LATVIJAS REPUBLIKAS SATVERSMES TIESAS TIESNESIS

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SEPARATE OPINION

of Justice

of the Constitutional Court of the Republic of Latvia

Artūrs Kučs

in Riga on 12 November 2020

in Case No. 2019-29-01

"On compliance of the programmes 03.00.00 "Higher Education", 02.03.00 "Higher Medical Education", 20.00.00 "Cultural Education" and sub-programme 22.02.00 "Higher Education" of the Law "On the State Budget for 2019", insofar these do not envisage annual increase of the State-allocated financing for studies in State-founded institutions of higher education in the amount no less than 0.25 per cent of the gross domestic product, as provided for in Section 78 (7) of the Law on Higher Education Institutions, with Article 1 and Article 66 of the *Satversme* of the Republic of Latvia"

1. On 29 October, the Constitutional Court (hereafter – the Court) delivered the judgement in case No. 2019-29-01 "On compliance of the programmes 03.00.00 "Higher Education", 02.03.00 "Higher Medical Education", 20.00.00 "Cultural Education" and sub-programme 22.02.00 "Higher Education" of the Law "On the State Budget for 2019", insofar these do not envisage annual increase of the State-allocated financing for studies in State-founded institutions of higher education in the amount no less than 0.25 per cent of the gross domestic product, as provided for in Section 78 (7) of the Law on Higher Education Institutions, with Article 1 and Article 66 of the *Satversme* of the Republic of Latvia" (hereafter – the Judgement).

The case was initiated on the basis of an application submitted by thirty-one Members of the 13th convocation of the *Saeima*.

At the court hearing, the *Saeima* argued that the Court could not decide on the budget expenditure and also on whether and to what extent the education sector could be regarded as being the State's priority.

However, the Court may rule on the process of adopting the budget law, to ensure harmony of the legal system and eliminate internally contradictory norms. The process should comply with the *Satversme* and principles that follow from the basic norm (*compare, see Judgement of 3 February 2012 by the Constitutional Court in Case No. 2011-11-0 , Para 11.2.*).

At the court hearing, the representative of the Ministry of Justice validly noted that the legislator's choice in adopting the budget was determined by political considerations and considerations of expedience. However, the process of adopting the budget should be legally correct. The principle of good legislation should be abided by in the process of legislation, legal stability and society's trust in the State and law should be facilitated.

Therefore, I uphold the conclusion expressed in Para 16 of the Judgement: "Although the State budget law is a pronouncedly "political" decision; however, in a democratic state governed by the rule of law, in drafting, adopting, implementing the State budget law and then in controlling its implementation law must be complied with", as well as the Court's decision to dismiss the *Saeima's* request to terminate legal proceedings.

However, I do not uphold the methodology, chosen by the Court, for broadening the limits of the claim, the finding regarding the compliance of the programmes 03.00.00 "Higher Education", 02.03.00 "Higher Medical Education", 20.00.00 "Cultural Education" and sub-programme 22.02.00 "Higher Education" of the Law "On the State Budget for 2019" (hereafter jointly also – the contested regulation) with Article 1 of the *Satversme*, as well as the opinion regarding the Cabinet's and the *Saeima's* role in adopting the annual State budget. Likewise, I do not subscribe to the Court's findings that norms that pertain to budget expenditure cannot be included in several laws.

2. It is found in Para 17 of the Judgement: "It is impossible to examine the Applicant's arguments regarding violations in the procedure, in which the contested regulation was adopted, without examining also that requirements and validity of

Section 78 (7) of the Law on Higher Education Institutions." The Court has noted that it can review the compatibility of the sub-programme of the State budget with the *Satversme's* provisions only in conjunction with a particular legal norm, which imposes an obligation upon the State and, at the same time, grants to a person the right to demand the performance of this obligation. Allegedly, this is the only way in which the Court can establish whether the legislator and other institutions of State power have acted in compliance with norms of the *Satversme*.

I cannot uphold the Court's finding that it cannot review the compliance of the contested regulation with the norms of the *Satversme* without interconnection with another legal norm, which imposes an obligation upon the State and grants rights to a person. Such finding by the Court is understandable in case No. 2009-42-0103, which was initiated on the basis of constitutional complaints by two persons. In the respective case, the applicants contested the compliance with the *Satversme* of both a sub-programme of the State budget and of the norm, which imposed an obligation upon the State and, at the same time, granted to a person the right to demand performance of this obligation, i.e., contested norms, which, in their conjunction, set out the procedure for disbursing a payment that these persons were entitled to.

There are two reasons why an identical Court's finding cannot be made in the present case.

Firstly, it is contradictory to the finding made in Para 16 of the Judgment that law should be complied with in preparing and adopting the state budget law. The contested regulation also comprises legal norms namely abstract general unbinding precepts regarding conduct. Hence, if valid doubts have been expressed that these legal norms have been adopted by violating, for example, the Rules of Procedure of the *Saeima* and the principle of good legislation, the Court has the obligation to review these norms. Moreover, the Court recognized in Para 16 of the Judgment that it had full competence to verify whether the *Satversme* had been complied with in preparing and adopting the law "On the State Budget for 2019".

Secondly, Section 78 (7) of the Law on Higher Education Institutions, contrary to the Court's finding in Case No. 2009-42-0103, quoted in the Judgement, does not create concrete rights for an individual. Namely, a person could not submit a constitutional complaint to the Court in connection with this norm. The compatibility of Section 78 (7)

of the Law on Higher Education Institutions with the *Satversme* could be reviewed only within the framework of abstract control to defend public interests.

Therefore, it was possible to review the contested regulation separately and it should have been done separately. Such review is not performed in the Judgement.

3. In Para 22 of its Judgement, the Court found that the regulation contested in the present case complied with Article 1 of the *Satversme*. I cannot uphold this finding because, therefore, the Court recognises that the principle of good legislation has not been violated. However, the Court has not performed the review that would allow arriving at this conclusion.

The applicant turned to the Court, arguing that the contested regulation had been adopted without aligning it with the legal norm already existing in the legal system, i.e., Section 78 (7) of the Law on Higher Education Institutions. Thus, the principle of good legislation had not been complied with. Also, the *Saeima* in its written reply provided an answer to this argument advanced by the Application. I agree that this is the central argument in the present case. The Court could have decided on broadening the limits of the claim only after the compliance of the contested regulation with the principle of good legislation had been examined.

3.1. It has been recognized in the Court's judicature that in a democratic state governed by the rule of law certain requirements regarding the process of legislation follow from the principle of the rule-of-law state. There are several requirements of the kind; however, in this opinion, I will assess only those which, to my mind, were of decisive importance in the present case.

The Court has recognized that the branches of power of a democratic state governed by the rule of law, *inter alia*, the legislator should strive at constantly increasing persons' trust in the State and law, as well as an understanding of the democratic process. Abiding by the principle of good legislation facilitates reaching of this aim (*see Judgement of 6 March 2019 by the Constitutional Court in Case No.2018-11-01, Para 18.1.*). In other words, the process of legislation not only should comply with the formal requirements set out in the regulatory in enactments but should also promote persons' trust in the State and law (*see Judgement of 12 April 2018 by the*

Constitutional Court in Case No. 2017-17-01, Para 21.3.).

The general principles of law, procedural prerequisites and requirements regulated in the *Satversme* and the Rules of Procedure of the *Saeima* must be complied with in the legislative process. This applies also to the course of adopting those draft laws that are linked to the State budget. The legislator must review the compliance of the legal norms included in the draft law with the legal norms of higher legal norms, *inter alia*, the *Satversme*, provisions of international and European Union law, and must align the legal norms envisaged by the draft law with the legal norms already existing in the legal system in accordance with the principle of a rational legislator (*see Judgement of 6 March 2019 by the Constitutional Court in Case No. 2018-11-01, Para 18.1.*).

3.2. Section 78 (7) of the Law on Higher Education Institutions (in the wording that was in force at the time when the Judgement was delivered) provided that the Cabinet, in submitting the annual draft law on the State budget to the *Saeima*, had to provide therein an annual increase of financing for studies in State founded higher education institutions of not less than 0.25 per cent of the gross domestic product until the State-allocated financing for studies in State founded higher education institutions reached at least two per cent of the gross domestic product.

Annex 4 to the law "On the State Budget for 2019" envisaged granting financing from the State budget resources: for programme 03.00.00 "Higher Education" – EUR 68 149 161, programme 02.03.00 "Higher Medical Education" – EUR 18 235 584, programme 20.00.00 "Cultural education" – EUR 52 661 419, but sub-programme 22.02.00 "Higher Education" – in the amount of EUR 9 818 610. It is established in the Judgement that the increase in the State financing envisaged for State founded institutions of higher education in the law "On the State Budget for 2019" was EUR 2.1 million, approximately 0.007 per cent of the gross domestic product.

In Para 19 of the Judgement the Court found: "[..] the Cabinet has prepared and the *Saeima* has adopted the contested regulation, in which the requirement set in Section 78 (7) of the Law on Higher Education Institutions regarding the increase in a certain amount of the State budget financing was not complied with." Moreover, such action had been repeated for successive years. In hearing the case, the Court found that the Cabinet, already since 2014, in drawing up the annual State budget law had not complied with the objective defined in Section 78 (7) of the Law on Higher Education

Institutions and the *Saeima*, in adopting the annual State budget, had not complied with a law it had issued itself. At the court hearing, the representatives of both the Ministry of Finance and the Ministry of Education and Science noted that also in drawing up the draft law "On the State Budget for 2021", Section 78 (7) of the Law on Higher Education Institutions still would not be entirely complied with because the State's economic possibilities, which are limited, prevent from implementing it.

Thus, for several years, the legislator has not abided by and does not even have the intention to abide by a legal norm that it has adopted itself – Section 78 (7) of the Law on Higher Education Institutions.

Likewise, the legislator has not taken into account the priorities set in the planning documents for several years. It is recognised in the Sustainable Development Strategy of Latvia until 2030, approved by the *Saeima*, that quality, accessibility and content of education on all levels of education and in all age groups – from pre-school to adult education – is the development opportunity for Latvia and prerequisite for increasing the value of human capital (*see The Sustainable Development Strategy of Latvia until 2030, p. 29*). It is noted in the Guidelines on the Development of Education for 2014–2020 that the current public financing of higher education in Latvia does not ensure full financing for one study place, accessibility of higher education to socially more vulnerable groups of inhabitants and is not sufficient to finance innovative measures and projects aimed at the development of higher education. To ensure accessible, qualitative higher education, foster the compliance of the offer with the labour market's requirements, reinforce the connection with science and research and make effective use of the State budget resources, *inter alia*, the development and implementation of a new model for financing higher education should be continued (*see The Guidelines on the Development of Education for 2014-2020, Para 9 of Section I).*

Thus, the legislator has recognised higher education as being a priority and an aim for national development both by policy planning documents and Section 78 (7) of the Law on Higher Education Institutions. These priorities have been taken into account neither in developing the contested regulation nor in the State budget laws of previous years. Thus, the legislator has not taken actions needed to gradually reach the aim it had set itself.

3.3. The *Satversme* imposes upon the Cabinet, as a collegial institution, the greatest responsibility for the legality of the draft budget law, submitted to the *Saeima*, and its compliance with valid laws, whereas the *Saeima* has been granted control over the way laws, adopted by the *Saeima*, are complied with (*see Judgement of 3 February 20212 by the Constitutional Court in Case No. 2011-11-01, Para 15.1. and Para 15.4.*).

In the present case, the Cabinet had not fulfilled the obligation established for it to anticipate that with the approval of the law "On the State Budget for 2019" a contradiction would arise between a valid legal norm, i.e., Section 78 (7) of the Law on Higher Education Institutions, and the respective draft State budget law. The Cabinet had the obligation to prepare (with the involvement of line Ministries) amendments to regulatory amendments to eliminate contradictions from the legal system.

Since the *Saeima* has been given the function of control, in adopting the law "On the State Budget for 2019", it had to take into account that the Cabinet had not aligned the said draft law with Section 78 (7) of the Law on Higher Education Institutions.

The *Saeima*, however, acted quite to the contrary, i.e., in deciding on the proposal made by several deputies of the opposition to ensure financing in accordance with Section 78 (7) of the Law on Higher Education Institutions, it dismissed it. When the draft law "On the State Budget for 2019" was discussed in the second reading, Member of the *Saeima* Jūlija Stepaņenko noted: "This proposal envisages determining that, pursuant to Section 78 (7) of the Law on Higher Education Institutions, additional financing is ensured for the annual increase in the financing of studies at State founded higher education institutions in the amount of EUR 20.8 million. Please, dear colleagues, let us be consistent and support that what is determined in law". Member of the *Saeima* Vjačeslavs Dombrovskis pointed out: "This law is a violation of Section 78 of the Law," and invited the deputies representing the majority to express their opinion. However, it was dismissed without more extensive discussion.

The fact that the proposals made by the deputies from the opposition were dismissed, moreover, without adequately discussing them, leads to the conclusion that the *Saeima* did not act as would be fit for a rational legislator. This action also shows that the *Saeima* was aware that with respect to the financing of higher education institutions a contradiction would arise between a valid legal norm and legal norm that

would be adopted, i.e., the law "On the State Budget for 2019". Pursuant to the principle of a rational legislator, the *Saeima* had to prevent a situation like this. The principle of good legislation does not comprise requirements regarding the exact action that the *Saeima* had to take in this case – whether the draft budget law had to be amended or revoked or Section 78 (7) of the Law on Higher Education Institutions had to be amended or revoked. However, the provisions of Section 111 (2) of the Rules of Procedure of the *Saeima* should be taken into account: "If, upon passing a draft law, contradictions arise between this law and the laws already in force, the *Saeima* shall rule that the new law or its separate parts take effect simultaneously with the amendments to the laws already in force." This norm does not impose an obligation upon the *Saeima* to act in one particular way but indicates how *Saeima* should act if it had adopted a norm which causes a contradiction with another norm, adopted previously.

3.4. An opinion was expressed at the court hearing that Section 78 (7) of the Law on Higher Education Institutions already initially had been adopted as "a promissory norm". The existence of such norms within the legal system promotes legal nihilism. The statements made by the Rectors' Council and the Higher Education Council at the court hearing proved that the existence of Section 78 (7) of the Law on Higher Education Institutions and the fact that the State consistently did not fulfil the obligation established in this norm had created the conviction that the *Saeima* for several years had not complied with the laws it had adopted itself. The concept of "a promissory norm" does not exist within the Latvian legal system. The *Saeima's* action, in adopting a legal norm as "a promissory norm", without intending to fulfil the obligations defined therein undermines society's trust in the legal system and in the *Saeima* itself as a constitutional institution and, thus, endangers the foundations of Latvia as a democratic and parliamentary state.

In view of the above, I am of the opinion that the violation of the principle of good legislation is revealed in the following aspects. First, in the process of adopting the annual State budget, for a long period of time a situation was allowed where the norms of the budget were not aligned with the norms already in force and the aims set in policy planning documents. Secondly, the legislator had no intention to resolve and eliminate this situation. Thirdly, the creation of the so-called promissory norms is contrary to the aim of the principle of good legislation to reinforce society's trust in the State and law.

Hence, in the process of adopting the contested regulation, the *Saeima* and the Cabinet committed several violations, which were substantive in their interconnection. Thus, the *Saeima's* and the Cabinet acted contrary to the principle of good legislation.

4. I cannot uphold the conclusion made in the Judgement regarding the role of the Cabinet and the *Saeima* in adopting the annual State budget.

4.1. It is concluded in Para 21.3. of the Judgement that "[..] the obligation, defined in the law, to allocate a certain amount of financing in a way that prohibits the Cabinet from taking into account the forecasts of social-economic development, as well as from balancing the planned expenditure between all sectors, binds the Cabinet in the process of drawing up the budget. Substantially, such normal prohibits the Cabinet from preparing the draft State budget by considering the existing economic situation as well as the financial resources that are actually available to the State (*compare, see Judgement of 14 January 2002 by the Constitutional Court of the Republic of Lithuania in Case No. 25/01*). The more requirements demanding a particular amount of budget financing are included in laws, the more the Cabinet's competence to decide freely on the priorities in financing the State's objectives, as well as the possibilities of the executive power to perform the State's tasks are restricted."

Without a broader explanation, this finding of the Court creates the basis for such interpretation that the *Saeima* may not reserve any budgetary resources, *inter alia*, beyond one fiscal year, and, thus, it substantially restricts the Saeima's discretion in developing long-term fiscal policy. In the circumstances of the present case, ensuring of increase in the financing for a particular sector by linking it to the gross domestic product was examined in the case; however, the Judgements lacks references as to whether any other situations should be assessed as such that prohibit the Cabinet from preparing a draft State budget law by taking into account the existing socio-economic situation. The lack of such a reference might create the impression that that, in the present case, the Court had ruled contrary to its own findings made in several cases related to the right to social security (case No. 2019-24-03 (guaranteed minimum income), No. 2019-25-03 (recognising a person as being needy), and No. 2019-27-03 (amount of the state social

security benefit). The Judgement should not be interpreted to mean that, thus, it questions the legislator's obligation to decide on matters important for the State.

4.2. In its Judgement, the Court has made a reference to the judgement of 14 January 2002 by the Constitutional Court of the Republic of Lithuania in Case No. 25/0. I agree that the conclusion set out in Para 21.3. of the Judgement can be derived from it: "[..] the more requirements demanding particular amount of budget financing are included in laws, the more the Cabinet's competence to decide freely on the priorities in financing the State's objectives, as well as the possibilities of the executive power to perform the State's tasks are restricted." However, this conclusion only partly reflects the findings made by the Lithuanian Constitutional Court.

The Lithuanian Constitutional Court concluded that, as an exception, the *Seimas* could envisage certain State budget expenditure. The Lithuanian Constitutional Court underscored that, in such cases, only such State budget expenditure could be envisaged that were necessary to reach a particular aim of general importance defined in a particular law within a certain period, if such needs cannot be provided for within one budgetary year. I.e., such norms are admissible with respect to long-term solutions (*see Judgement of 14 January 2002 by the Constitutional Court of the Republic of Lithuania in Case No. 25/01, Para 7.3.*).

This approach, in assessing the government's and the legislator's authorisation in preparing and adopting the State budget, was confirmed by the Lithuanian Constitutional Court in its recent judgement. I.e., on 3 November 2020, the Lithuanian Constitutional Court delivered the judgement in case No. 8/2019 and indicated therein that the *Seimas* could not establish such legal regulation that would restrict or deny the government's authorisation of the draft State budget, set in the Constitution (*see Judgement of 3 November 2020 by the Lithuanian Constitutional Court in Case No. 8/2019, Para 65.1. and Para 67.1.*). The following finding is also included in this judgement: since Lithuania is a parliamentary republic and the principle that the government is responsible before the *Saeimas* has been enshrined in its Constitution, the government, as the institution enforcing laws, must not only abide by the priorities and guidelines defined by it but also must implement the policy priorities in various areas of life, defined by the *Seimas* (*see Judgement of 3 November 2020 by the Lithuanian Constitutional Court in Case No. 8/2019, Para 65.2. and Para 67.2.1.2.*). Thus, the Lithuanian Constitutional

Court recognised, similarly as in its judgement of 14 January 2020, that laws which envisage certain budgetary expenditure are admissible as an exception.

Thus, the reference made in the Judgement only partially reflects the conclusions made by the Lithuanian Constitutional Court in cases, in which the role of the executive power and the legislator in the procedure of adopting the budget was examined.

4.3. The Court has recognised that the adoption of the State budget law is an important function of the *Saeima*, which it fulfils as an institution, who is directly responsible before the people of Latvia. Compared to other constitutional institutions involved in the elaboration and adoption of the State budget, the *Saeima* is the one with the most important constitutional legal role in performing this task (*see Judgement of 3 February 2012 by the Constitutional Court in Case No. 2011-11-01, Para 10*).

Thus, the *Saeima* is an institution of state power, legitimised directly by the people of Latvia. The finding made in Para 22 of the Judgement that *Saeima* may not "earmark" in the long-term part of the budget expenditure and use as an indicator for increasing financing from the State budget, decreases the importance of the *Saeima* as a constitutional body in a parliamentary republic. It is not clear from the Judgement why the *Saeima* could be denied the possibility to make conceptual decisions on long-term solutions for issues that are of general importance for the society and the State, in particular, if the *Saeima* envisages the resources required to implement the respective regulation. I agree that in the present case the *Saeima* had not allocated resources and had not taken into account the norm that imposed upon it the obligation to allocate certain financing for higher education. In the circumstances of the present case, it could have been sufficient grounds for recognising that the *Saeima* had exercised its rights contrary to the provisions of the *Satversme.* However, viewing in isolation from the present case, I do not see the grounds for interpreting the Judgement to mean that the *Saeima* would be denied in general the possibility to decide on the development of long-term fiscal policy and the priorities in financing the State's tasks, which the Cabinet should comply with in drafting the budget.

The Court has recognised that, pursuant to provisions of the *Satversme*, the *Saeima* not only has the right but also an obligation to draft and adopt regulation that decides on important matters in the life of the State and society. Likewise, the *Satversme* grants to the *Saeima* the right to decide on issues pertaining to the State budget (*see*

Judgement of 21 December 2009 by the Constitutional Court in Case No. 2009-43-01, Para 35.3.).

This finding underscored the role of the *Saeima* in a democratic state governed by the rule of law. However, this does not exclude the need to abide by the principle of separation of powers. Absolutizing the role of one or another branch of the state power in the process of preparing and adopting the budget is inadmissible. The procedure for exercising the right to budget, defined in Article 66 of the *Satversme*, aims to achieve a rational balance between the competence of the legislator and the executive power in preparing and adopting the budget, thus, retaining full competence both for the Cabinet and the *Saeima*.

I am of the opinion that the Judgement restricts, without grounds, the *Saeima's* possibility to decide on long-term solutions of matters that are of general importance for society and the State, allocating appropriate resources for them.

5. Finally, I do not uphold the statement made in Para 22 of the Judgement: "If the *Saeima*, by other laws, allocates actually and in the long-term the budget expenditure in advance, then the necessity for united state budget law in general disappears. A State budget, fragmented like this, becomes untransparent and its management is hindered. However, the first sentence of Article 66 of the *Satversme* requires the Cabinet to draw up annually a united and transparent State budget law and the *Saeima* - to decide on it annually".

Para 20-22 of the law "On Budget and Financial Management" defines the procedure, in which the draft State budget law and the package of budget draft laws are to be prepared and the annual State budget law is adopted.

Section I of the law "On Budget and Financial Management" – "Terms Used in this Law" – explains what a package of draft budget laws is. I.e., a package of draft laws consists of the draft annual State budget law or draft amendments to the annual State budget law, and draft laws determining or amending the State budget

Section 87^1 of the Rules of Procedure of the *Saeima* provides that a package of draft budget laws contains the annual State budget law and draft laws related to the enforcement of it, amendments or additions to it, which ensure not only the implementation of the State budget but also mid-term national fiscal stability.

Therefore the Court's findings, referred to above, that certain budgetary expenditure cannot be envisaged in other laws, in addition to the budget law, is incomprehensible. In preparing the annual State budget, all regulatory enactments related to it must be identified and decisions must be taken regarding amendments to them or adoption of new legal acts. It is done in preparing the package of draft budget laws. Thus, the process of adopting the budget is inevitably linked to several changes in regulatory enactments or the creation of new norms. This, however, does not exclude the Cabinet's obligation to submit a united and transparent annual State budget law, summarising and reflecting the provisions made in other regulatory enactments.

Justice of the Constitutional Court Artūrs Kučs