



JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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SEPARATE OPINION of the Constitutional Court's Judge

Jānis Nemainis

in Riga on 24 July 2024

in Case No. 2022-45-01

“On Compliance of Section 9 (1¹), 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”.

I do not uphold the findings made by the Constitutional Court that the provisions, contested in case No. 2022-45-01, would be compatible with the first sentence of Article 112 and Article 114 of the Constitution.

In my separate opinion, I shall use the abbreviations introduced in the judgement.

The right of persons belonging to ethnic minorities to preserve and develop their language, ethnic and cultural singularity has been established in Article 114 of the Constitution. The first part of Article 13 of the Framework Convention on the Protection of National Minorities of the Council of Europe (hereafter – the Convention) provides that, within the framework of educational system, the Parties commit to recognise that

persons belonging to national minorities have the right to establish and manage institutions of education and training.

The contested provisions set out that, in the private educational institutions, established by persons belonging to ethnic minorities, it is impossible to acquire general education in the language of ethnic minority. Namely, not a single subject can be taught in the minority language because the entire curriculum must be taught in the official language. The minority language can be used only in the framework of interest-related education or voluntarily established hobby groups, outside implementation of the mandatory curriculum.

Thus, to recognise the contested provisions as being compatible with Article 114 of the Constitution and the Convention, the Constitutional Court had to broaden the content of the term “education”, used in Article 112 of the Constitution, to the interest-related education. Otherwise, it had to be admitted that a person belonging to an ethnic minority, within the system of State educational system in private educational institutions, does not have the right at all to acquire the minority language or to acquire education, in any part of it, in the language of their minority.

I do not subscribe to the interpretation of Article 112 of the Constitution, provided by the Court.

Article 112 provides that everyone has the right to education. The concept of education is very broad; therefore it should be specified what kind of education a person has the right to, i.e., what kind of right to education the State is obliged to ensure. If interest-related education falls within the right to education or the State’s educational system, referred to in Article 112 of the Constitution, it gives rise to the State’s obligation to ensure to persons interest-related education (the State’s positive obligation), which, moreover, should comply with the extended range of other positive obligations with respect to the quality of such education. Application of Article 112 of the Constitution to other educational programmes outside general education – life-long education, informal education, actually, even self-study, gives rise to disproportional range of the State’s obligation to control whether all these programmes comply with the principles of educational opportunities, principles of accessibility, acceptability and adaptability, as well as other requirements following from this article of the Constitution. Likewise, in this case, the content of this constitutional article is explained by the content of an inferior legal act, i.e., Education Law.

I hold that the concept of “education”, used in Article 112 of the Constitution, and, accordingly, the State’s obligation to ensure “education”, comprises only the general education, as can be understood from the system of this article’s content. The State’s obligation to ensure the accessibility and appropriateness of this education, in other aspects of the offer and the control thereof being the expression of the State’s free will, which, of course, still has to meet the Constitution’s standards, *inter alia*, protection of the rights of a child and the equality principle.

In view of the above, I conclude that the contested provisions restrict the rights referred to in Article 114 and Article 112 of the Constitution, as well as Article 13 of the Convention in a way that makes it impossible for a person to even exercise it. It is meaningless to establish a private educational institution if one’s national language and culture cannot be mastered therein. Interest-related education or hobby groups were already allowed previously.

Moreover, it is exactly the persons belonging to the ethnic minorities of Russians or Belarussians who, actually, have been prohibited from exercising the right referred to in Article 114 of the Constitution and Article 13 of the Convention, whereas, for example, persons belonging to the Polish ethnic minority are allowed to exercise this right, on the basis of other provisions of Education Law, which link the provision of general education to intergovernmental agreements. Unfortunately, some ethnic minorities in Latvia have no impact whatsoever on whether their national state would enter into an agreement with the State of Latvia. For example, currently, the policy of russification is implemented in Belarus, whereas persons belong to the Belarussian minority, possibly, might wish to preserve and improve the proficiency in the Belarussian language (*mova*). However, the absence of an agreement with Belarus prohibits it. This example reflects vividly the absurdity of the situation of persons belonging to some ethnic minorities. Moreover, not all ethnic minorities, e.g., Roma, have such a state of “representation”. Hence, persons belonging to ethnic minorities are ungroundedly placed in a more disadvantaged situation due to the policy or even *de facto* non-existence of a state, the official language of which were the language chosen by these persons. It should be taken into consideration that, *inter alia*, that the approach that allowed in Polish educational institutions an original programme, which envisages that certain subjects, e.g., sports or culture, are replaced by the Polish language in the amount of even three or four classes per week, was recognised, at the court hearing, by the Ministry of Education and Science as both being compatible with the principles of

competency-based education and such that does not impact the acquisition of the official language. Thus, obviously, the aim of restriction on the fundamental rights of private educational institutions and their educatees could be reached by a less restrictive measure.

Every constitution is a political document, based upon, *inter alia*, the nation's historical experience. Article 14 of the Constitution was adopted after the restoration of Latvia's independence, with the awareness of the impact left by Latvia's occupation on the composition of population and the official language use. Likewise, the State accessed the Convention, being aware of the impact by these circumstances. Therefore, I do not hold that narrowing the understanding, in 2024, of this obligation of the State, by referring to well-known facts, is founded.

In addition to the above, the intensity Constitutional Court's review of the legislative process, which had been the basis for the adoption of the contested provisions, as well as the binding nature of its previous findings and the consequences of not complying therewith, etc. has varied.

For example, the Constitutional Court, quite conspicuously, departed from the findings made previously in cases No. 2018-22-01 and No. 2019-20-03 that, *within the framework of general education*, the possibility for the persons belonging to ethnic minorities to master their native language should be ensured. *Inter alia*, this approach is based upon the idea that, alongside the contested provisions, the possibility has been introduced for persons belonging to ethnic minorities to attend classes in interest-related education, complying with their interests, for which state financing has been committed. However, interest-related education as part of the educational process has long since existed, financed both from the State and local government funds. Also at the time when the Constitutional Court delivered its previous judgements, in addition to the classes reviewed, in which it was possible to teach the minority language in the framework of general education, classes in interest-related education were accessible to educatees belonging to ethnic minorities.

Likewise, also the standard of the so-called "good legislation" has been applied in a more lenient way because, prior to the adoption of the contested provisions, the previous reform to the language of instruction in education was not assessed in accordance with the Constitutional Court's case law.

Neither was the applicability to the case of the available studies of the educatees' insufficient proficiency in the official language to the examined. How could studies "Linguistic Situation in Latvia: 2016–2020" and "Attitude towards the Latvian

Language and the Process of Learning it” (2016–2020)” could be attributed to the education reform of 2018? Educatees who were impacted by the education reform only for a year, in the best case, were surveyed. The fact that, in the framework of the study “Linguistic Situation in Latvia: 2016–2020”, in 2018, 20 percent of the surveyed persons belonging to ethnic minorities in the age group from 18 to 34 years have admitted that they had mastered the Latvian language only at the basic level of proficiency or had very poor knowledge of it, does not mean that the reform of 2018 had to be adopted because the previous educational system had been inappropriate. However, these data that were collected while the education reform was ongoing do not say anything about the impact of the reform of 2018. Finally, in general, surveys should not be deemed to be comprehensive assessment of the educational reform. The questions in the survey regarding self-assessment, likewise, does not point to inappropriate quality of education since there might be different reasons for providing such answers to them. There always will be educatees who will not have the possibility to master other languages above the basic proficiency due to their health condition. Likewise, there is no need for persons belonging to ethnic minorities to have the same level of proficiency in the official language as the persons for whom it is their native language. Linguistic skills and cultural abilities is a person’s wealth, however, there are limits to it. It is self-evident that a person who knows several languages has a slightly narrower vocabulary in each of them, compared to a person who is proficient only in one language. By such requirements, the State downgrades the status and individuality of ethnic minorities.

The Constitutional Court does not provide its assessment as to why these studies should be taken into consideration and be applicable to justify a restriction on fundamental rights. The standard of verifying the truthfulness of the statement of facts was not met and, thus, of the actual need for the restriction. The Applicant’s arguments regarding the inapplicability of these studies to the contested provisions, both in terms of time and in directly assessing private educational institutions were, not examined. Likewise, it was not assessed whether the problems, identified in the studies, could be eliminated by measures that were less restrictive upon a person's rights, *inter alia*, by controlling teachers’ work.

With respect to children in the age from eighteen months to 5 years, there have not been any studies at all regarding the necessity and suitability of the contested provisions. And how can “combatting disinformation” may serve as the grounds for restricting the rights of children aged from eighteen months to 5 years?

Likewise, I am of the opinion that the Constitutional Court should have differentiated between the two stages in pre-school education due to their substantial differences. It follows from Section 21 of the law “On General Education” that access to an institution of pre-school education should be ensured to a child starting from the age of eighteen months. However, in accordance with Section 4 of Education Law and Section 20 (1) of the law “On General Education”, preparing a child for the acquisition of basic education or mastering of the pre-school educational programme is mandatory from the age of five. Section 20 (2) of the law “On General Education” provides that a child must master the pre-school educational programme until the age of seven. Thus, within the pre-school education in Latvia, learning is divided into two stages. The first stage is the pre-school education in the early childhood, i.e., from the age of eighteen months to five years. The second stage is the mandatory pre-school education for children from the age of five to seven years.

The Constitutional Court has previously reviewed both stages in the pre-school education. It has recognised that the State, in establishing such stage of pre-school education that is available to a child already from the age of eighteen months, at the same time has created for the child’s parents a support mechanism, allowing them to ensure to their child education and development. In this age, parents have the primary role. Thus, parents can choose the way in which a child’s education and development will be ensured – in a narrower circle, i.e., in the setting of a family and next of kin or entrusting this obligation, partially, to an institution of pre-school education, its teachers and staff (*compare, see, Judgement by the Constitutional Court of 19 June 2020 in Case No. 2019-20-03, Para 12.2.*). Whereas the second stage, i.e., pre-school education for a child from the age of five to seven years, is mandatory.

The first stage in pre-school education is aimed at childcare and ensuring development and improvement of age-appropriate social and emotional skills. Whereas during the second stage of pre-school education, i.e., in the age from five to seven years, learning becomes more intensive because, during this age, a child is being prepared in a targeted way for the acquisition of basic education (*compare, see Judgement by the Constitutional Court of 19 June 2020 in Case No. 2019-20-03, Para 14.2.*). I.e., during the first stage of pre-school education, the main emphasis is placed on ensuring a support mechanism for parents, as well as developing a child’s diverse skills, which, undeniably, may impact their future educational opportunities, whereas the purpose of the second stage in pre-school education is to ensure to a child the possibility to acquire education in the next stage – the stage of basic education.

In view of the fact that the first stage in pre-school education is mainly developed as the State’s support mechanism for parents, in choosing a child’s education and

development in this stage at a pre-school educational institution, entrusting to such educational institutions part of their obligations. In choosing a child's education and development at a pre-school education institution during the first stage of pre-school education, parents entrust this institution also with the responsibility for facilitating the acquisition of the minority language culture and ethnic belonging.

The mandatory nature of the second stage in pre-school education, substantially, means that acquisition of only State-recognised education or such that complies with this mandatory nature is admissible. This means that there can be special regulation on the acquisition of such education. In the Constitutional Court's judgement, the regulation on the first stage in pre-school education, in turn, is substantiated only by general references to the significance of this stage in preparing a child for pre-school education and by linking this stage to general education. I cannot uphold such approach because, pursuant to it, an eighteen-months old child is already being prepared for school. All aspects of personal growth, personal hygiene, the multifaceted development of the child are subject only to the starting of school (and work, resulting from it) as the overarching aim, turning the human being into a tool for the acquisition of capital, ignoring universal human values and, of course, the aspect of care in this stage. Here, the question posed by Seneca would be in place, i.e., do we study for school or for life. Likewise, this approach should be deemed legally incorrect. As the representative of the National Centre for Education also repeatedly underscored at the court hearing, the mandatory curriculum was not everything included in the Guidelines on Pre-school Education but the purpose or the norm that a child should know upon graduating from the pre-school educational institution. Thus, the acquisition of this knowledge does not take place for the whole period of attending the pre-school educational institution but also can take place only during the second stage.

If special regulation on the first stage of the pre-school education level cannot be substantiated by the applicability of the national standard in the same scope as for the mandatory education then such restrictions as, in particular, the contested provisions cannot be applied to its implementation in private educational institutions.

It must be pointed out that the European Court of Human Rights, in its judgement of 18 July 2024 in the case *Djeri and Others v. Latvia* (application No. [50942/20](#) and [2022/21](#)), has underscored the differences between the two stages in pre-school education, moreover, so substantial that the first of them is recognised as not falling within the right to education. It follows from the above that the State, even more so, had no grounds for establishing restrictions on the functioning of private educational institutions in this stage.

Even if regulating this stage were admissible, I believe that there were no adequate grounds for applying the contested provisions to it, in particular, in private educational institutions.

The study conducted by the Liepāja University assessed only the knowledge acquired at the end of the second, mandatory stage of pre-school education. Namely, it does not follow automatically that education of poor quality or insufficient proficiency in the official language of a particular child would be ensured to children belonging to ethnic minorities in the first stage of pre-school education and, therefore, transition to acquiring education only in the official language would be necessary. At the same time, it should be noted that the skills and competencies that should be mastered by the end of the first stage in pre-school education have not been specifically indicated because, in this stage, the main task is to ensure childcare and general development of the child. Hence, there are no criteria for conducting comprehensive assessment of whether, in exactly this stage, educatees have acquired *adequate* proficiency in the official language.

Likewise, during the first stage at the level of pre-school education, children with very different cognitive abilities acquire education. In view of this and also other differences, referred to above, between the two stages of pre-school education, there are no grounds to consider that the restriction on fundamental rights, established in the contested provisions should be applied to both of them in identical way to reach the legitimate aims. Namely, in view of the autonomy of private educational institutions, established by ethnic minorities, and the specificity of the first stage in pre-school education, no reasonable arguments can be found for applying the restriction on the first stage of pre-school education that begins when a child reaches the age of eighteen months.

Moreover, if the parents conclude that, during the first stage in pre-school education, the use of a child's native language that would meet their needs will be denied to the child at the pre-school educational institutions and choose to ensure the child's education otherwise, at the age of five, the child could be less ready for starting the mandatory stage of pre-school education because they would lack the experience of attending a pre-school educational institution and might have insufficient proficiency in the official language. Thus, society would not have gained particular benefit from applying the contested provisions to children of this age.

In view of the non-mandatory nature of the first stage in pre-school education and the absence of criteria that would allow conducting comprehensive assessment of whether the educatees in, specifically, this stage had acquired adequate proficiency in the official language, as well as the need for the proportion of native language use that

would meet the best interests of a child, no substantiation has been provided as to why all education, which is provided in this stage of education and also in private educational institutions, which is ensured in compliance with the State's guidelines of pre-school education, should be provided only in the official language.

I do not consent that the solution indicated by the Constitutional Court – interest-related education – would be a suitable solution for ensuring the rights of persons belonging to ethnic minorities, in particular, during the first stage of pre-school education. This follows not only from the finding that interest-related education does not fall within the right to education but also because, in adopting the contested provisions and provisions related to them, the *Saeima*, actually, has not analysed whether classes in interest-related education are organised at all and are suitable for children below the age of five. It follows from the statistics provided by the Ministry of Education and Science, which was submitted to the court during the court hearing, almost no classes in interest-related education are ensured to children below the age of three. Institutions of education also pointed out that, actually, they were ensuring interest-related education only to children aged three and older. Most probably, this can be explained by the fact that this is age when the transition from the child's object-manipulative activity, which focuses on exploring objects, space and form, to story-based role-play, through which a child explores the surrounding world, occurs. Hence, at this age, classes in interest-related education cannot ensure an educatee's right to safe and comfortable environment at the pre-school educational institution, as well as the acquisition of the minority language and culture. At the same time, following the approach, presented in the judgement, that classes in interest-related education could be provided at almost half of the time that an educatee spends at the educational institution, actually, this does not pertain to interest-related education in the classical understanding of the word but rather to the part of activities, when access to learning that is ensured to children is as individual as in the remaining process of learning and which is named interest-related education only to ensure the legality of this process. This gives rise to legal nihilism, which, moreover, would allow even more extensive use of the minority language than the previous reform.

It follows from the above that application of the contested provisions to the youngest children or restricting their rights in this scope, most definitely, was neither well-considered nor valid.

Likewise, I do not hold that also at other ages, in particular, at private educational institutions, interest-related education would ensure a person's right to mastering and developing the language, culture and ethnic singularity. Firstly, at the stage of basic education, interest-related education, undeniably, will create additional workload for

educatees, influencing both their health and welfare, as well as by making them choose between different possibilities. Educational institutions pointed out, *inter alia*, that pupils of some grades could not attend classes in interest-related education because they overlapped with the times for tutorials. The argument that interest-related education could be organised in the morning does not take into account the complex logistics of educatees coming to the educational institution, as well as the matter, long since proven and discussed also in Latvia, that early morning hours – even as early as the regular beginning of classes – actually could be harmful for educatees. Secondly, I am not of the opinion that 3 lessons per week, allocated for such interest-related education in minority language and culture, would, indeed, be science-based. The reference to the same number of lessons that previously had been allocated to one subject, which was only a part of the curriculum available in the minority language in basic education, substantially, indicates a random regularity. Transferring this number of lessons to pre-school education is even less substantiated, *inter alia*, due to the extended explanation, provided in the judgement, of the fundamental difference of this stage of education. However, even if a large amount of financing were available it, nevertheless, would not change the impact of the workload on educatees belonging to ethnic minorities.

Adolescents belonging to ethnic minorities should have the same access to opportunities for developing, in their leisure time, their artistic, athletic and other skills as the persons belonging to the title nation, without making them choose between their cultural and linguistic identity and hobbies.

The case also raised the issue of the Applicants' right to submit a constitutional complaint. The Constitutional Court should have explained the relevant aspect of law in depth; however, it was done with insufficient intensity.

In conclusion, I would like to ask a rhetoric question, what is the significance of Article 114 of the Constitution and Article 13 of the Convention? What rights does it grant? Those that a person already has on the basis of general discretion or a person's private autonomy? Is there any additional content that the State undertakes to guarantee to ethnic minorities? Do the persons belonging to ethnic minorities have the right to establish private educational establishments to master the official language and culture or to master their own language and culture?

Judge

J. Neimanis