



CONSTITUTIONAL COURT JUDGE

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Constitutional Court judge

Jānis Neimanis

DISSENTING OPINION

in Case No. 2022-41-01

“On Compliance of Section 4(2), Section 5(2) and (5) and Section 8(1) of the Law on the Prohibition of Exhibiting Items Glorifying the Soviet and Nazi Regimes and Their Dismantling in the Territory of the Republic of Latvia with Article 1 and Article 101 of the Constitution of the Republic of Latvia”.

On 7 December 2023, the Constitutional Court rendered a judgment in Case No 2022-41-01 and recognised the second paragraph of Section 4, the second and fifth paragraphs of Section 5 and the first paragraph of Section 8 of the law “On the Prohibition of Exhibiting Objects Glorifying the Soviet and Nazi Regimes and the Dismantling Thereof in the Territory of the Republic of Latvia” as being compatible with Article 1 and the first sentence of the second paragraph of Article 101 of the Constitution.

I cannot agree with several of the conclusions of this Judgment.

I will use the abbreviations used in the Judgment in the dissenting opinion.

1 The Constitutional Court concluded that the objects defined in the Law were not covered by the autonomous function of local governments – care for the culture, as these monuments were an instrument of Soviet propaganda and thus existed contrary to the principle of continuity of the State (*see paragraph 7.4 of the judgment*).

This conclusion is not acceptable to me, because it divides art and culture into two parts, depending on the message they convey.

In every monument, memorial and mural, the artist includes a message for society. They are created and installed with a specific purpose or meaning. Reminders of historical events or personalities are also not aimless, but have a political and ideological purpose. The installation of such reminders indicates what a particular political order considers worth remembering or celebrating. Democracies, authoritarian and totalitarian regimes alike have such memory and identity-building goals. A new ideology sweeps away elements of the old ideology, just as the young take over the old. However, this does not mean that the objects installed in the old days no longer belong to culture and that their management becomes illegitimate.

Monuments shall be sited in the local environment. They can be deployed either by a national decision reflecting the interests of society as a whole, or by the wishes of local residents. However, the object becomes "embedded" in the local environment, so it goes without saying that caring for these sites as part of local culture is part of the local or autonomous functions of any municipality.

The Court's conclusion on the division of the cultural function according to ideology is also systemically flawed because:

- 1) The law applies not only to public outdoor space, but also to the indoor space of a public entity, i.e. objects located inside buildings. In this part the Law does not affect the improvement function of the local government.

- 2) For the application of the Law, the local government must assess the message of the object, not the risks to health and life posed by the object or any other aspect of the improvement of the territory. In particular, the Law defines the types of cultural expression that are no longer permissible and sets out the obligations to dismantle objects that are part of this cultural framework.

- 3) The provisions of the Law itself state that the original parts or fragments of the object to be dismantled may have artistic value, architectural quality or cultural, historical or educational significance, and stipulate that in such a case the object must be documented using three-dimensional laser scanning prior to dismantling, and after dismantling the relevant parts must be included in the collection of the Museum of the Occupation of Latvia (*see Section 5(1) and Section 9 of the Law*).

Consequently, the contested norms also restricted the autonomous function of the local government – care for the culture.

2 In its judgment, the Court concluded that the principle of the continuity of the state implied an obligation on the part of local authorities to stop the negative and unlawful impact on the statehood of Latvia caused by objects glorifying the Soviet regime, i.e. to dismantle the objects meeting the criteria set out in the Law themselves a long time ago.

First, every general principle of law is a rule of law and, as a rule of law, a principle also has a specific content. The essence of the principle of continuity of the state is the non-recognition of the legitimacy of the occupation, i.e. that the Latvian state continued to exist during the occupation by Nazi Germany and the USSR. The legal consequence of the principle of the continuity of the state is that the legislator is obliged to restore the constitutive elements of the state, including the territory, the citizenry and the institutions of the state, as well as the symbols of the state. Similarly, the principle of state continuity results in the right to seek reparation for the harm caused by the occupying regime. However, the principle of state continuity does not imply a comprehensive obligation to effectively return the state to the way it was before the occupation by the Soviet and Nazi regimes, destroying all the layers created over time. It concerns only the substantive issues of statehood: the return of state power to the people of Latvia in accordance with their sovereign will and the recognition and, to the extent possible, restoration of the legal relations that existed in Latvia before the occupation.

The continuity of the state must be distinguished from the state's duty to reveal the historical truth, to explain the events of the occupation and to remedy the ideological consequences of the occupation. This is why we should distinguish between the demolition of monuments as a last resort and the preservation of monuments, with an accompanying explanation – they are all possible solutions, depending on society's overall view of how to deal with its historical, ideological heritage.

Second, the Court's conclusion is contrary to the legislative intent as reflected in the Law. The Saeima recognizes only the monument to "Monument to the Liberators of Soviet Latvia and Riga from the German Fascist Invaders" in Riga's Victory Park as to be demolished, but authorizes the Cabinet of Ministers and local governments to determine other objects to be demolished. The Court's conclusion that the local governments should have already demolished such objects is contrary to the requirements of legal certainty and

the authorization contained in the Law for the Cabinet of Ministers and local governments to specify which objects should really be demolished. It follows that local governments were not previously obliged to neglect these objects. As there was no pre-existing obligation to demolish the objects, the local governments' actions in preserving them, while perhaps not to everyone's political liking, were lawful. However, before the Law entered into force, the demolition of certain objects could be assessed as an action taken by a local government in the interests of its citizens within the scope of its autonomous functions.

Thirdly, it is clear from the annotation of the draft law that the objects to be dismantled were previously considered as historical evidence and their message has changed with the full-scale Russian invasion of Ukraine. According to the legislator, with these events, the objects became potential places of conflict of views for citizens.

However, already in 2016 it was pointed out that these monuments were (or could have been) used to demonstrate Russian political influence on the territory of Latvia, which became especially acute after the Russian aggression in Ukraine and related propaganda campaigns in the mass media, using arguments related to the “historical rights” of the Russian Empire (*Mintaurs M. Pieminekļi un atmiņa: padomju perioda kultūras mantojums Latvijā. Book: Atmiņu kopienas: atceres un aizmiršanas kultūra Latvijā. Rīga: Zelta Grauds, 2016, p. 124*). It is acknowledged that Russian state agencies regularly emphasise the unifying, supranational dimension of war memory and use this to justify contemporary Russian Federation policy (*Gabowitsch M. What Has Happened to Soviet War Memorials since 1989/91? Journal of Soviet and Post-Soviet Politics and Society, 2021, p. 204*). Such memory is essential for the construction of collective identities of groups in particular societies. In Latvia, too, certain groups have called for participation in the non-recognition of the fact of occupation and the rehabilitation of the USSR society and political regime (*Hanovs D. Kolektīvās atmiņas Eiropas kultūrtelpā: konflikti un iekļaujošais potenciāls. Book: Atmiņu kopienas: atceres un aizmiršanas kultūra Latvijā. Rīga: Zelta Grauds, 2016, p. 32*). It is also acknowledged that Latvia has a growing generation whose ethnic and cultural identities continue to reflect the mutual alienation of communities of public memory, which is reinforced, inter alia, by participation in the performative practices of memory on 16 March and 9 May (*ibid.*), for which the monuments erected during the Latvian occupation were essential.

The Law was thus a political decision of the state to deal with the consequences of the historical, ideological legacy, taking into account Latvia's history and its similarities

with the current occupation of part of Ukraine, as well as to address the current threats to the country.

To summarise, I agree that the state could have adopted a law regulating the dismantling of municipal outdoor and indoor objects, but the decision to dismantle is not based on the principle of state continuity, but on a certain political view of the state on how to deal with historical, ideological heritage. With the Law, the legislator simply established a normative reality, excluding certain interpretations of memory promoted by monuments, which were deemed unacceptable in the current geopolitical situation.

3 I disagree with the notion of "obligation" and the assessment based on it. In doing so, the court contradicts the legal system's procedure for determining the tasks of local authorities and for assessing the constitutionality of their imposition.

The contested norms establish a new administrative task for the Applicant and detail the procedure for its performance. That is to say, while the local government previously had absolute discretion over the appearance and future of a monument in its public space that had not been granted the status of a cultural monument of national importance, with the contested norms the legislator has not only transferred the decision to its competence, but has also laid down specific obligations to be performed by municipalities under specific conditions. As also pointed out by the invited person Bucerius Law School Chair of Public Law I – Public Law, Public International and European Law, Professor Dr. Jörn Axel Kämmerer , it is possible to speak of "superimposed abolition of the right of self-government", since the overall responsibility of local authorities for monuments remains; it is only superimposed and effectively excluded by the new task of "dismantling" to be carried out in certain territories"; the task of self-government is replaced by a national task, which in turn must be carried out by local authorities(*see pp. 7, 8 of the opinion*). Consequently, the Constitutional Court had to examine the legality of both the withdrawal of competence and the assignment of the task, which it did in part, but without using the legal terminology existing in administrative law. There is a contradiction in the judgment that the task is both an obligation and a procedure.

In the case under review, the Constitutional Court first had to assess whether (according to what criteria) the legislator could deprive local governments of the right to decide on monuments located in their territory. The State may intervene in the exercise of a local function only in the public interest, where it can be concluded that the proper

performance of the task could not otherwise be ensured. Assuming that local government councils have different political views on the understanding and impact of the historical, ideological heritage, the state could decide how to deal with this heritage in a coherent way. Further, the Constitutional Court should have assessed whether the removal of the decision on the future of the objects from the competence of local governments and their subsequent re-assignment in the form of a specific task would be effective and proportionate. The Court had to analyze whether the municipality was given adequate discretion to adapt the performance of the task to local conditions (*see Article 4(5) of the Charter*).

4 The Court narrowed and thus misapplied the requirements of the Charter in relation to the adoption process of the contested norms. The Court also departed from its pre-defined standard of good legislation.

Article 4(6) of the Charter specifically underlines the legislator's duty to consult in due time and in an appropriate way. The timing and form of consultation should be such that local authorities have a real opportunity to assess the impact of decisions (*see: Explanatory Memorandum of the Congress of Local and Regional Authorities "A contemporary commentary by the Congress on the Explanatory Report to the European Charter of Local Self-Government". Council of Europe, 12 February 2020, CG38(2020)11prov, point 80. Available at: rm.coe.int*). In addition, the commentary to Article 9 of the Charter states that, in accordance with the principle of proportionality, any new task entrusted or devolved to local authorities must be accompanied by adequate funding or a source of revenue to cover the additional costs. Accordingly, in order to protect the interests and autonomy of local authorities, it is recommended that any transfer of powers and tasks be based on a careful calculation of the actual costs of service provision to be borne by local authorities. The costs of mandatory and delegated tasks may include a number of factors (such as the socio-economic structure of the population) in order to make more accurate calculations and avoid arbitrary political decisions (*ibid.*, *para. 150*). In other words, before imposing the task on local authorities, the legislator should carefully assess the burden it will impose by bearing the full cost itself.

The Constitutional Court has also recognised that relations between the State and local governments should be established in the form of dialogue, observing the principle of good faith and mutual respect, in order to ensure efficient management of the State and use of resources (*see paragraph 18 of the Constitutional Court's judgment of 15 May 2020*

in Case No 2019-17-05). Democracy is based on mutual listening, diversity of opinion and the search for the best solution, while authoritarian solutions that do not take into account the interests of individuals only appear to produce uniform results, foster a sense of injustice and lack of respect; a divided country is more vulnerable to all kinds of threats.

When adopting the law, the Saeima had no idea in which local governments which objects to be dismantled were located, so the Cabinet of Ministers was authorized to identify the objects. As the legislator did not have a list of the objects to be dismantled in the local governments, the local governments involved in the task were not properly consulted at the time of the adoption of the Law. Similarly, no estimates of the costs of the task included in the contested norms were made, except for a one-page statement by the Ministry of Finance that there would be a share of state funding for the dismantling of the objects.

The legislator therefore did not know what financial burden its decision would entail. The chosen funding model created unforeseen financial obligations for municipalities in 2022, which were not precisely understood by the legislator itself. It is clear from the meetings of the responsible committee of the Saeima that this choice was made deliberately, arguing that "it will cost next to nothing" and that the budgets of local governments have grown in 2022. Such a justification, in my view, is not adequate.

The Court had to take account of such circumstances and accordingly balance them against both the requirements of the Charter and the standard of legislative quality specified by the Court.

5 I disagree with the Constitutional Court's assessment of the constitutionality of Section 8(1) of the Law.

5.1 Local government needs money to exist and to run. The principle of local self-government therefore inherently includes the autonomy of the local government to decide on the management of its own income and expenditure, i.e. financial self-responsibility (*see Burgi M. Kommunalrecht. Munich: Schmidt, 2019, S. 300.*). The principle of financial autonomy of local government is, inter alia, specified in Article 9(1) of the Charter, which provides that local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers. This independence is particularly important given that the financial resources of a local government are based on local taxes and levies, or the

financial resources of the local government's residents, which they have transferred to the local government for public administration and the provision of services.

The principle is further specified in the Article 9(2) of the Charter, which provides that any new task entrusted or devolved to local authorities must be accompanied by an adequate source of funding or revenue to cover the additional costs. The invited persons – Professor Dr. Jörn Axel Kämmerer and Professor Dr. Christoph Brüning – also acknowledged in their opinions that, according to the principle of financial linkage, the costs of a sovereign act are borne by the institution that initiated it. Dr. Christoph Brüning in particular has pointed out that the absence of state compensation for the statutory task of dismantling monuments is an unjustified interference with the guarantees of local self-government.

One of the explanatory positivisations of the principle of financial linkage, which is applicable to the relations between the state and local governments, is included in the Latvian legal system in the Local Government Law, which provides that the local government is provided with financing necessary for the performance of the task assigned to it. That is to say, an administrative task, the performance of which was not previously within the autonomous competences of the local government, the performance of which the local government is not entitled to fundamentally influence and for the performance of which it is not responsible, cannot adversely affect the budget of the local government. Otherwise, the State has interfered in the local government's budgeting, both procedurally and in substance (content), by reducing the financial resources available to it and, in effect, taking action it needs to take, but at the expense of the local government.

That is exactly what happened in this case.

5.2 The Saeima has justified this infringement on the basis of the unique nature of the task. However, even in cases where the task is unique or nationally important, the legislator must not ignore fundamental principles of local government law, from which legal norms do not provide for the right to deviate. If such deviations occur, the task of strengthening statehood actually has a negative impact on the rule of law and the principle of subsidiarity, as well as on mutual respect between the state and the local governments. That is to say, in such a situation, actions aimed at strengthening democracy actually undermine it.

The objects to be dismantled had been on the territory of the Republic of Latvia for more than thirty years after the restoration of the country's independence, and at the time

of the Law's promotion and adoption several months had passed since the beginning of Russia's full-scale invasion of Ukraine, and even several years since other manifestations of Russian aggression against Council of Europe countries. Moreover, the ideological significance of the monuments dedicated to the Soviet military and the Red Army soldiers and conquests in the Baltic States was already highlighted after the Estonian authorities moved the monument dedicated to the Soviet soldiers from the centre of Tallinn to the military cemetery in the spring of 2007, which was followed by organised and violent protests by the Russian community (*see Mintauris M. Cīņa ar ēnu. Par pieminēkļu derīgumu un kaitīgumu dzīvei. Latvijas Vēstures Institūta Žurnāls, 2022, Nr. 2 (117), p. 152*). Following the events in Tallinn, discussions and studies on public attitudes towards the "Soviet heritage" in both its tangible and intangible forms were also reportedly carried out in the Latvian academic community, but no national-level measures aimed at removing these heritage objects from the public space were taken (*ibid.*).

During this time, the legislator could have reminded local governments that these objects had to be demolished and opted for a different form of regulation, including not setting it as a demolition task to be carried out within a short time limit, but generally prohibiting the display of the propaganda symbols and messages in question in the public environment. This would regulate the exercise of the autonomous functions of the local government, without imposing a direct task and costs of this magnitude. This was not done. Nor did the legislator choose other ways to fight the Soviet legacy and the consequences of the occupation. A political decision was taken, guided by the conviction that with the destruction of the objects symbolising the trauma of the past (the Soviet occupation), there would be liberation from the trauma itself and its consequences (*ibid., p. 159*). Moreover, the legislator chose not to carry out this task itself.

If the legislator chose to adopt a regulation quickly and in the form of a specific task to be carried out, it should have been aware that in a democratic state governed by the rule of law, this task must be accompanied by financial resources, the impact of which on the state budget should have been assessed before the decision was taken.

Instead of a timely and targeted process of ensuring transitional justice and safeguarding democracy, the war-driven desire to radically and quickly desovietise and decolonise public space in the form of the contested norms interfered with the 2022 budgets already drawn up by local authorities (the budgetary rights of local authorities), obliging

them to find funds within a few months for a task they did not support or at least did not choose themselves.

5.3. The Constitutional Court noted that such a funding model was lawful, as the task was in the interest of all the inhabitants of the State, including the inhabitants of the local government. However, almost any obligation could be interpreted as being in the interests of the local government's inhabitants, at least at a minimum level. This argument would therefore allow the legislator to avoid full compliance with the financial linkage principle in every delegation.

The arguments of the Constitutional Court that the funds of the budget of the local government which are planned for the improvement of the territory of the local government may (and even must) be used for this purpose do not respect the decision-making competence of the local government, moreover, they are based on the assumption that the local government has such financial resources at all. As the performance of a task delegated by the State is binding on the local government, the local government must find the necessary funding for its performance from other revenues of its budget. In turn, this prevents the local government from using these local government budget funds for other administrative tasks and functions planned in the municipal budget, affecting the sustainability of the local government.

Finally, the Court points to the possibility provided by the Law to collect and use donations from natural and legal persons for the dismantling of objects. It should be noted here that donations as a source of finance have always been part of local government budgets and are not a new source of finance. Moreover, it is unacceptable to shift the burden of a state task onto the citizens, while also shaming the local governments for the laziness of their citizens in financing such a task. As Dr. Christoph Brüning acknowledged, from the point of view of those local governments that have decided not to support the dismantling of the sites for whatever reason, the obligation to cover the dismantling costs is just as much a sanction; to continue with this idea, if the inhabitants of a local government have chosen not to donate to the dismantling for ideological or socio-financial reasons, the local government must bear this sanction to an even greater extent.

From this follows my belief that Section 8(1) of the Law violates the principle of the financial linkage and, consequently, the principle of self-government. Therefore, the first paragraph of Section 8 of the Law is incompatible with Article 1 of the Constitution in conjunction with the first sentence of the second paragraph of Article 101 of the

Constitution. In order to prevent a situation in which a local government had unjustifiably financed a state task, the Constitutional Court had to declare the first paragraph of Section 8 of the Law null and void as from the moment of its adoption.

Judge*

J. Neimanis

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