https://doi.org/10.22364/iscflul.9.2.02

Jautrite Briede, Dr. iur., Associate Professor
Faculty of Law, University of Latvia, Latvia

APPLYING PRINCIPLE OF EQUALITY IN CASE OF RESTRICTION OF RIGHTS

Key words: principle of equality, restriction of rights, rationality, constitutional review, judicial activism

Summary

The article analyses the practice of the Constitutional Court in the application of the principle of equality in cases where a legal norm establishes a restriction of rights. The article critically evaluates the fact that the court can declare a norm invalid only because a relevant restriction, which is otherwise necessary, appropriate and proportionate, has not been set for other persons who should have been subject to it. It is concluded that this can have serious negative consequences and violate the principle of rationality.

Introduction

The first sentence of Article 91 of the Constitution of the Republic of Latvia[1] (hereinafter – the Constitution) states: "All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind".[2] Relatively many cases have been considered in the Constitutional Court of the Republic of Latvia, in which compliance of legal norms with this article has been evaluated. In most of the cases, a legal norm is contested, which grants a person some benefit that another group of persons also wants to obtain. However, there are also cases where legal norms that set some restrictions of rights are evaluated. The Constitutional Court does not distinguish whether the case is about a restriction or a benefit, it always follows the same

[1] The Constitution of the Republic of Latvia. Available in English: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [viewed 01.12.2023.].

[2] See: Latvijas Republikas Satversmes 91. pants: tiesiskas vienlidzibas princips. Satversmes tiesas judikatura [Article 91 of the Constitution of the Republic of Latvia: The principle of legal equality. Jurisprudence of the Constitutional Court]. Riga, Tiesu namu agentura,, 2022.

methodology. If it is recognized that the groups are comparable and there is no legitimate purpose for different treatment, the norm is declared invalid.

The current article offers a discussion, whether such behaviour is always rational.

1. The case on the restriction of practice in engineering research

One such case was initiated after a person's constitutional complaint regarding the provision of the Construction Law[3], according to which a person had to obtain a second-level professional higher education by a certain time in order to be able to continue practice in construction design.[4] The requirement for such a level of education was and still is defined in Article 13 of the law, but Article 4 of the transitional provisions initially allowed that persons with first-level education, who had already obtained the right to practice, were entitled to continue their practice in engineering research, design or construction expertise, but not longer than until 31 December 2020. However, according to the contested norm in the Constitutional Court, which was adopted on 3 December 2020, the persons who had a practice in engineering research had a possibility to continue it without a time limit, but in construction design or expertise – only until 31 December 2020.[5]

Therefore, the contested legal provision improved the situation of those persons who did not obtain a second-level education and worked in the field of engineering research, but did not change the applicant's legal situation, since such a requirement was established already in 2013. However, the applicant believed that the contested norm unreasonably limited his right to occupation and legitimate trust, and this provision stipulated a different attitude, as the legislator had allowed to continue the practice in the specialty of engineering research without restrictions. The Constitutional Court had initiated a case regarding the compliance of the contested legal provision with several articles of the Constitution, including the first sentence of Article 91.

In its judgment, the Constitutional Court stated that the basic question in the case was whether the increased educational requirements for those who had previously obtained the right to practice were proportionate and could be fulfilled within the specified period. The court concluded that the contested norm served to ensure the quality and safety of the construction project and,

---

[3] Buvniecibas likums [Construction Law] (09.07.2013.). Available: https://likumi.lv/ta/en/en/id/258572-construction-law [viewed 01.12.2023.].

[4] Judgment of the Constitutional Court if the Republic of Latvia of 21 April 2022 in Case No. 2021-27-01. Available in Latvian: https://likumi.lv/ta/id/331871-par-buvniecibas-likuma-parejas-noteikumu-4-punkta-pirma-teikuma-atbilstibu-latvijas-republikas-satversmes-1-pantam-91-panta-pir [viewed 01.12.2023.].

[5] Grozijumi Buvniecibas likuma [Amendments to Construction Law] (03.12.2020.). Available in Latvian: https://likumi.lv/ta/id/319556-grozijumi-buvniecibas-likuma [viewed 01.12.2023.].

accordingly, the building, as well as people's right to life, health and a favourable environment. The court recognized the requirements set out in the disputed norms as proportionate and enforceable within the specified period.

Next, the court turned to the principle of equality. The court emphasized that the principle of equality prohibited the adoption of such norms that, without a reasonable basis, allowed different treatment of persons who were in the same and comparable circumstances. The court concluded that persons who had obtained a first-level education and wanted to continue practice in engineering research, design or construction expertise were in the same and comparable conditions, but the challenged norm provided for different treatment. Consequently, the court concluded that the different treatment had no legitimate purpose, and therefore the challenged norm did not comply with the first sentence of Article 91 of the Constitution. The contested norm was declared invalid and the legislator was given time (eight months) to adopt a new regulation.

The legislator, in order to prevent the formal violation of equal treatment due to the aforementioned judgment of the Constitutional Court, excluded the word "engineering" from paragraph 3 of the transition provisions of the law, which contained similar requirements.[6] As a result, no person who already had practice in engineering research, design or construction expertise, but did not have a second level education, could continue their practice.

From a practical point of view, such a solution is probably justifiable, although there is also a separate opinion of the Constitutional Court judge, in which he explains why the legislator's arguments did not convince the judge that such educational requirements were really necessary.[7]

The outcome of the case for the applicant was that his legal situation, for which he had appealed to the Constitutional Court, was not improved, while it worsened the situation of persons who previously had the right to continue their practice in engineering research with a first-level education.

Although the applicant did not emphasize that he opposed the contested norm only to the extent that it did not establish a more favourable regulation regarding the construction design practice, the argumentation contained in the application indicated exactly this desire.[8] The applicant did not argue in his application, and it did not follow from the judgment of the Constitutional Court, that the court specifically focused on the analysis of the tasks to be performed

---

[6] Grozijumi Buvniecibas likuma [Amendments to Construction Law] (15.12.2022). Available in Latvian: https://likumi.lv/ta/id/338206-grozijumi-buvniecibas-likuma [viewed 01.12.2023.].

[7] Satversmes tiesas tiesnesa Neimana J. atseviskas domas lieta Nr. 2021-27-01 [Separate opinion of the Constitutional Court Judge Neimanis J. in Case No. 2021-27-01]. Available in Latvian: https://likumi.lv/ta/id/333342-satversmes-tiesas-tiesnesa-jana-neimana-atseviskas-domas-lieta-nr-2021-27-01-par-buvniecibas-likuma-parejas-noteikumu-4-punkta- [viewed 01.12.2023.].

[8] It is unlikely that the applicant is satisfied that other persons whose education does not meet the requirements also lose their rights along with them. It is likely that he, believing that the relevant requirements are not necessary at all, is upset that, as a result of his application, the opportunity to continue practice is now also taken away from those who previously could work in engineering research.

during the engineering research. The court actually made the conclusion that the specialists mentioned in the disputed norm were in the same and according to certain criteria comprable conditions, taking into account only the fact that the legislator should set the same requirements for them.[9]

2. The rational core of judgment

Taking into account the above, the question of the limits of competence of the Constitutional Court is debatable. Should the Constitutional Court, analysing the validity of the restriction and concluding that the restriction is necessary, appropriate and proportionate, check whether such a restriction should have been imposed on other persons, as well? Can the applicant's rights be affected by the fact that other persons are not subject to the same restriction as the applicant, but which is in accordance with the Constitution?

Similar issues have been resolved in administrative courts. In an application to an administrative court, an appeal or a cassation complaint, it is often stated that the principle of equality has been violated, because the situation was not resolved in the same unfavourable way concerning some other person. If the administrative court recognizes that the unfavourable administrative act has been issued on the basis of a mandatory legal norm and is otherwise legal, it does not analyse other situations in which such an administrative act has not been issued or is more favourable. In that case, the administrative court usually states that the principle of legal equality does not create the right to equal treatment if the comparable situation is illegal.[10] Such insights can also be found in legal doctrine.[11]

Although the Constitutional Court, unlike the administrative court, usually performs abstract instead of concrete control of the rule of law, nevertheless, the applicant of the constitutional complaint, similarly to the applicant in the administrative court, must substantiate the presence of a specific violation of his rights. A person would not be able to justify the violation of rights by stating that because an incorrect legal regulation has been established for another group of persons, such an incorrect regulation should also be adopted regarding him.

It follows from the annotation of the amendments to the Construction Law that the aforementioned judgment of the Constitutional Court did not have significant consequences, as the regulation on specialists in the engineering research specialty was included in the transition regulations as a precaution, and

[9] See Paragraph 30 of the judgment of the Constitutional Court.

[10] See, for example, item 23 of the judgment of the Senate of 31 October 2023 in Case No. A43008017, SKA-4/2023 [ECLI:LV:AT:2023:1031.A43008017.12.S]. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [viewed 01.12.2023.].

[11] Levits E. Satversmes 91. panta komentars [Commentary on Article 91 of the Constitution]. In: Latvijas Republikas Satversmes komentari. VIII nodala. Cilveka pamattiesibas. Autoru kolektivs prof. R. Baloza zinatniska vadiba, Riga: Latvijas Vestnesis, 2011, p. 88.

not because there were persons to whom it applied.[12] However, there may be cases when the fact that the Constitutional Court, after recognizing a legal norm as necessary, appropriate and proportionate, additionally checks its compliance with the principle of equality and accordingly declares it invalid, may cause significant adverse consequences.

For example, the case when the applicant had indicated in the application another comparable group of persons not mentioned in the law, and therefore contested the norm of the Construction Law, which specified educational requirements. If the Constitutional Court recognized that this group should have been included, then following its practice, the court would have to declare the norm invalid due to the violation of the principle of equality. It would be invalidated not because the educational requirements are wrong or disproportionate, but only because the requirements are not imposed on any other group. Although the Constitutional Court in such cases usually gives the legislator time to correct the deficiency in the normative act, such a judgment would not be rational. In fact, the legislator should reissue the same norm, only supplementing it with another group. This approach of the Constitutional Court suggests going beyond the boundaries of the claim, and therefore excessive judicial activism – exceeding competence.[13]

For comparison, another example from the recent practice of the Constitutional Court can be given. Namely, the court examined the case in which it was checked whether the ban on a soldier to be a member of a political party was justified.[14] The court concluded that this restriction of freedom of association is justified. Since the case was also initiated regarding the compliance of the norm with Article 91 of the Constitution, the court examined whether the principle of equality had not been violated. Since the court concluded that the groups specified in the application were not comparable, the court recognized the conformity of the challenged norm. However, had the Constitutional Court recognized that the contested norms violated the principle of equality, it should, following its previous approach, recognize as invalid those legal norms that are completely correct and necessary and otherwise comply with the Constitution.

If the Constitutional Court assesses the compliance of the restriction with both another article of the Constitution and the principle of equality, and recognizes the restriction of fundamental rights as appropriate, then in connection

---

[12] See "Description of the problem" section of the Annotation of the Amendments to the Construction Law. Available in Latvian: https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/B5B574186DCA2AEBC22588F30028781E?OpenDocument [viewed 01.12.2023.].

[13] On positive and negative judicial activism, see: Tancevs E. Velreiz par aktivismu konstitucionalaja tiesvediba [Once more, about activism in constitutional proceedings]. Konstitucionalas tiesas aktivisms demokratiska valsti.Satversmes tiesas 2016. gada konferences materialu krajums. Riga: Latvijas Republikas Satversmes tiesa, 2016, pp. 53–89.

[14] Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2022-33-01. Available in Latvian: Latvijas Vestnesis, 204, 20.10.2023. Information in English: https://www.satv.tiesa.gov.lv/en/press-release/prohibition-for-a-professional-service-soldier-to-become-a-member-of-a-political-party-complies-with-the-constitution/ [viewed 08.01.2024.].

with the principle of equality, it essentially evaluates not the contested norm, but the regulation included in another legal norm, which does not contain a restriction for another group. In fact, the compliance of the absence of any legal framework with the first sentence of Article 91 of the Constitution is assessed. It goes beyond the scope of the case. It also does not correspond to the positive goal of judicial activism and, therefore, to the permissible case – to guarantee justice for each person, in each specific case.[15]

In addition, with such a ruling, the Constitutional Court would limit the freedom of discretion of the legislator to decide, whose comparable groups should have their fundamental rights restricted, and would essentially impose the obligation to restrict fundamental rights of some other group of persons. This would mean an impermissible interference of the Constitutional Court in the competence of the legislator.

Taking into account the above, it can be concluded that if the Constitutional Court has recognized the restriction of fundamental rights set out in the contested norms as consistent with the Constitution, it does not have to evaluate the conformity of the contested norms with the principle of equality. The court must say that such an assessment cannot change the outcome of the judgment, so it is not useful. The principle of internal consistency of the Constitution provides that constitutionally protected values must be reconciled with each other when these values conflict.[16] The consideration of usefulness is one of the criteria that the Constitutional Court often examines when considering the compliance of a legal provision with the Constitution. From the perspective of usefulness, it should also assess the possible consequences of its judgment.

Likewise, this approach can be found in the jurisprudence of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).

A whole chapter is dedicated to the principle of equality in the European Charter of Fundamental Rights[17]. However, in the judicial practice, there have so far been only a few cases in which a restriction of rights has been considered from the perspective of the principle of equality.

For example, the ECJ considered a case in which the Italian court had doubts about the validity of the norms of a regulation, but in the case of validity, doubted the compliance of its norms with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, which strengthen the principles of equality and non-discrimination. The ECJ recognized that the provision of the regulation is appropriate and valid. The court stated that, for this reason, "Articles 20 and 21 of

---

[15] Compare Osipova S. Tiesiska valsts vai "tiesnesu valsts" [Legal state or "judge state"]? Konstitucionalas tiesas aktivisms demokratiska valsti. Satversmes tiesas 2016. gada konferences materialu krajums Riga: Latvijas Republikas Satversmes tiesa, 2016, p. 93.

[16] Pleps J. Satversmes iztulkosana [Interpretation of the Constitution]. Riga: Latvijas Vestnesis 2012, p. 223.

[17] Charter of Fundamental Rights of the European Union. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT [viewed 01.12.2023.].

the Charter cannot usefully be relied on."[18] In other words, the court recognized that, given that the legal provision was correct, it was not useful to address the principle of equality.

The ECHR has issued a guide on case law on the application of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms[19] (hereinafter – the Convention) and Article 1 of Protocol 12, which strengthen the prohibition of discrimination.[20] This guide does not mention a single case in which the ECHR has found a violation because someone has not been subject to the same restriction as the applicant. On the other hand, in the jurisprudence search engine of this court, as one of the leading decisions related to Article 14 of the Convention, a decision can be found in which the court examined the complaint of a person sentenced to life imprisonment about the restriction of private life in connection with Article 14, because she was forbidden to keep a record player and the accessories necessary for it. In this case, the ECHR first analysed whether such a restriction was necessary and concluded that there was no violation of a person's private life. The court further stated that, taking this into account, it was not necessary to conduct a separate examination regarding Article 14 of the Convention.[21]

Thus, the approach suggested in this article would also correspond to the findings of the jurisprudence of the aforementioned courts.

If the different treatment seems obvious and therefore unfair, the Constitutional Court has the opportunity to draw the legislator's attention by *obiter dictum* to the fact that there are other comparable groups, thus allowing the legislator to consider for himself, according to his competence, whether the same or similar restriction of fundamental rights should be determined in relation to those groups.

Conclusions

1. If the Constitutional Court has recognized the restriction of fundamental rights established in the contested norms as necessary, appropriate and proportionate, it does not have to continue evaluating the conformity of the contested norms with the principle of equality.

---

[18] See para. 62–63 of ECJ Judgement of 06.05.2021. in Case No. C-142/20 Analisi G. Caracciolo. Available: https://curia.europa.eu/ [viewed 01.12.2023.].

[19] European Convention on Human Rights. Signed in Rome on 04.11.1950 [in the wording of 04.12.2023.]. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [viewed 01.12.2023.].

[20] Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Available: https://www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG [viewed 01.12.2023.].

[21] ECHR decision of 22 January 2008 in Case Wolfgang Beier v. Germany (application No. 20579/04). Available: https://hudoc.echr.coe.int/#{%22fulltext%22:[%2220579/04%22],%22itemid%22:[%22001-84948%22]} [viewed 01.12.2023.].

2. In such cases, the court should indicate that such an assessment is not useful, as the result of the case cannot be changed.
3. The Constitutional Court may, by *obiter dictum*, draw the attention of the legislator to the fact that there may be other comparable groups, thus allowing the legislator to consider for himself whether the same or similar restriction of fundamental rights cannot be determined with respect to those other groups.

BIBLIOGRAPHY

Literature

1. Levits E. Satversmes 91. panta komentars [Commentary on Article 91 of the Constitution]. Latvijas Republikas Satversmes komentari. VIII nodala. Cilveka pamattiesibas. Autoru kolektivs prof. R. Baloza zinatniska vadiba. Riga: Latvijas Vestnesis, 2011.
2. Osipova S. Tiesiska valsts vai "tiesnesu valsts" [Legal state or "judge state"]? Konstitucionalas tiesas aktivisms demokratiska valsti. Satversmes tiesas 2016. gada konferences materialu krajums. Riga: Latvijas Republikas Satversmes tiesa, 2016.
3. Tancevs E. Velreiz par aktivismu konstitucionalaja tiesvediba [Once more, about activism in constitutional proceedings]. Konstitucionalas tiesas aktivisms demokratiska valsti. Satversmes tiesas 2016. gada konferences materialu krajums. Riga: Latvijas Republikas Satversmes tiesa, 2016.53.
4. Pleps J. Satversmes iztulkosana [Interpretation of the Constitution]. Riga: Latvijas Vestnesis, 2012.

Legal acts

5. The Constitution of the Republic of Latvia. Available in English: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia
6. European Convention on Human Rights. Signed in Rome on 04.11.1950 [in the wording of 04.12.2023.]. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [viewed 01.12.2023.].
7. Charter of Fundamental Rights of the European Union. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT [viewed 01.12.2023.].
8. Buvniecibas likums [Construction Law] (09.07.2013.). Available: https://likumi.lv/ta/en/en/id/258572-construction-law [viewed 01.12.2023.].

Court practice

9. Judgment of the Constitutional Court if the Republic of Latvia of 21 April 2022 in Case No. 2021-27-01. Available in Latvian: https://likumi.lv/ta/id/331871-par-buvniecibas-likuma-parejas-noteikumu-4-punkta-pirma-teikuma-atbilstibu-latvijas-republikas-satversmes-1-pantam-91-panta-pir [viewed 01.12.2023.].
10. Judgment of the Constitutional Court of the Republic of Latvia of 18 October 2023 in Case No. 2022-33-01. Available in Latvian: Latvijas Vestnesis, 204, 20.10.2023. Information in English: https://www.satv.tiesa.gov.lv/en/press-release/

prohibition-for-a-professional-service-soldier-to-become-a-member-of-a-political-party-complies-with-the-constitution/ [viewed 08.01.2024.].

11. ECJ Judgment of 06.05.2021 in Case No. C-142/20 Analisi G. Caracciolo. Available: https://curia.europa.eu/ [viewed 01.12.2023.].
12. ECtHR decision of 22 January 2008 in Case Wolfgang Beier v. Germany (application No. 20579/04). Available: https://hudoc.echr.coe.int/#{%22fulltext%22:[%2220579/04%22],%22itemid%22:[%22001-84948%22]} [viewed 01.12.2023.].
13. Judgment of the Senate of the Supreme Court of Republic of Latvia of 31 October 2023 in Case No. A43008017, SKA-4/2023 Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [viewed 01.12.2023.].

Other materials

14. Annotation of amendments to the Republic of Latvia Construction Law. Available in Latvian: https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/B5B574186DCA2AEBC22588F30028781E?OpenDocument [viewed 01.12.2023.].
15. Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention.
16. Latvijas Republikas Satversmes 91. pants: tiesiskas vienlidzibas princips. Satversmes tiesas judikatura [Article 91 of the Constitution of the Republic of Latvia: the principle of legal equality. Jurisprudence of the Constitutional Court]. Riga: Tiesu namu agentura, 2022.
17. Separate opinion of the Constitutional Court Judge Neimanis J. in Case No. 2021-27-01. Available in Latvian: https://likumi.lv/ta/id/333342-satversmes-tiesas-tiesnesa-jana-neimana-atseviskas-domas-lieta-nr-2021-27-01-par-buvniecibas-likuma-parejas-noteikumu-4-punkta- [viewed 01.12.2023.].