



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Justice of the Constitutional Court

Ineta Ziemele

SEPARATE OPINION

Riga, 19 June 2019

Case No 2018-15-01

**“On compliance of Section 27, Paragraph five and Section 30,
Paragraph four of the Law on Higher Education Institutions with the first
sentence of Article 106 of the Constitution of the Republic of Latvia”**

1. On 7 June 2019, the Constitutional Court adopted a judgment in Case No 2018-15-01 “On Compliance of Section 27(5) and Section 30(4) of the Law on Higher Education Institutions with the First Sentence of Article 106 of the Constitution of the Republic of Latvia” (hereinafter — the Constitution) and declared Section 27(5) of the Law on Higher Education Institutions, with regard to associate professors and professors, Section 28(2) and Section 30(4), in so far as they do not provide protection against the abuse arising from the use of successive fixed-term employment contracts, (hereinafter — the contested provisions) non-compliant with the first sentence of Article 106 of the Constitution of the Republic of Latvia.

I agree with the conclusions included in the Judgment that the contested norms restrict the right of the Applicant to maintain employment enshrined in the first sentence of Article 106 of the Constitution, and that the restriction of fundamental rights resulting from the contested provisions is established by law and has a legitimate aim, as

well as with the references in the Judgment to the decisive importance of the understanding of academic freedom in the present case. However, I cannot agree with the conclusions of the Court that the employment of associate professors and professors (hereinafter – the professorship) for a fixed period of time achieves the legitimate aim and that there are no other alternative means.

2. The main dispute in the present case regards whether the legitimate aim of the regulation laid down in the contested provisions, in so far as it concerns the employment of higher-ranking academic staff – associate professors and professors – for a fixed period of time and the application of the procedure of examination of scientific activity every six years, can be achieved by other means which are less restrictive of the rights of a person.

The Applicant has expressed his opinion that the legislator, in adopting Section 27(5) and Section 30(4) of the Law on Higher Education Institutions, has not considered whether there were other means that were less restrictive of the rights and legitimate interests of a person. As pointed out in the Application, the legislator could establish a system whereby higher-ranking academic staff would not be required to undergo a re-election procedure, but the quality of scientific activity would be ensured by means of regular examinations. The Applicant considers that the procedure for reviewing scientific activity could be carried out only in the event of complaints concerning the performance of a particular person, whereas a person who no longer possessed the necessary abilities and qualifications for the academic position in question could have his or her employment terminated in accordance with the Labour Law. The Ombudsperson has also acknowledged that there could be other, more lenient means by which the legitimate aim of the restriction of the fundamental right could be achieved at least to the same quality as the contested provisions. The *Saeima* and the Ministry of Education

and Science, on the other hand, consider that there are no other, more lenient means.

The Constitutional Court held that the legitimate aim of the restriction of fundamental rights could not be achieved to the same quality by the alternative means indicated by the Applicant. I agree with this opinion. The Constitutional Court, guided by the law of the European Union as well, cautiously indicated that the contested regulation in itself, i.e., carrying out an evaluation of the professorship every six years, complies with the legitimate aim (*see paragraph 16.2 of the Judgment*), but does not contain the necessary guarantees against its abuse (*see paragraph 20.3 of the Judgment*).

The reason why the Constitutional Court accepted in principle that the six-year period, contrary to the opinion of the Applicant on more frequent evaluation of the professorship, complies with the fundamental rights enshrined in Article 106 of the Constitution, is related to the definition of academic freedom provided by the Court. In particular, the Court rightly emphasised: “Scientific and research work is an ongoing and continuous process, the progress of which depends, *inter alia*, on the availability of infrastructure and resources, as well as on the qualifications of the professorship. Moreover, scientific progress is only possible within the framework of academic freedom, characterised by constant dialogue with colleagues in the field in Latvia and abroad” (*paragraph 16.2 of the Judgment*). It would be strange if a scientist engaged in a long-term scientific project were to be evaluated every year on the progress of that project. Such an approach would be difficult to justify in terms of academic freedom.

3. In the present case, the Constitutional Court interprets Article 106 of the Constitution in the light of Article 113 of the Constitution, which establishes the obligation of the State to recognise the freedom of scientific

research, artistic and other creative activity (*see paragraph 11.3 of the Judgment*).

Section 6 of the Law on Higher Education Institutions stipulates that freedom of research work and artistic creation shall be ensured in higher education institutions. Following its accession to the European Union, Latvia is also bound by the Charter of Fundamental Rights of the European Union, Article 13 of which states that the arts and scientific research shall be free of constraint, i.e. the academic freedom of the researcher is respected. It is important to emphasise that the Constitutional Court defined academic freedom in its Judgment, i.e., it indicated that it includes the right, without constriction by prescribed doctrine, to freedom of teaching, freedom to carry out research and disseminate and publish the results thereof, freedom to express freely one's opinion about the institution or system in which one works, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. Anyone engaged in science, research or teaching has the right to be protected against any attempt by the State to influence the acquisition and transmission of knowledge (*see paragraph 11.3 of the Judgment*).

Thus, the obligation of the State to respect and protect the academic freedom of professorship follows from Article 113 of the Constitution. This means that the State, when imposing requirements on the professorship, is obliged to ensure that the system of the activity of the professorship established by the State ensures the right of the persons concerned to freedom of scientific, artistic and other creative activity. Thus, an assessment of the system established in Latvia, under which the professorship reports on their work every six years, must answer the question of whether such periodic reporting, without any guarantees of employment, is consistent with, and contributes to the observance of, the principle of academic freedom.

4. In its Judgment, the Constitutional Court held that Academic tenure constitutes one of the major procedural safeguards of academic freedom (*see paragraph 11.3 of the Judgment*). The Constitutional Court also rightly recognised in the Judgment that the professorship not only contributes to ensuring the right to quality higher education, but also contribute to the development of the economy, which underpins the welfare of society as a whole (*see paragraph 14 of the Judgment*).

It could be assumed that the six-year term for which a person is elected to the position of associate professor or professor ensures, to a certain extent, the periodic renewal of academic staff, thereby also contributing to the development of scientific research and artistic creation. However, it should be borne in mind that **the existence of a strong professorship in a country is one of the mandatory preconditions for the sustainable development of that country**. Not all research activities can be reduced to a six-year period. Research is a process that cannot always be measured in terms of specific performance indicators over a six-year period. I believe that the time limit chosen by the legislator does not in itself guarantee the quality of scientific activity. I do not deny that it is necessary to evaluate the quality of academic activity, but how successful is the system established in Latvia at ensuring this evaluation?

The Constitutional Court notes that in Latvia, although not provided so by the contested provisions, the procedure of secret ballot is used to evaluate the quality of scientific activity carried out by persons (*see paragraph 16.1 of the Judgment*). If evaluation criteria such as the long-term research activity, the importance of scientific publications and work with students are already used to evaluate a candidate, there is no justification for the need for a secret ballot. Such a practice is contrary to the need for dialogue in quality science.

The essence of science is dialogue, the presentation of ideas and arguments, justification, counter-arguments and listening to criticism. A strong

professorship is one actively engaged in science. Without science, there is no professorship. Quality scientific activity involves, *inter alia*, dialogue with academics working in related fields from all over the world. In today's information society, involvement in international scientific processes is particularly important. Disconnection from global scientific processes leads to stagnation in scientific activity.

Thus, the case-file does not provide assurance that the contested regulation, i.e. the conclusion of contracts with the professorship for a term of six years, would promote activity of the professorship in line with the principle of academic freedom and ensure high-quality science in all areas of national importance in the long run.

5. The *Saeima* and the Ministry of Education and Science have not provided arguments in the case whether an analysis of the practice of other countries has been carried out in adhering to the regulation of the contested provisions for a longer period of time. Quality scientific research is not limited to one country. I believe that the regulation of selection and employment of the professorship should not be evaluated in isolation from the practice in other countries, especially European countries. Distancing ourselves from the practices of other countries in the matter of assessing the quality of the scientific activity of higher-ranking academic staff would be undesirable. Therefore, possible alternative measures should be considered in the context of the experience of other countries.

Looking at the practice in other European countries, it could be noted that the process of obtaining the position of professor is a lengthy one. It is the pinnacle of an academic career and requires many years of work in other academic positions, for which a system of fixed-term contracts could also be in place. In some countries, there is even a provision for passing a special examination to become a professor, which is the basis for the conclusion of a contract of indefinite duration. However, greater importance is awarded to

scientific activity and publications that have given rise to scientific debate, have been used in practice and have been referred to by other scientists in both national and global scientific discourse. In other European countries, the emphasis is therefore on the substantive, i.e. qualitative, performance of academic staff. Employment guarantees are provided accordingly.

The practices of other countries thus point to the existence of other, alternative solutions.

6. The legislator has a duty to periodically review regulation if there are doubts or public debate about whether it still meets the needs of society and contributes to the development thereof. The legislator must examine whether there are circumstances that require a change of an outdated legal framework, adapting it to the trends in the development of society. The legislator should ensure, through parliamentary control or other legal means at its disposal, that the procedures for the selection and employment of higher-ranking academic staff are also reviewed, taking into account the particular importance of higher education and science for the development of the country and the need for a permanent link with the international scientific environment.

The contested provisions were adopted before Latvia's accession to the European Union. As recognised in paragraph 17.1 of the Judgment, the proportion of academic staff aged 35-49 in Latvia is among the lowest in the EU. The World Bank's report on academic careers in Latvia also recognises the necessity to consider new solutions in selecting academic staff (*see paragraph 16.1 of the Judgment*). As the Constitutional Court points out, one of the reasons for the emergence of such a situation is the fact that the age limit for academic positions was revoked in the past.

The selection and employment of higher-ranking academic staff is an extremely important factor affecting the level of higher education, science and research in Latvian universities and in the country in general. The legislator

should therefore pay particular attention to this issue by considering and developing a meaningful solution. Higher education and science are an essential component of the sustainable cultural, economic and environmental development of society. Academic freedom is essential for the sustainable development of society as a whole. Therefore, delays in initiating a discussion on the selection and employment of higher-ranking academic staff may have a negative long-term impact on the well-being of Latvian society.

Thus, there are a number of facts which show that it was necessary for the legislator, from the point of view of the long-term development of the State, to review the system for the establishment of and criteria for the evaluation of the professorship – the main guarantor of the development of science.

Justice of the Constitutional Court

I. Ziemele