interprets the concept "family life" more extensively, stressing that a number of factors may be relevant, including whether the couple lives together, the length of their relationship, whether the parties are faithful to one another, whether they have children together etc. (*see ECHR Judgment in case "X,Y and Z v. the United Kingdom, §36; and in case "Kroon and Others v. the Netherlands", §30*).

When interpreting the concept "family life" the European Court of Human Rights points out that biological and social reality prevail over the legal presumption (*see ECHR Judgment in case "Kroon and Others v. the Netherlands, §40*).

Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms makes no distinction between "the legitimate" and the "illegitimate" family (*see ECHR Judgment in case "Marckx v. Belgium", §31*). Such a distinction would not be consonant with the word "everyone". The European Court of Human Rights, making reference to Resolution (70) 15 of 15 May 1970 on the Social Protection of Unmarried Mothers and their Children, ( para. I-10 and II-5 etc.) by the Committee of Ministers of the European Council, notes that the Committee of Ministers regards the single woman and her child as one form of family no less than others (*see ECHR Judgment in the Marckx case, §31*).

**Thus the State shall protect every family.**

The European Court of Human Rights reiterates that in judicial decisions where the rights under Article 8 of parents and those of the child are at stake, the child's rights must be the paramount consideration. If any balancing of interests

is necessary, the interests of the child must prevail (*see ECHR Judgment in case "Yousef v. the Netherlands" §73*).

The fact that a man is the father of the child born out of wedlock in several cases may influence the financial situation of his family based on marriage as well as the property rights of the family members. Therefore it is important for the family members to learn about the recognition of paternity. However, it is possible to achieve it with the help of measures, which would restrict the rights of a child in a lesser degree, namely, by determining that the spouse shall be informed about voluntary recognition of paternity.

In the same way it is important to envisage for the certain range of concerned persons, whose rights may be violated, the right of opposing the voluntary recognition of paternity, if they know that the man is not the biological father of the child. If the man has children born of a marriage, their protection shall not differ from that of the children born out of wedlock. Both – the children born of a marriage and those, who are born out of wedlock have equal rights of knowing their father and receive from him material and another kind of support. Otherwise the children, born out of wedlock, would be discriminated.

### **The substantive part**

On the basis of Articles 30 – 32 of the Constitutional Court Law the Constitutional Court

#### **hereby rules:**

to declare the sixth part of Article 155 of the Civil Law as unconfornable with the first sentence of Article 110 of the Republic of Latvia Satversme and Article 4 of the European Convention on the Status of Children Born out of Wedlock and null and void as of the day of publishing this Judgment.

The Judgment is final and allowing of no appeal.

The Judgment takes effect as of the day of publishing it.

The Chairman of the Court session

A.Endziņš