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BLANKET BANS IN CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Summary

Irrespective of whether a human rights case is being decided in a national or international court, similar methodology is used when assessing whether a human rights restriction is justifiable. In some cases, however, the European Court of Human Rights and Constitutional Court of the Republic of Latvia use different approach for specific kind of human rights restriction – the blanket ban. This concept and applied methodology are still under the discussion regarding both courts. This article looks into concept of blanket ban, analyses influence of this concept to courts' assessment, as well as reflects objections to the concept.

Introduction

Courts are not bound by the methodology they use as their task is to ensure fair proceedings and outcome. The consistent use of the methodology provides clarity for persons applying to the court.

Irrespective of whether human rights case is being decided in a national or international court, usually similar methodology is used when assessing whether a restriction of human rights is compatible with international legal sources or constitutions, for instance, the classical three-part test in case of the negative obligations.

In some cases, however, the European Court of Human Rights (hereinafter – the ECHR) as well as the Constitutional Court of the Republic of Latvia (hereinafter – the Constitutional Court) use a modified approach to assess interferences with human rights. These cases concern a specific kind of human rights restriction – the blanket

ban. The meaning of this term, specific methodology applied in these cases and its necessity are still under the discussion in the context of the both courts.

This article looks into the concept of the blanket ban in both mentioned courts, analyses the influence of this concept to courts' assessment in judgments, as well as reflects objections to the blanket ban concept made by judges in their dissenting opinions and arguments found in legal literature.

1. Blanket ban: The concept

Legal systems often face the challenge of finding the balance between legal certainty, on one hand, and flexibility and adaptability to individual circumstances, on the other hand. This challenge is particularly strong in human rights cases where individual circumstances may be particularly important in order to ensure protection of individual's rights.¹ Adopting only the kind of norms which provide for individual assessment, however, would be a disproportionate burden on a legislator and law enforcers, and could cause uncertainty. Therefore, legal systems have norms which are inflexible – not adaptable to individual circumstances – and automatically applicable to everyone within its scope. In some cases, such inflexible norms could cause an anomaly. Namely, in democratic states under the rule of law anyone has equal rights.² However, if for someone a certain right is denied in its entirety, an anomaly occurs. Such anomaly has far-reaching consequences considering the presumption that all persons in a given group without an individual assessment are subject to the certain human rights restriction.

The case law of the ECHR is not fully consistent in choice of terms to describe absolute human rights restrictions. For instance, in the case *Hirst v. the United Kingdom (No. 2)* the ECHR assessed a ban for prisoners to exercise their voting rights.³ In this case ECHR used the term “blanket ban” describing it as a general, automatic and indiscriminate restriction.⁴ Another case dealing with absolute human rights restrictions was *Animal Defenders International v the United Kingdom*.⁵ Here, the ECHR assessed the statutory ban on all paid political advertising on television, including an advertisement by a non-governmental organization concerning the protection of animal rights. When describing this ban, the ECHR referred to general measures which apply to pre-defined

¹ See, for example, Gerards J. Abstract and Concrete Reasonableness Review by the European Court of Human Rights. *The European Convention on Human Rights Law Review*, 2020, No. 1(2):218.

² See, for example, United Nations, General Assembly. Report of the Secretary-General “In larger freedom: Towards development, security and human rights for all”, 2005, No. A/59/2005.

³ ECHR judgment of 6 October 2005 in Case *Hirst v. the United Kingdom (No. 2)* (application No. 74025/01).

⁴ ECHR judgment in Case *Hirst v. the United Kingdom (No. 2)*.

⁵ ECHR judgment of 22 April 2013 in Case *Animal Defenders International v. the United Kingdom* (application No. 48876/08).

situations regardless of the individual facts of each case.⁶ Similarly, in the case *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, the ECHR recognized the statutory blanket prohibition on secondary strike action as general measure.⁷ The case law of the ECHR shows that whether a restriction is established for life is not a decisive factor in recognizing a ban as blanket, but it nevertheless affects the assessment of proportionality.⁸

Despite inconsistency in terminology, it is clear that the blanket ban in case law of the ECHR is a restriction applicable without exception to everyone falling within its scope regardless of individual circumstances. Legal doctrine concerning the case law of ECHR also refers to inflexible laws, which, without exception, have consequences for all those who fall within their scope, as well as laws that are “insensitive to facts”.⁹

The concept of the blanket ban was introduced in the Constitutional Court based on, *inter alia*, the case law of the ECHR.¹⁰ In this case, the court assessed the ban for life on working as a teacher for people who had been convicted of intentional serious or particularly serious crime. To establish that, the prohibition included in a legal norm is a blanket ban, the Constitutional Court assesses whether this restriction: (1) applies to all persons belonging to a certain group without individual assessment of each particular case and exemptions, and (2) has been established for life.¹¹

The definition of the blanket ban has been consistent since the beginning. The only exception is the slightly different application of it in one particular case in 2021. In this case, the court assessed the prohibition to be employed in contact with children for persons convicted of violent criminal offenses, regardless of the removal of the criminal record. The nature of this restriction differed from that assessed in the previous cases, as there were exceptions, namely, the restriction did not apply to, for instance, persons providing temporary services. Nevertheless, the Constitutional Court assessed this ban as blanket: although the exceptions narrow the range of subjects of the restriction included in the impugned norm, no exceptions are allowed in relation to sufficiently clearly defined subjects, furthermore, the ban is imposed for

⁶ ECHR judgment in *Case Animal Defenders International v. the United Kingdom*.

⁷ ECHR judgment of 8 September 2014 in *Case National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (application No. 31045/10).

⁸ See, for example, ECHR judgment of 6 January 2011 in *Case Paksas v. Lithuania* (application No. 34932/04).

⁹ Cumper P, Lewis T. Uncertainty, irony and subsidiarity: Blanket bans and the European Court of Human Rights' procedural turn. *International and Comparative Law Quarterly*, 2019, No. 68(3), pp. 611–638.

¹⁰ Judgment of the Constitutional Court of the Republic of Latvia of 24 November 2017 in Case No. 2017-07-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Spriedums.pdf#search=\[viewed 01.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Spriedums.pdf#search=[viewed%2001.11.2021.]).

¹¹ See, for example, judgment of the Constitutional Court of the Republic of Latvia of 5 December 2019 in Case No. 2019-01-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01_Spriedums.pdf#search=\[viewed 02.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01_Spriedums.pdf#search=[viewed%2002.11.2021.]).

life.¹² In view of the foregoing, the blanket ban in the case law of the Constitutional Court is a ban applicable to all persons in certain and clearly defined group and, in contrast with the ECHR, established for life.

Consequently, the understanding of the blanket ban is similar in both the case law of the ECHR and the Constitutional Court – a prohibition applicable to all persons in certain group without exception regardless of individual circumstances. The understanding differs only in the part where the criteria “established for life” is decisive in the Constitutional Court, but only affects the proportionality part in the ECHR.

2. Influence of the blanket ban concept on the courts’ assessment

As blanket bans have a highly restrictive nature and far-reaching consequences, the question arises – how do blanket bans influence assessment in judgments of both courts?

The ECHR in some cases, including blanket bans, has shifted towards the procedural review.¹³ Namely, the ECHR primarily assesses the legislative choices underlying the blanket ban, the quality of parliamentary review and the persuasiveness of abstract justification for the blanket ban.¹⁴ The quality of the parliamentary review of the necessity of the measure is of particular importance and goes directly to the proportionality of the measure in question.¹⁵ The more convincing the general justifications for the blanket ban are, the less importance the ECHR will attach to its impact in the particular case.¹⁶ The core issue is whether, in adopting the blanket ban and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.¹⁷

Where there has been such a “proper” debate, this widens the margin of appreciation, allowing more weight to be given to the domestic legislature’s assessment.¹⁸ Where the quality of debate at national level is strong, the ECHR should fully embrace its subsidiary role and approach the measure in question

¹² Judgment of the Constitutional Court of the Republic of Latvia of 25 March 2021 in Case No. 2020-36-01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/07/2020-36-01_Spriedums.pdf#search= [viewed 29.10.2021.].

¹³ Arnardóttir O. M. The “procedural turn” under the European Convention on Human Rights and presumptions of Convention compliance. Oxford University Press and New York University School of Law. *I•CON* (2017), Vol. 15, No. 1, pp. 9–35.

¹⁴ Arnardóttir O. M. Organised Retreat? The Move from ‘Substantive’ to ‘Procedural’ Review in the ECtHR’s Case Law on the Margin of Appreciation. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709669 [viewed 02.11.2021.].

¹⁵ ECHR judgment in Case *Animal Defenders International v. the United Kingdom*.

¹⁶ *Ibid.*

¹⁷ ECHR judgment of 10 April 2007 in Case *Evans v. the United Kingdom* (application No. 6339/05).

¹⁸ Cumper P., Lewis T. 2019, pp. 611–638.

with a presumption of deference to be rebutted only by weighty considerations.¹⁹ This approach is part of the process of reformulating the substantive and procedural criteria that regulate the appropriate level of deference to be afforded to the Member States of European Convention of the Human Rights (hereinafter – the Convention)²⁰, so as to implement a more robust and coherent concept of subsidiarity in conformity with Protocol No. 15 amending the Convention.²¹ According to this protocol, the contracting parties affirmed that they, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the protocols and enjoy a margin of appreciation, subject to the supervisory jurisdiction of the ECHR.²²

Legal experts have expressed an opinion the procedural review implies a more limited jurisdiction.²³ The ECHR, however, is not merely accepting the government's word that there has been some debate. The ECHR will look at whether or not the debate has been the right kind of debate, which takes into consideration the human right and weighs it in the balance against competing considerations of public policy.²⁴ For instance, in case *Shindler v. the United Kingdom* the ECHR noted that the existence of parliamentary scrutiny was “relevant, but not necessarily decisive, to the Court's proportionality assessment”.²⁵

Similarly, the Constitutional Court focuses more on legislative process. Namely, the court requires the legislator to conduct a broader assessment of a restriction. Specifically, in addition to the “classical” methodology for constitutionality of the restriction of fundamental rights, the Constitutional Court always ascertains that the legislator has: (1) substantiated the need for the blanket ban, (2) examined the substance of the blanket ban and the consequences of its application and (3) substantiated that, if exemption to this blanket ban were envisaged, it would be impossible to reach its aim in the same quality.²⁶

Under the first criterion the Constitutional Court evaluates the drafting materials of the law and analyses whether the legislator has substantiated the necessity of the blanket ban.²⁷ When analysing compliance with the second criterion, it is important whether the legislator has substantiated that a ban

¹⁹ Cumper P., Lewis T. 2019, pp. 611–638.

²⁰ European Convention on Human Rights. Signed in Rome on 04.11.1950. [in the wording of 05.11.2021.].

²¹ Spano R. *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*. *Human Rights Law Review*, 2014, 14, pp. 487–502.

²² Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. Signed in Strasbourg on 24.06.2013. [in the wording of 05.11.2021.].

²³ See, for example, Arnardóttir O. M. *Organised Retreat? The Move from ‘Substantive’ to ‘Procedural’ Review in the ECtHR's Case Law on the Margin of Appreciation*.

²⁴ Cumper P., Lewis T. 2019, pp. 611–638.

²⁵ ECHR judgment of 7 May 2013 in Case *Shindler v. United Kingdom* (application No. 19840/09).

²⁶ Judgment of the Constitutional Court of the Republic of Latvia of 17 December 2020 in Case No. 2020-18-01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2020/03/2020-18-01_Lemums_ierosinasana.pdf#search= [viewed 27.10.2021.].

²⁷ Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2020-36-01.

is necessary to the specific extent, as well as assessed the consequences of its application.²⁸ The court attaches importance to the fact whether after the adoption of the impugned norm the legislator has reviewed this issue.²⁹ In addition, the legislator shall ensure that the consequences of the blanket ban are proportionate, for instance, taking into account that a person's behaviour and attitude towards a criminal offense committed, as well as the value system, may change over time.³⁰

Lastly, the Constitutional Court examines if the legislator had made sure that the blanket ban is the only means whereby the legitimate aim can be achieved.³¹ Exceptions to the blanket ban can vary, for example, a regulation that allows individual assessment in certain cases, exceptions specified in the law, a regulation that would provide for a periodic review of the need for a ban.³² Later on, the Constitutional Court developed this criteria even further by recognizing that, when examining the constitutionality of the blanket ban, it assesses not only whether the legislator, when imposing such a prohibition, has weighed the opposite interests affected by the restriction, but also if the legislator has done so in accordance with general legal principles and other norms of the constitution.³³ This means that the Constitutional Court, just like the ECHR, also examines the constitutionality of the assessment and conclusions made by legislator.

Considering the above, both courts have developed specific approach for the assessment of the blanket ban, where focus is on legislative process underlying these bans, instead of a compliance with the Convention or the constitution by substance. This approach, however, does not mean that the courts are merely looking at whether or not there has been the debate – they also examine whether it has been the right kind of debate, which is compliant with the Convention or the constitution. The main difference in approaches used by both courts are the consequences of insufficient legislative deliberations. The ECHR will not grant a broader margin of appreciation for the state in that case and will assess the blanket ban according to classical approach. In the Constitutional Court that, however, shall lead to a conclusion that an impugned norm is not compatible with the constitution.

²⁸ Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2017-07-01.

²⁹ *Ibid.*

³⁰ Judgment of the Constitutional Court of the Republic of Latvia of 28 January 2021 in Case No. 2020-29-01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-29-01_Spriedums.pdf#search= [viewed 25.10.2021.].

³¹ Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2017-07-01.

³² *Ibid.*

³³ Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2020-36-01.

3. Objections to the concept of the blanket ban

Dissenting opinions of judges of the both courts and legal literature demonstrate that views on the concept of the blanket ban are ambiguous.

As regards the ECHR, in joint dissenting opinion of judges Ziemele, Sajo, Kalaydjieva, Vucinic and de Gaetano to case *Animal Defenders* argued that this approach ran the risk of establishing a double standard within the context of a Convention whose minimum standards should be equally applicable to all Member States.³⁴ Namely, the same kind of ban could be declared as compatible with the Convention, whereas in another case – not compatible. The case *VgT Verein gegen Tierfabriken v. Switzerland* similarly as *Animal Defenders*' case concerned ban on broadcasting video concerning animal defending.³⁵ In *VgT* judgment, however, the term "blanket ban" or similar was not mentioned. The ECHR, in contrast to *Animal Defenders*' case, found a violation of Article 10 of the Convention. In the ECHR's view, the Swiss authorities did not provide an "appropriate and sufficient" justification for the restriction in the applicant's particular circumstances.

Furthermore, the aforementioned judges pointed out that the fact that the blanket ban was enacted in a fair and careful manner by parliament should not alter the duty incumbent upon the ECHR to apply the standards established in the Convention, nor does it necessarily mean that the conclusion reached by the legislature is Convention compliant or alter the margin of appreciation accorded to the state. This may have the effect of sweeping away the commitments of High Contracting Parties under the Convention. Similarly, judges Tulkens, Spielmann and Laffranque argued that the central issue is the proportionality of the disputed ban.³⁶ Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in their dissenting opinion to judgment in *Hirst (No. 2)* case considered that it was not for the ECHR to prescribe the way in which national legislatures carry out their legislative functions.³⁷

In a legal literature, we can find objections that this procedural turn in the blanket ban cases may have serious consequences for the protection of the rights of those from some of Europe's most vulnerable minorities, whose voices may struggle to be heard in the democratic forums of state's parties, no matter how rigorous those institutions' processes are.³⁸ However, the ECHR is looking at whether or not the debate has been the right kind of debate, which takes

³⁴ Dissenting opinion of judges Ziemele, Sajo, Kalaydjieva, Vucinic and de Gaetano of 22 April 2013 in ECHR Case *Animal Defenders International v. the United Kingdom* (application No. 48876/08).

³⁵ ECHR judgment of 28 June 2001 in Case *VgT Verein gegen Tierfabriken v. Switzerland* (application No 24699/94).

³⁶ Dissenting opinion of judges Tulkens, Spielmann and Laffranque of 22 April 2013 in ECHR Case *Animal Defenders International v. the United Kingdom* (application No. 48876/08).

³⁷ Dissenting opinion of judges Wildhaber, Costa, Lorenzen, Kovler and Jebens of 6 October 2005 in ECHR Case *Hirst v the United Kingdom (No. 2)* (application No. 74025/01).

³⁸ Cumper P., Lewis T. 2019, pp. 611–638.

into consideration the competing interests.³⁹ Concerns are also expressed that procedural review, in effect, writes the individual applicant out of the equation, as it is difficult to see, from the right holder's perspective, why the quality and quantity of debate should have a determinative impact on whether there has been a violation of their rights.⁴⁰

Consequently, the ECHR's approach in the blanket ban cases is criticized for its inconsistency, not providing wholesome protection of interfered human rights and unnecessary intervention with national legislative processes.

In regard to the Constitutional Court, some judges in their dissenting opinions have expressed objections not only against the methodology for assessing blanket bans, but also the concept as such. They believe that the definition of the blanket ban is too broad, as it effectively means that any prohibition without an individual assessment is regarded as the blanket ban. Namely, they consider that ban, e.g., for persons convicted of crimes related to violence shall be recognized as an exception already, and thus such bans are not blanket.⁴¹ In their opinion, a ban is absolute only if it is comprehensive or unlimited, for instance, certain types of advertising are banned in all media.⁴²

Regarding the methodology, the judges' main argument is that the constitutionality of any prohibition can be effectively examined by applying the classical methodology for assessing the constitutionality of the restriction of fundamental rights. Judges consider that overly detailed assessment of discussions during the legislation process causes the court to intervene, to a certain extent, with the issues of the internal work agenda of the legislator. The statements of the deputies cannot be the only decisive arguments for the objective assessment of the necessity of the restriction. The absence of a debate does not in any way mean that the legislature has not, in essence, assessed and justified the need for such a ban. The ban could be self-evident in a way that it does not require a detailed justification.⁴³

Thus, the judges of the Constitutional Court in their dissenting opinions have pointed to the broadness of the blanket ban definition, as well as the fact

³⁹ ECHR judgment in Case *Hirst v. the United Kingdom* (No. 2).

⁴⁰ Lewis T. *Animal Defenders International v. United Kingdom*: sensible dialogue or a bad case of Strasbourg jitters? *The Modern Law Review*, 2014, 77 (3), pp. 460–474.

⁴¹ Dissenting opinion of judge of the Constitutional Court of the Republic of Latvia Aldis Lavins of 8 December 2017 in Case No. 2017-07-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Atseviskas_domas_Lavins.pdf#search=\[viewed 02.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/03/2017-07-01_Atseviskas_domas_Lavins.pdf#search=[viewed 02.11.2021.]); Dissenting opinion of judge of the Constitutional Court of the Republic of Latvia Aldis Lavins of 18 December 2019 in Case No. 2019-01-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01_Atseviskas_domas_Lavi%C5%86%C5%A1.pdf#search=\[viewed 02.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2019/01/2019-01-01_Atseviskas_domas_Lavi%C5%86%C5%A1.pdf#search=[viewed 02.11.2021.]).

⁴² Dissenting opinion of judge of the Constitutional Court of the Republic of Latvia Aldis Lavins of 18 December 2019 in Case No. 2019-01-01.

⁴³ Dissenting opinion of judges of the Constitutional Court of the Republic of Latvia Janis Neimanis un Aldis Lavins of 11 February 2021 in Case No. 2020-29-01. Available in Latvian: [https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-29-01_Atseviskas_domas_Lavins_Neimanis.pdf#search=\[viewed 01.11.2021.\]](https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-29-01_Atseviskas_domas_Lavins_Neimanis.pdf#search=[viewed 01.11.2021.]).

that it imposes disproportionate requirements on the legislator and unnecessarily intervenes with the legislative process.

Opposing the views above, the approach for assessing the blanket ban does not restrict the autonomy of the parliament, but allows the parliament to re-evaluate and justify, within the limits of its discretion, the need for a restriction that significantly curbs the fundamental rights. Thus, the public is provided with an explanation as to why such a far-reaching restriction of fundamental rights is necessary and whether no alternative, less restrictive means exist to achieve the legitimate aim.

Conclusion

1. The ECHR and the Constitutional Court have developed the concept of the blanket ban in order to describe and assess absolute human rights restrictions. Understanding of this concept in both courts is similar – prohibition applicable to all persons in a certain group without exception, regardless of individual circumstances. In the Constitutional Court, however, another decisive factor is whether the ban is established for life, whereas for the ECHR it is the only circumstance to be considered in the proportionality part.
2. The approach for assessing the blanket ban in the ECHR and the Constitutional Court focuses on the quality of legislative processes instead of the proportionality of the particular restriction. Consequences of insufficient legislative debate, however, differs between these courts. The ECHR will not grant a broader margin of appreciation for the state in that case, and will assess the blanket ban according to the classical approach, whereas in the Constitutional Court that shall lead to a conclusion that an impugned norm is not compatible with the constitution.
3. The approach for assessing the blanket ban is not limiting the competence of the ECHR and the Constitutional Court. The both courts are not only making sure that there has been some legislative debate, but also look at whether this debate is compliant with the Convention or the constitution.
4. The judges in their dissenting opinions, as well as legal experts as regards the both courts have criticized the approach in the blanket ban cases, targeting unnecessary intervention with legislative processes. Opposing this view, the approach for the blanket ban does not restrict the autonomy of the parliament, but allows the parliament to re-evaluate and justify, within the limits of its discretion, the need for a restriction that significantly curbs the fundamental rights. The broader assessment is required to provide the public with an explanation as to why such a far-reaching restriction of fundamental rights is necessary, and whether no alternative, less restrictive means exist to achieve the legitimate aim.

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