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**CONSTITUTIONAL COURTS
AND THE JUDICIARY:
PROTECTING HUMAN RIGHTS TOGETHER**

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REPORT

**“THE CONSTITUTIONAL COURT OF LATVIA
AND THE PRINCIPLE OF EQUALITY”**

by

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Introduction

[1] The Constitutional Court of Latvia (in Latvian – Satversmes tiesa; hereinafter - CCL) similarly to the Constitutional Court of Jordan (hereinafter – CCJ) assesses, whether the principle of equality has been ensured, by adjudication a concrete case on the compatibility of a norm with the Constitution.

CCL has broader possibilities to protect human rights (including the right to equal treatment), since the person himself or herself may submit an application to the Court – the institution of constitutional complaint operates in Latvia. However, it should be added that the jurisdiction of the Constitutional Court of Latvia allows assessing only the legal provision itself, but not the constitutionality of the action taken by persons or institutions applying it.

However, this difference in jurisdictions of the courts should not influence the process of assessment itself and the content of the principle of equality. Thus, the insights expressed in the case law and judgements of CCL could be used in Jordan's jurisprudence.

[2] Also CCL, in analysing the content of the principle of equality, has referred to the case law of the constitutional courts in other countries.

[2.1] For example, in the case regarding the service pensions of military personnel, the Court referred to the case law of the German Federal Constitutional Court, since, similarly to Latvia's Satversme (i.e., the Constitution), also the first part of Article 3 in German Fundamental Law provides: "All people shall be equal before the law." German legal scholars, in analysing the case law of German Federal Constitutional Court, have noted that the first part of Article 3 of the Fundamental Law is of practical significance in almost all fields of life. Inter alia, the importance of this norm in the social field is emphasized in particular. The legislator's effort to implement justice, by establishing more special regulations, at the same time often leads to a conflict with the first part of Article 3 in the Fundamental Law, to which those, to whom such regulation has not granted advantages, refer to.

[2.2] The Constitutional Court of Latvia has also used the insight by the Lithuanian Constitutional Court that "the principle of equality must be complied with both in adopting and applying laws. This principle requires evaluating homogenous facts in one and the same way, and forbids arbitrary different assessment of facts, which are essentially similar. On the other hand, the constitutional principle □ equality before law □ does not prohibit establishing in law different legal regulation with regard to some categories of persons, who are in different situations. The diversity of social life can become the basis for the type and content of legal regulation."

[3] Equality in the system of rights functions as a general principle of law.

Even though in a modern democratic state this principle functions independently of the fact, whether it is included in a positive legal norm or not, the constitution usually contains a direct reference to this principle – the principle is made positive.

[3.1] In Latvian Constitution, similarly to the Constitution of Jordan, the principle of equality is included in the Chapter on Fundamental Rights.

Concretely, Article 91 of Satversme of Latvia provides:

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

At this point I would like to draw your attention to the initial words of the norm. In Latvia equality is ensured to all (also – an illegal immigrant). Moreover, it is emphasized in a number of Judgements by CCL that the personal rights, freedoms and obligations, which are defined in the Satversme, are applicable also to legal persons, to the extent these rights,

freedoms and obligations, in conformity with their substance, can be applied to a legal person.

Thus, this article defines human right to equality, which is one of the most fundamental human rights.

[3.2] In the Constitution of Jordan the equality requirement is expressis verbis included in a number of articles, that is, Article 6.3 as the requirement to ensure equal opportunities with regard to work and education , and in Article 111 in connection with the state taxation policy . However, the main norm, which defines the principle of equality, is included in Article 6.1 of the Constitution of Jordan, and is very similar to an article in the Satversme:

“6.1. Jordanians shall be equal before the law with no discrimination between them in rights and duties even if they differ in race, language or religion.”

On the separation of two principles

[4] In the Constitutions of both states the so-called “equality article” is split into two parts, separating the principle of equality and the prohibition of discrimination.

The Constitutional Court of Latvia, in interpreting Article 91 of the Constitution, has recognised that it contains closely interconnected, yet different principles: the principle of equality – in the first sentence – and the principle of prohibition of discrimination – in the second sentence.

Further on I shall briefly analyse also the issue of the legislator’s discretion in the context of the principle of equality. But at this point, separating the two parts of this Article – the requirement of equality and the prohibition of discrimination, I would like to refer to the finding by CCL: “The legislator’s discretion in the framework of implementing the principle of equality is broader than in the framework of implementing the principle of the prohibition of discrimination.”

The prohibition of discrimination

[5] The prohibition of discrimination is a specific regulation within the framework of the principle of equality, which in addition does not permit unequal treatment or makes it difficult. The aim of the principle of prohibition of discrimination, which is embedded in the Constitution (the second sentence of the Article), is to prevent the possibility that a person’s fundamental rights were restricted on the basis of an inadmissible criterion, for example, race, ethnicity or gender. Moreover, the burden of proof with regard to the absence of the violation of the principle of prohibition of discrimination, included in the Satversme, falls upon the State.

In difference to the Constitution of Jordan, these criteria are not enumerated in the Satversme of Latvia .

Already at the time of elaborating Chapter 8 of the Satversme (Fundamental Human Rights) (both in 1920–1922 and in 1990s), dissenting opinions were expressed concerning the need to supplement Article 91 of the Satversme with criteria, on the basis of which differential treatment of persons would not be allowed. It was suggested that a set of such criteria should include, for example, belonging to a certain race, ethnicity, gender, age, language, affiliation with a concrete political party, political opinion, religious or world view, social, material or official status, moreover, by creating this enumeration as an open range of prohibited criteria . However, the prohibited criteria were not listed. They were left in the care of theory and practice.

The principle of equality

[6] The Constitutional Court of Latvia in its judgements has noted that the principle of equality, which is enshrined in the Satversme, should guarantee the existence of a united legal order. Namely, its task is to ensure the implementation of such a requirement of a judicial state as a comprehensive impact of law upon all persons and application of law without any privileges. It also guarantees total effect of the law, objective and unbiased application of it, as well the fact that nobody is allowed to disobey injunctions of law. And yet, such uniformity of legal order does not mean levelling out, since “equality allows differential treatment, if it is justifiable in a democratic society”.

The Constitutional Court, in explaining the content of the principle of equality, has recognised that the principle of equality forbids state institutions to adopt such norms that without reasonable grounds allow differential treatment of persons, who are in similar and according to concrete criteria comparable circumstances. However, the principle of equality allows and even demands differential treatment of persons, who are in different circumstances. And yet, it also allows differential treatment of persons, who are in similar circumstances, if there are objective and reasonable grounds for that.

To put it simply, in similar actual and legal circumstances the treatment should be similar, however in different circumstances the treatment should be different.

What does differential treatment “without reasonable grounds” mean? CCL has given an answer to this, namely: “Differential treatment lacks objective and reasonable grounds, if it has no legitimate aim or if the relationship between the chosen measures and the set aims is not proportional”. Moreover, CCL has, innumerable times, verified, if the principle of equality has been ensured, by using this theoretical insight as the basis for it. (I shall discuss the methodology of assessment slightly later.)

[7] Article 116 of the Satversme enumerates those fundamental rights, which can be restricted; it also notes those values (legitimate aims), because of which the aforementioned rights can be restricted by law. Even though this Article does not mention that the right to equal treatment, guaranteed in Article 91, can be in general restricted, this does not mean that these rights are absolute and that no restrictions can be imposed upon them. CCL has noted that the Satversme is a uniform whole, and that the norms included in it should be interpreted in a systemic manner. An assumption that no restrictions at all can be imposed upon the rights envisaged by Article 91 of the Satversme would come into conflict with both their aims and the fundamental rights of other persons, guaranteed in other Articles of the Satversme.

Moreover, the Constitutional Court of Latvia, in interpreting the aforementioned Article of the Satversme, has gone even further. Namely, in the case on the duration of criminal proceedings, it noted that the legitimate aims in the context of the principle of equality are not only the ones referred to in Article 116 of the Satversme, but these can be any other reasonable aims. CCL, referring to the doctrine of constitutional law, recognised that any reasonable consideration may serve as a justified cause of differential treatment in comparable situations. The legislator must determine those legal situations, to which it attributes the same legal consequences, if this approach has an objective justification.

On the application of the principle of equality and its assessment in interconnection with other rights

[8] The Constitutional Court has repeatedly noted that the principle of legal equality should be, predominantly, applied together with other fundamental rights, since frequently it is impossible to decide how a case should be adjudicated only on the basis of this principle.

The right to equal treatment, which is enshrined in the first sentence of Article 91 of the Satversme, is “relative”, i.e., it may demand equal treatment, but per se cannot reveal what this treatment should be like, namely, should it be favourable or unfavourable. To select one of these solutions, other considerations must be taken into account, which fall outside the borders of the concept of equality.

[8.1] One of such considerations is the concrete field of law or sector, which is regulated by the concrete norm, which must be assessed. When assessing the compliance of a legal norm with principles of law, including the principle of equality, it must be taken into account that these principles might manifest themselves differently in various fields of law.

[8.2] Another consideration – the fundamental right, together with which the principle is applied.

The Constitutional Court has recognised that it is not always possible to assess the constitutionality of a restriction to a concrete fundamental right only from the perspective of the first sentence of Article 91 of the Satversme. It must be taken into consideration that frequently the principle of equality, set out in this Article, must be applied together with other fundamental rights. In such cases the content of the concrete right must also be taken into account.

Thus, the nature of the contested norms, their link with other norms of the Satversme and place in the system of fundamental rights inevitably leaves an impact upon the legislator’s discretion and, thus, also upon the scope of control implemented by the Constitutional Court of Latvia.

In order to establish, whether the legislator has exercised its discretion in compliance with the Satversme, the Constitutional Court of Latvia in its rulings (also in connection with assessment of the principle of equality) has evaluated, whether the legislator had considered alternatives to the contested norm. The Court has noted that even if the fundamental rights of any group of persons are not restricted, but the legislator has intended to establish differential treatment of persons, who are in similar and comparable circumstances, it is obliged, taking into account the particular situation and circumstances, to consider possible alternatives to the intended legal regulation. Abiding by this duty, inter alia, ensures that a better-considered decision is adopted.

Some examples:

(A) In the case having regard to pension supplements, the Constitutional Court of Latvia noted that in this case it should be taken into consideration that the contested norm applies to such support measures of financial nature, which depend upon the limits of the legislator’s discretion. The broader the legislator’s discretion to regulate an issue, which falls within a particular field of social rights, the smaller is the legal protection, which the principle of legal equality establishes for persons.

(B) In the case regarding differences in calculating pensions for citizens and non-citizens CCL noted that in the field of social rights the basis for differential treatment is the idea that the State assumes special care and responsibility for its citizens, the basic needs of whom it must satisfy. No standards have been set for the social rights that must be implemented in general procedure, taking into consideration the maximum resources of a particular state. However, some social rights can be ensured only partially. An absolute equality in particular social rights might cause serious financial consequences for the State. The fact alone that a person does not enjoy particular social right does not cause a violation of fundamental rights. This violation occurs, if the infringement of this right has no grounds.

The Constitutional Court of Latvia has assessed the principle of equality in interconnection with, for example, the right to health protection, the right to social security, the right to a fair court, the right to a vacation, the right to own property, etc.

[8.3] However, there is also a third consideration that must be taken into account in analysing, whether the principle of equality is complied with, – the Satversme (constitution) is a united whole, and the legal norms that it comprises are closely interconnected. Each norm of the Satversme has a concrete place in the constitutional system. The Constitutional Court of Latvia has noted: to establish the content of particular norms in a more comprehensive and objective way, these should be interpreted in interconnection with other norms of the Satversme. The principle of the unity of the Satversme prohibits interpreting a particular constitutional norm in isolation from other norms of the Satversme, since the Satversme as a uniform document influences the scope and the content of each particular norm. Therefore, the smaller discretion is granted to the legislator by the Satversme, the stricter the Constitutional Court of Latvia should control the exercise of this discretion, and vice versa: the broader discretion the legislator has, the less Constitutional Court of Latvia should interfere in the exercise of this discretion. For example, if it is established that Article 91 of the Satversme requires unifying the treatment of comparable groups of persons, the Constitutional Court of Latvia can rule, what this treatment should be like, if the legislator's discretion is narrow, or it can entrust the Saeima with this choice, if the discretion is broad. Likewise, the actions by the Constitutional Court of Latvia and, if necessary, the stringency and particularity of requirements set for the legislator should depend upon the facts of the case under examination.

On the formula of assessment (methodology)

[9] The Constitutional Court of Latvia, in order to assess, whether the contested norm complies with the principle of equality, usually takes the following successive steps, namely, it establishes:

- 1) whether and which persons (groups of persons) are in similar and according to definite criteria comparable circumstances;
- 2) whether the contested norm envisages equal or differential treatment of these persons;
- 3) whether this (differential) treatment has objective and reasonable grounds, i.e., whether it has a legitimate aim and whether the principle of proportionality has been complied with.

[9.1] the first step – identification of comparable groups

In identifying comparable groups, namely, persons, who are in similar and according to definite criteria comparable circumstance, the Constitutional Court of Latvia verifies the arguments provided by the applicant and the institution that has adopted the contested norm, often disagreeing that the indicated groups are comparable.

Sometimes the Court does not support these proposals. For example, in the case regarding pension supplements, CCL did not agree with any of the parties regarding the comparable groups they had indicated. The evaluation offered by participants of the case, regarding which persons are in similar and comparable circumstances, could not be used. If the Applicant's argument were recognised as valid, a situation would arise, in which a term set by the legislator would always create two groups of persons and also differential treatment of them. The argument offered by the Saeima (the Parliament), in its turn, would mean that the term set in the law could never be examined from the vantage point of equality, since the changes in persons' rights or obligations after this term would always occur within the framework of a new regulation. The Court held that it would be reasonable to assume, in the context of the contested norm, that all those persons, who had been granted a pension and who had accrued insurance period prior to 31 December 1995, were in similar and comparable circumstances.

Two situations are never totally identical. A situation, which has one or several shared features with the situation to be examined, should be chosen for comparison. Namely, to establish, whether and which groups of persons are in similar and comparable circumstances, the main feature uniting this group (common elements) should be identified.

[9.2] the second step – identification of differential treatment

Usually it is not difficult to assess this issue. When examining cases related to legal norms that pertain to respecting human rights, one of the initial tasks is to establish, whether a person's fundamental rights have been restricted. If a restriction exists vis-à-vis one group of persons, but it has not been established with regard to the other group – then differential treatment can be identified.

[9.3] the third step – justifying the differential treatment, i.e., identifying its aim and assessing its proportionality.

In assessing the proportionality, the Court establishes:

- 1) whether the measures used by the legislator are appropriate for reaching the legitimate aim;
- 2) whether such action is necessary, i.e., whether it would be possible to reach the legitimate aim by other measures, less restrictive to individual's rights and legitimate interests;
- 3) whether the legislator's action is proportional or commensurate, i.e., whether the benefit gained by society exceeds the damage inflicted upon the individual's rights and legal interests.

[10] Depending upon the circumstances, the Court may decide to stop assessment (if a violation or compliance is identified) during any of the steps. For example, if it establishes that comparable groups do not exist, it discontinues assessment. Likewise, assessment may be stopped upon establishing that differential treatment of comparable groups is not envisaged.

Some examples:

(A) In the case regarding the requirements for official language proficiency set for local government members the applicant tried to prove that the following should be compared: (1) local government members, who are exempt from taking the official language proficiency test, and (2) local government members, who are not exempt from it. The Court established that the contested norm envisaged only one group of persons – all local government members, and the requirements regarding the official language proficiency were set equally to all of them. Thus, the Court established that the contested norm did not create two comparable groups, towards who differential treatment had been established, and stopped assessing already after the first “step”.

(B) Also in the case on the accessibility of reimbursement medicines (on the procedure of reimbursing purchasing of medicines), in which the applicant held that the contested regulation created different procedure for reimbursing purchase of medicines for two groups of patients, CCL established that the indicated groups of persons were not in similar and comparable circumstances and that the contested norm was not incompatible with the principle of equality enshrined in the first sentence of Article 91 of the Satversme.

(C) Whereas in the case of parents' benefit (in connection with the birth of a child) CCL established that the contested norm envisaged differential treatment of persons, who were not in similar and comparable circumstances. Thus, such differential treatment is not incompatible with Article 91 of the Satversme (the principle of equality).

Conclusion

From the overview of the case law of the Constitutional Court of Latvia in connection with the principle of equality provided within the time allocated to me, I would like to draw your attention to the following three main conclusions:

1. Irrespectively of the way we define and apply equality – as an independent fundamental right or as a principle of law, it is one of the fundamental values of a democratic and judicial state.
2. Equality should be differentiated from the prohibition of discrimination.
3. In assessing, whether the equality requirement has been met, the following should be taken into consideration – (1) the concrete field of law; (2) the fundamental right, in connection with which the principle of equality is applied, and also (3) that the Constitution should be interpreted as a united whole.

At the very end I would like to recall a well-known truth: the principle of equality is binding to all three branches of state power – the legislator, the executive power and the judicial power. The State, in adopting, interpreting and applying legal norms, which affect private persons, should use as the basis the principle that all people are equal, i.e., having equal rights and equal obligations.