



LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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SEPARATE OPINION

of Ineta Ziemele,

Justice of the Constitutional Court

of the Republic of Latvia

in Riga on 21 December 2019

in Case No. 2018-25-01

**“On Compliance of Section 50⁴ of the Sentence Execution Code of Latvia
with Article 91 of the *Satversme* of the Republic of Latvia”.**

On 7 November 2019, the Constitutional Court delivered its judgement in case No. 2018-25-01 “On Compliance of Section 50⁴ of the Sentence Execution Code of Latvia with Article 91 of the *Satversme* of the Republic of Latvia” (hereafter – the Judgement).

I uphold the finding made in the Judgement that the contested norm, insofar the differential treatment of men established therein lacks objective and reasonable grounds, is incompatible with Article 91 of the *Satversme* of the Republic of Latvia. However, I cannot agree to the methodology chosen for assessing the constitutionality of the contested norm, the use of which causes uncertainty regarding the scope and consequences of the Judgement.

In substantiating my opinion I shall use abbreviations used in the Judgement.

1. The Constitutional Court, throughout its history, has reviewed the compliance of legal norms with Article 91 of the *Satversme* in more than 130 rulings.

Until now, predominantly, the compliance of legal norms with the principle of legal equality, included in Article 91 of the *Satversme*, has been examined in the Court’s judicature. The Court has had to review issues related to the prohibition of discrimination comparatively less often (*see Judgement by the Constitutional Court of*

23 November 2015 in Case No. 2015-10-01 and Judgement of 29 June 2018 in Case No. 2017-28-0306).

To review the compatibility of a legal norm with Article 91 of the *Satversme*, the Constitutional Court usually verifies:

- 1) whether and which persons (groups of persons) are in similar and according to certain criteria comparable circumstances;
- 2) whether the contested norm establishes similar or differential treatment of these persons (groups of persons);
- 3) whether this treatment has been established by a legal norm adopted in the procedure set out in regulatory enactments;
- 4) whether there are objective and reasonable grounds for such treatment.

Thus, methodology for reviewing the compliance of a legal norm with Article 91 of the *Satversme* has been consolidated in the Constitutional Court's judicature. The Court has adhered to this methodology also in the present case (*see Para 18 of the Judgement*).

However, due to certain reasons, the present case differs from the cases, reviewed before by the Constitutional Court, related to observing the principle of legal equality.

2. The present case was the first time when the Constitutional Court had to review the constitutionality of differential treatment based on the gender criterion. I subscribe to the considerations, included in the Judgement, regarding the historical context of the development in the awareness of women's rights and gender equality and the fact that, in the present case, this context is of particular importance (*see Para 22 of the Judgement*).

The first human rights treaties, adopted after the First World War, provided that discrimination on the grounds of origins, citizenship, language, race and religion was prohibited. However, the gender criterion was not yet included in these treaties; however, the fight for women's rights already had begun. Consolidation of gender equality in a broader scope started with the establishment of the United Nations Organisation (*see: W. A. Schabas, U. N. International Covenant on Civil and Political Rights. Nowak's CCPR Commentary, 3rd revised ed., N. P. Engel, Publisher, 2019, pp.78–79*). For example, the International Covenant on Civil and Political Rights

(hereafter – the Covenant) and, specifically, its Article 3 in particular enshrines gender equality. Although this Article is applicable in conjunction with other Articles of the Covenant, its content comprises the positive obligation of the State Parties to ensure that not only women are not discriminated against on the basis of the gender criterion but also to take special measures that would allow women to exercise all of their rights effectively (*see: W. A. Schabas, U. N. International Covenant on Civil and Political Rights. Nowak's CCPR Commentary, 3rd revised ed., N. P. Engel, Publisher, 2019, pp. 83*).

4. Each human being is unique. There always will be various, different groups of persons in society. Diversity is the driving force in society's development. This is exactly the reason why ensuring legal equality and prohibition of discrimination is always in the centre of human rights as a matter of law. Namely, **in a democratic state governed by the rule of law, a person's difference from other people may not be the grounds for disproportional restrictions on their rights**. In a democratic state governed by the rule of law, the legislator must ascertain that each person, irrespectively of their particular traits, may exercise the human rights, established in the state, effectively and substantively.

The following principle has been recognised in both international human rights and the constitutional law of several states: upon establishing that some groups of persons are unable to exercise their rights in the same scope as the majority of society, the legislator has the right to adopt and implement special measures to prevent or, at least, decrease the perceived or actual inequality that follows from the particular differences.

International and European human rights documents have focused, in particular, on the need for such special or specific measures, special temporary measures or positive action that would ensure not only formal equality but also substantive equality. Such extraordinary measures or actions may be manifested as differential treatment, which is more favourable for persons who usually are in more disadvantageous conditions [*see, for example: UN Committee on the Elimination of Racial Discrimination, "General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination"*,

UN Doc. CERD/C/GC/32, 24 September 2009; UN Committee on the Elimination of Discrimination Against Women, “General Recommendation No. 25: Article 4, para. 1 of the Convention (temporary special measures)”, UN Doc. A/59/38 (supp), 18 March 2004].

The European Court of Human Rights, likewise, in reviewing a case pertaining to differences in the rights of women and men while serving a custodial sentence, referred to other international standards that recognised the specific needs of convicted women, and underscored the need to take these into account, and noted that differential treatment aimed at ensuring genuine equality could be justified in the meaning of Article 14 of the Convention. Hence, differences in the prison regime, applicable to men and women, are acceptable and can be even necessary to ensure gender equality (*see Judgement by the European Court of Human Rights of 10 January 2019 in Case “Ēcis v. Latvia”, Application No. 12879/09, Para 86*). The European Court of Human Rights also noted that the differences, established on the basis of gender criterion, must comply with the proportionality principle (*ibid.*, § 70).

Pursuant to international standards, which allow and even require implementation of special measures, the legislator must constantly identify the persons who are in a more unfavourable situation compared to other members of society and the reasons for it being so and must assess whether and what measures are needed to improve the condition of these persons. Whereas, in introducing special measures aimed at improving the condition of a certain group of persons, the legislator at the same time must follow how long these can be maintained not to create a new situation of inequality, in which they no longer could be justified. Namely, the legislator must reassess, constantly and regularly, the need for and the scope of the established measures and the consequences of their application.

Hence, in those cases where the State introduces special measures to ensure to a certain group, which is united by a certain feature, the possibility to exercise its rights substantively, such measures are not considered to be a violation of the principle of equal rights. Hence, the conclusion included in Para 19 of the Judgement, in which the Constitutional Court concludes that, within the framework of the present case, men and women who, while being adults, have committed a serious or an especially serious crime, have received a custodial sentence and are serving their sentences (hereafter also

– convicted men and women) are in similar and comparable circumstances, is incomplete. The same applies to the conclusion included in Para 20 of the Judgement that the contested norm envisages differential treatment. The differential treatment itself, which, indirectly, had developed due to the fact that, because of historical reasons, special measures had been implemented with respect to one group, had to be characterised.

5. It is validly noted further in the text of the Judgement: to remedy long-standing inequality, the legislator has the right and, in certain cases, an obligation to implement special measures (*see, Para 22.1. and Para 23.1. of the Judgement*). Substantially, I subscribe to the conclusion made in the Judgement that differential treatment of men, established by the contested norm, originated when the State implemented special measures to safeguard the rights of convicted women and to decrease the gender equality that had evolved historically (*see Para 23.3. of the Judgement*).

Hence, men and women are comparable groups, which historically have been in unequal circumstances and, therefore, states had been obliged to implement special measures to consolidate women's rights. In providing an answer to the question in the test regarding the second sentence of Article 91 of the *Satversme*, whether the contested norm envisages similar or equal treatment of these persons (groups of persons), the Court should have conducted special analysis of the differential treatment, taking into account the fact that international human rights have requested the states to take special measures for effective protection of women's rights and that the establishment of such differences was not regarded as a violation of the principle of equal rights.

These circumstances point to the fact that, in the present case, the differential treatment is not defined in the same way as in the majority of other cases examined in relation to Article 91 of the *Satversme*. In the presence of special measures, the Court should define the legal nature of differences. Namely, it should establish: 1) whether the differential treatment occurred due to the special measures implemented by the State; 2) whether Latvia's international commitments in the area of human rights still demand implementation of such special measures; 3) if international standards and the practice of democratic states have evolved, whether the particular differential treatment is objective and reasonable. Namely, whether it is still reasonable not to apply the same

measures to other comparable group, whether all special measures should be retained in the future or part of them with respect to the group of persons who once used to be in an unequal situation. In cases relating to special measures the main question is whether by retaining the special measures in force the rights of the comparable group, to which such measures are not applied, are not disproportionately restricted. Moreover, it should be kept in mind that non-application of such measures within a certain period of time is not considered to be a violation of the principle of equal rights.

6. Thus, one might say that, in the context of special measures, the contested norm is neutral. However, as is well known, neutral regulation also may cause a violation of the principle of equal rights. The Court, however, has not identified in full the particularities of the specific situation, thus stating in the Judgement that the contested norm *per se* establishes the differential treatment, and its necessity is analysed in accordance with the last criterion included in the test of Article 91 of the *Satversme*, i.e., whether such treatment has objective and reasonable grounds, thus, whether it has a legitimate aim and whether the principle of proportionality has been abided by. In assessing proportionality, the reason why, historically, protection of women's right required special attention and how society and its understanding of gender equality has evolved over time is taken into account.

Since, with respect to convicted women, the special measures that have been implemented is one of the main criteria for assessing the proportionality of differential treatment, the approach of this Judgement can be understood to mean that the special measures *per se* constitute the differential treatment on the basis of gender criterion. Para 29.2. of the Judgement comprises the conclusion that "the legal regulation that envisages a stricter sentence service regime for men, only on the basis of the gender criterion, without taking into account the individual needs and risks of each convicted persons, and also the different rights and restrictions following from it (in particular, restrictions on the right to private life), compared with convicted women, does not ensure that the rights of convicted men are respected. It also does not ensure to the families of convicted men the same protection as to the families of convicted women and, *inter alia*, infringes upon the best interests of the convicted men's children". Whereas in Para 30 of the Judgement the Court notes that convicted women is a group

of convicted persons requiring special protection, and whether and what kind of special measures are needed for the protection of this group of prisoners must be regularly examined. The Substantive part of the Judgement, in turn, allows for the assessment of what should be changed in the implementation of the convicted men's rights.

Therefore, the traditional method of assessment, abided by in the Judgement, in assessing the compliance of the contested norm with Article 91 of the *Satversme*, undermines the clarity of the Judgment and suggests a certain internal contradiction.

7. The Court's finding that the differential treatment is most visibly manifested with respect to the restrictions imposed on the convicted persons in their communication with the family, as well as in financial restrictions, i.e., restrictions on the rights defined in Article 96 of the *Satversme* (*see Para 20.3. of the Judgement*), should be also taken into account. Likewise, it is underscored in the Judgement that it is important for the convicted persons, irrespectively of their gender, to maintain contacts with the family, in particular, with the children (*see Para 27 of the Judgement*). It is not questioned in contemporary society that both the mother and the father have equally important roles in the family and upbringing of children (*see Para 28 of the Judgement*). Namely, at present it is self-evident that a man plays actively his role as a parent within the family. These are significant findings made by the Court, which *per se* make the legislator consider seriously the scope of convicted men's rights, taking into account that both a man's role in the family and the understanding of the purpose of a criminal sentence have changed.

In such a situation, objective and reasonable grounds for the differential treatment of convicted men cannot be found.

Hence, the contested norm, insofar the differential treatment of men established therein lacks objective and reasonable grounds, is incompatible with Article 91 of the *Satversme* of the Republic of Latvia

Justice of the Constitutional Court

Ineta Ziemele