JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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SEPARATE OPINION

of the Constitutional Court's Judge

Artūrs Kučs

in Riga on 12 July 2024

in Case No. 2022-45-01

"On Compliance of Section 9 (1^1), Sub-para 1 of Para 102 of Transitional Provisions of Education Law and of Sections 1, 5 and 6 of the Law of 29 September 2022 "Amendments to Education Law" with Article 1, the First Sentence of Article 112, and Article 114 of the Constitution of the Republic of Latvia"

1. On 10 July 2024, the Constitutional Court delivered its judgement in case No. 2022-45-01 "On Compliance of Section 9 (1^1), Sub-para 1 of Para 102 of Transitional Provisions of Education Law and of Sections 1, 5 and 6 of the Law of 29 September 2022 "Amendments to Education Law" with Article 1, the First Sentence of Article 112, and Article 114 of the Constitution of the Republic of Latvia" (hereafter – the Judgement), by which it recognised Section 9 (1^1), Sub-para 1 of Para 102 of Transitional Provisions of Education Law and of Sections 1, 5 and 6 of the law of 29 September 2022 "Amendments to Education Law" as being compatible with Article 1, the First Sentence of Article 112, and Article 114 of the Constitution of the Republic of Latvia.

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

2. I subscribe to the finding made in the Judgement that the contested provisions are compatible with Article 1 of the Constitution. With respect to Article 114 of the Constitution, in conjunction with the first sentence of Article 112, I consent that the official language is an integral part in the constitutional identity of the State of Latvia and increasing the proficiency in it is essential in ensuring a person's rights and creating a cohesive society. Likewise, I consent that the alternative proposed by the Applicants – no regulation on the use of languages in private educational institutions and determining only a test of the proficiency in the official language – cannot be recognised as a more lenient measure that would allow reaching the legitimate aims in the same quality.

However, I do not consent that that contested provisions comply with Article 114 of the Constitution, in conjunction with the first sentence of Article 112, i.e., that the restriction on fundamental rights had been established by a legal provision, adopted in due procedure. Likewise, I do not consent that the legislator had ensured balance between promoting the use of the official language and the right to educatees belonging to ethnic minorities to preservation and development of their language, as well as ethnic and cultural singularity in private educational institutions.

3. First and foremost, I shall present my opinion as to why it should be recognised that the contested provisions had not been adopted in due procedure, i.e., in such legislative process that would comply with the principle good legislation.

3.1. Compliance with the principle of good legislation facilitates the development of conviction in society regarding the lawfulness of the decisions that are adopted and that, in the course of adopting the contested provisions, the need to restrict fundamental rights, established in the Constitution, had been carefully considered (*compare, see Judgement by the Constitutional Court of 26 November 2009 in Case No. 2009-08-01, Para 17.2. , and Judgement of 23 April 2019 in Case No. 2018-12-01, Para 24.1.*). Explanatory studies should be provided, to the extent necessary, to duly substantiate the intended legal regulation

(*see Judgement by the Constitutional Court of 6 March 2019 in Case No. 2018-11-01, Para 18.1.*).

It is recognised in Para 32 of the Judgement that the contested provisions are aimed at protecting the official language, ensuring to persons belonging to ethnic minorities the possibilities for raising their level of proficiency in the official language at all stages of education. This means that the contested provisions should have been duly substantiated by studies of the proficiency in the official language, i.e., substantiating that the previous stage of reforms to the language of instruction in education had not ensured to persons belonging to ethnic minorities sufficient proficiency in the official language. However, information accessible in the case does not provide confirmation that such studies had been conducted.

In its judgement, the Constitutional Court refers to two studies: 1) the Agency's study "Linguistic Situation in Latvia: 2016–2020", which established that, in 2019, 20 percent of surveyed minority youth had admitted that they had mastered the Latvian language only on the level of basic proficiency or had poor knowledge of it, and 2) the study conducted by the Liepāja University in 2021 "The Outcomes of Latvian Language Acquisition among Pre-schoolers in Latvia: in Kurzeme, Riga and Latgale. Acquisition of the Latvian Language", which established that children of pre-school age had insufficient proficiency in the Latvian language. I am of the opinion that the aforementioned studies cannot be deemed to be such as to provide due substantiation why the previous stage of the reform to the language of instruction in education had not ensured to persons belonging to ethnic minorities sufficient proficiency in the official language.

Firstly, the period when the aforementioned studies were conducted and published testify that these studies cannot substantiate the conclusions regarding the insufficiency of the first stage in the reform to the language of instruction in education for ensuring proficiency in the official language. The previous stage in the reform to the language of instruction in education began in 2018 and the reform was introduced gradually according to groups of grades. Thus, e.g., with respect to Grades 9 and 12, implementation of the reform began only on 1 September 2021 (*see Law of 22 March 2018 "Amendments to Education Law"*). The

aforementioned studies also were published in 2021, i.e., in the year when pupils of Grades 9 and 12 started learning in accordance with the requirements defined in the previous stage of reform to the language of instruction in education. Whether the previous stage of reform to the language of instruction in education has ensured sufficient proficiency in the official language can be assessed only after educatees have studied, for a certain period of time, in accordance with the legal regulation of this stage of reform. Moreover, in Para 36.1.1. of the Judgement, the Constitutional Court has noted that the quality of educational reform can be assessed only after almost nine years. Thus, the aforementioned studies cannot be used to substantiate that the previous stage of the reform to the language of instruction in education has not ensured to persons belonging to ethnic minorities sufficient proficiency in the official language.

Secondly, to address properly the issue of improving the proficiency in the official language, it is essential to examine not only the level of proficiency in the official language but also the reasons why this level is as it is. Only by clarifying the reasons why the proficiency in the official language is not sufficient, the most appropriate solution for improving this proficiency can be selected, irrespective of whether these would be amendments to legal regulation or to application thereof. However, it does not follow from the materials in the case that the legislator had examined these reasons appropriately.

Thus, for example, both studies referred to above cover the period of time when various measures, intended to curb the spread of Covid-19, had been introduced, *inter alia*, distance learning. The Constitutional Court has already established that the quality of learning had deteriorated during the period of distant learning (*see Judgement by the Constitutional Court of 26 May 2022 in Case No. 2021-33-0103, Para 22.3.*). When the quality of education deteriorates, also the proficiency in the official language may decrease.

The level of proficiency in the official language that a pupil acquires depends also upon the teacher’s competency. At the court hearing, the representative of the Ministry of Education and Science pointed out that problems in the acquisition of the official language occur also because teachers have

insufficient proficiency in the official language. Dr. Ņikita Bezborodovs, lecturer at Riga Stradins University, Department of Psychiatry and Narcology, Head of the Paediatric Psychiatric Clinic, Head of Development at the Resource Centre for Teenagers, has noted that teachers' proficiency in the official language impacts the quality of education (*see Audio-recording of the court hearing of 13 June 2024 in Case No. 2023-15-01*).

The If sufficient proficiency in the official language is not reached due to the application of legal regulation then the aim of increasing the proficiency in the official language will not be reached through the adoption of new legal regulation, i.e., the contested provisions, whereas the quality of education previously provided by the educational institutions that implemented minority educational programmes will be jeopardised.

Therefore I hold that the contested provisions have not been sufficiently justified by explanatory studies.

3.2. The Constitutional Court has repeatedly recognised that the State is obliged to control constantly the quality of education, by using effectively the mechanism for controlling the quality of education, established in the state, to identify possible changes in the educational quality (*see, for example, Judgement by the Constitutional Court of 13 May 2005 in Case No. 2004-18-0106, Para 20.2.3., Judgement of 13 November 2019 in Case No. 2018-22-01, Para 22.1., and Judgement of 26 May 2022 in Case No. 2021-33-0103, Para 22.3.*). This finding has been expressed in cases pertaining to educational matters in general, as well as in cases reviewing the previous legal regulation on the use of the language of instruction within the system of formal education.

In a democratic state governed by the rule of law, constitutional bodies have the relationship of mutual respect and a situation where the Constitutional Court's judgements is not enforced or is enforced only formally would be inadmissible. The principle of good legislation demands the legislator to review the constitutionality of a restriction on fundamental rights, complying with the findings expressed in the Constitutional Court's judgements. In particular, the legislator has to take into account those judgements by the Constitutional Court in

which the respective matter had been examined already (*compare, see Judgement by the Constitutional Court of 28 June 2023 in Case No. 2021-45-01, Para 17.2.1.*). Thus, in adopting the contested provisions, the legislator had to take into consideration the findings from the Constitutional Court's case law regarding the State's obligation to control the quality of education constantly.

I do not contest the finding made in Para 36.2. of the Judgement that the State has established a system aimed at controlling and ensuring the quality of education. However, on the basis of information available in the case, it cannot be ascertained that the impact of the previous stage of reform upon the quality of education had been assessed.

At the court hearing, the representative of the Ministry of Education and Science pointed out that only the results of centralised examinations were available but specific research of the impact by the previous stage of reform on educational quality had not been conducted. Although the results of centralised examinations are available, more qualitative and systemic data analysis would be needed, in particular, with respect to the causals link between the language, in which a certain subject is taught and the result in the respective examination. It is noted in Para 36.1.1. of the Judgement that the outcomes of the previous stage of the reform to the language of instruction in education have not been analysed comprehensively because the quality of educational reform can be fully assessed only when educatees have completed the entire cycle of compulsory education. However, a situation where the impact of educational reform upon the quality of education is not assessed at all because new stages in this reform are initiated without waiting for the moment when it is possible to assess fully the quality of education ensured in the previous stage would be inadmissible. In my separate opinion in case No. 2018-22-01 "On Compliance of Section 1 (1) of the Law of 22 March 2018 in the Law "Amendments to Education Law" with Article 1, the Second Sentence of Article 91, the First Sentence of Article 112 and Article 114 of the Constitution of the Republic of Latvia", I already drew attention to the fact that the legislator had not properly analysed the impact of educational reform upon the quality of education.

Hence, the legislator, in adopting the contested provisions, has disregarded the Constitutional Court's findings regarding the State's obligation to control the quality of education constantly.

3.3. In view of the fact that the contested provisions have not been duly substantiated by explanatory studies and the findings included in the Constitutional Court's case law on the control over the quality of education have not been taken into consideration, it can be concluded that the principle of good legislation had been violated in the process of adopting the contested provisions.

It has been repeatedly recognised in the Constitutional Court's case law that not every violation of the parliamentary procedure is a sufficient cause for holding that the adopted act lacks legal effect. To recognise an act as invalid due to violations of parliamentary procedure, there should be valid doubt that, in the case where the procedure had been respected, the *Saeima* would not have made the same decision. I.e., a legal provision can be deemed to be unlawful only because of substantial procedural violations (*see, for example, Judgement by the Constitutional Court of 11 June 2020 in Case No. 2019-12-01, Para 31.3.*).

In adopting the contested provisions, the legislator had not examined whether the previous reform already had not ensured to persons belonging to ethnic minorities sufficient proficiency in the official language and, if it had not been ensured, what had been the reasons for it, likewise, it had not examined the impact left by the reform on educational quality. Hence, doubts arise whether, if the aforementioned violations had not been made and the principle of good legislation had been respected, the *Saeima* had made the same decision, i.e., had chosen the exactly the solution that is included in the contested provisions, for improving proficiency in the official language.

Hence, I hold that the restriction on fundamental rights, included in the contested provisions, has not been established by law, adopted in due procedure.

4. Even if the restriction on fundamental rights, included in the contested provisions, had been established by law, adopted in due procedure, I hold that it is

incompatible with the principle of proportionality because the legislator has not ensured balance between promoting the use of the official language and the right of educatees belonging to ethnic minorities to preservation and development of their language, as well as ethnic and cultural singularity in private educational institutions.

It has been noted repeatedly in the Judgement that the contested provisions facilitate the establishment of a united school, i.e., ensuring uniform education in the official language to eliminate segregation of educational institutions. I agree that, in private educational institutions that implement a minority educational programme, educatees must acquire sufficient proficiency in the official language. If the proportion of using the official and the minority language, defined in the previous stage in the reform to the language of instruction in education, did not ensure sufficient proficiency in the official language, the legislator could assess the need to change this proportion. However, I do not subscribe to applying the concept of "united school" to private institutions of minority education.

Article 13 of the Convention on Minorities envisages the right of persons belonging to ethnic minorities to establish and manage private institutions of education and training. It follows from this Article and the substance of the Convention on Minorities that persons belonging to ethnic minorities set up their educational institutions to preserve and develop the singularity of the minority language, culture and ethnicity. The Advisory Committee also has underscored that the minority language is essential in the educational process (*see The Fourth Opinion on Latvia by the Advisory Committee of 9 October 2023, Para 145. Available: coe.int*). Thus, the meaning of the right, included in Article 13 of the Convention on Minorities, is establishment of such educational institutions that differ from other educational institutions by ensuring preservation and development of the minority language, culture and ethnic singularity.

The purpose of including the private educational institutions, which previously had implemented minority educational programmes, into the united school, applying to them the same regulation as to the State and local government educational institutions and allowing the use of minority language only in interest-

related education is contrary to the substance of the right, included in Article 13 of the Convention on Minorities.

Namely, the contested provisions create a situation where the private educational institutions, established by persons belonging to ethnic minorities, substantially do no differ from the State and local government educational institutions. It is recognised in Para 36 and 37 of the Judgement that private educational institutions still have adequate possibilities for ensuring, in the educational process, curriculum that is related to the minority language, culture and ethnic singularity, i.e., in classes of interest-related education. However, in order to implement only and solely interest-related education, there is no need for persons belonging to ethnic minorities to establish such educational institutions, for this purpose, they could establish, for example, centres of interest-related education. If the minority language, culture and ethnic singularity can be preserved and developed only in the framework of interest-related educational programmes then it is meaningless for persons belonging to ethnic minorities to establish private educational institutions.

Hence, I consider that the legislator has not balanced the aim of promoting the use of the official language with the right of educatees belonging to ethnic minorities to preserve and develop their language, ethnic and cultural singularity in private educational institutions in a way not to deprive, substantially, persons belonging to ethnic minority of their right to establish and manage private educational institutions.

Thus, the contested provisions are incompatible with Article 114 of the Constitution, in conjunction with the first sentence of Article 112.

Judge of the Constitutional Court Artūrs Kučs