



# JUSTICE OF THE CONSTITUTIONAL COURT

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**By Justice of the Constitutional Court  
Jānis Neimanis**

## **SEPARATE OPINION**

**Riga, 22 February 2023**

**in Case No. 2020-33-01**

**"On Compliance of the Third Sentence of Section 5, Paragraph One, Section 56, Paragraph Three and Paragraph 49 of Transitional Provisions of the Law on Higher Education Institutions with Article 1 and Article 105 of the Constitution of the Republic of Latvia".**

I do not agree with the arguments described in Clause 27 of the Conclusion Part of the Constitutional Court's Judgement that the legal provisions governing the language in which study programmes are to be implemented at higher education institutions and colleges in the future infringe the fundamental right of private higher education institutions to own property.

Contrary to the majority view of the Court, I think that the contested provisions lead to a restriction of the freedom of action of institutions of higher education and colleges: their freedom of action and decision-making is limited by the requirements for stricter use of the official language. Therefore, by the contested provisions, the legislator restricted the freedom of private institutions of higher education and colleges, which has been determined in Article 106 of the Constitution, and not the property rights of these subjects. This does not change the end result, but I thought it was important to comment on this separately, because freedom of occupation as a fundamental right has long been undeservedly ignored.

The problem is that the European Convention on Human Rights and Fundamental Freedoms does not regulate freedom of occupation. Therefore, both the applicants and, unfortunately, the Constitutional Court are guided by the application and replace the fundamental right to freedom of occupation with the fundamental right to own property, especially where the person's occupation takes place in some connection with a licence issued by the state. It is then found that the scope of the right to own property includes the right of a person to carry out commercial activity on the basis of a licence. And if there is some kind of licence, then the Constitutional Court establishes a restriction of Article 105 of the Constitution. The second problem is that there is no serious debate in the legal science in Latvia regarding either the content of fundamental rights or court rulings.

So freedom of occupation as a fundamental right goes largely unnoticed. In the present case, the applicants also challenged the legal provisions in relation to the right to own property, not the right to freedom of occupation. However, this is not a reason why the Constitutional Court could not itself objectively establish the correct fundamental right in the unified system of the Constitution and verify compliance of the contested provisions with those fundamental rights which are truly restricted by these provisions. The Court itself knows the law, and the procedure of the Constitutional Court is of an objective nature, in which compliance of the contested provision with the entire legal order established by the Constitution is to be ascertained.

I do not agree to content of Clause 27.2 of the Constitutional Court's Judgement that the right to freedom of establishment enshrined in Article 49 of the Treaty on the Functioning of the European Union, as well as the freedom to conduct a business, included in Article 16 of the Charter of Fundamental Rights of the European Union correspond to Article 105 of the Constitution. These fundamental rights recognised by the European Union (e.g., Articles 15 and 16 of the Charter) correspond to Article 106 of the Constitution. Article 17 of the Charter of Fundamental Rights of the European Union corresponds to Article 105 of the Constitution.

Who is the subject of freedom of occupation as a fundamental right? According to the wording of Article 106 of the Constitution – everyone, or every person. The comments on the Constitution indicate that the subject of the fundamental right to freedom of occupation is a natural person (*see I. Bite. 106. Everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. Forced labour is prohibited. Involvement in disaster relief and its aftermath and employment under a court order are not considered forced labour. Book: Comments on the Constitution of the Republic of Latvia. Chapter VIII. Fundamental human rights.*

*Prepared by a group of authors under the scientific leadership of Prof. R. Balodis. Riga: Latvijas Vēstnesis, 2011, pp. 480, Clause 2).* However, this cannot be accepted, because the Constitution does not attribute the freedom of occupation solely to the natural characteristics of a human being; the freedom of occupation may also be exercised collectively - by associations of persons, hence also by legal entities governed by private law.

What does freedom of occupation protect? Article 106 of the Constitution protects both the freedom to choose an occupation and the freedom to pursue that occupation, because - what would be the benefit from the freedom to choose an occupation have if the freedom to pursue it was not protected? Furthermore, the pursuance of an occupation every time confirms the choice of that occupation. Whereas, the way in which the pursuance of an occupation is regulated, and the specific criteria for performing an occupation, influence a person's choice of occupation. Thus, Article 106 of the Constitution protects both the freedom to choose an occupation and the freedom to pursue that occupation - occupation in all of its aspects, up to its completion. It also protects a person's freedom not to choose a particular occupation. The concept of "occupation" has a broad content: it is a long-term purposeful activity in order to secure and maintain the basis of one's existence, of one's life; within the context of the freedom of occupation, it does not matter whether the occupation is performed independently or under someone's management, in the private sphere or in the public administration (*see also Clauses 15, 15.1 of the Constitutional Court's Judgement of 21 April 2022 in Case No. 2021-27-01*).

The execution of programmes of private institutions of higher education and colleges is also an occupation, the language of its execution is a part of the freedom of choice and freedom of execution of these right-holders. Language of the occupation - execution of the programmes of private institutions of higher education and colleges - is part of the means of the occupation of these institutions of higher education and colleges, also in a sense the means of content, since it is the function of language - to be a means of communication, a means of exchange of ideas and information, also a means of thinking and naming.

Requirement regarding the use of language only marginally affects the property of private institutions of higher education and colleges. For example, it was argued at the hearing that the requirements regarding the use of language would allegedly affect the right-holders' library usage habits and spending on supplements/replacements of library collection. I can understand the applicants being squeezed into the scope of the property right in a sense, trying to find some reduction, limitation of their property, because non-

acquisition of the future income from student fees or the profit interest in the content of the property right is rejected. But the change in library collection is only a secondary side feature of the conceptual change in the content of occupation.

I disagree with the content of Clause 27.2 of the Constitutional Court's Judgement that the fact that the language of the occupation is listed in the licence is an indication that the right to own property has been infringed.

The fact that the language of the occupation is listed in the licence of private institutions of higher education and colleges is not decisive. The infringement of freedom of occupation or property rights did not have to be made dependent on it. It was necessary to look at the substance of the restriction on this fundamental right. The way in which an activity should be implemented, in what language, has only a subordinate effect on ownership positions; it can be negative, neutral or even actually profitable in the end. The fact that private institutions of higher education and colleges have to subordinate their activities to different requirements is already a direct indication that the previous occupation of these right-holders is being affected, that the occupation has to be brought into line with new requirements. Any changes in occupation require some resources, some expenditure, but this should not immediately be understood as a restriction on property rights, but as a restriction on the freedom of the occupation previously pursued.

Justice\*

J. Neimanis

*\*The document has been signed with a secure electronic signature and contains a time stamp.*