THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

DISSENTING OPINION

of the Justice of the Constitutional Court

Artūrs Kučs

Riga, 27 November 2019

Case No. 2018-22-01

"On the Compliance of Section 1(1) of the Law of 22 March 2018 "Amendments to the Education Law" with Article 1, the Second Sentence of Article 91, the First Sentence of Article 112 and Article 114 of the *Satversme* of the Republic of Latvia".

1. On 13 November 2019, the Constitutional Court passed a judgment in the case No. 2018-22-01 "On the Compliance of Section 1(1) of the Law of 22 March 2018 "Amendments to the Education Law" with Article 1, the second sentence of Article 91, the First Sentence of Article 112 and Article 114 of the *Satversme* of the Republic of Latvia" (hereinafter — the Judgment) and recognized Section 9 (1^1) of the Education Law as being compatible with Article 1, the second sentence of Article 91, the first sentence of Article 112 and Article 114 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*).

The case was initiated at the request of twenty members of the *Saeima*, as well as constitutional complaints filed by the following persons: Davids Džibuti, Dana Džibuti, Timurs Jareško, Mila Šteina, Edvards Šmits Aleksandrs Fominovs, Vladislavs Kuļikovs, Vlada Elīza Ševšeļova, Jeļizaveta Kotova, Anna Lisa Čmihova, Agnija Busila, Marija Busila, Mihails Zaslavskis, Aleksandrs Zaslavskis.

2. I agree that the contested provision restricts the fundamental rights established in the first sentence of Article 112 of the *Satversme* in conjunction with Article 114 of the *Satversme*. The Judgment also rightly refers to the criteria to be examined in order

to determine whether the restriction of the fundamental rights established in the contested norm is justifiable.

I also agree with Para 14.4 of the Judgement which states that the legal framework introduced by the reform of the education system restricts the use of ethnic minority languages in the teaching process but provides for the possibility of teaching and studying ethnic minority language and literature, as well as educational content on a secondary education level related to ethnic minority identity in private educational institutions. The said argument, including on the general education process, I acknowledge as being substantiated within the Para 22.2 of the Judgment that reads "[..] the contested norm and the legal framework relating thereto must be interpreted as meaning that both the specialized course on "Ethnic minority language and literature" and other specialized courses on minority identity and culture not covered by the National General Secondary Education Standard, shall be studied using the ethnic minority language as the language of instruction."

I do not agree with the conclusion expressed in the Judgment that the contested provision has been issued in compliance with the principle of proper legislative process. Consequently, I do not agree that the restriction of the fundamental rights included in the contested provision has been established by law and complies with the first sentence of Article 112 of the *Satversme* in conjunction with Article 114 of the *Satversme*. Nor can I agree that the contested provision shall be regarded as compliant with the second sentence of Article 91 of the *Satversme*.

My opinion is based on the following arguments. For sake of clarity, I shall operate with the abbreviations used in the Judgment.

3. I agree with Para 15.3 of the Judgment where it has been stated that the State shall regulate the languages of instruction used in the process of general education in such a way so as to ensure an appropriate balance between the studying of the official language and the protection of ethnic minorities in accordance with the protection of the rights of ethnic minorities.

Although the State has wide discretion in determining this balance, I cannot concur with the conclusion in Para 17 of the Judgment that the restriction of the

fundamental rights contained in the contested provision is statutory, because I consider that its adoption does not respect the principle of proper legislative process.

3.1. The *Satversme* imposes certain procedural requirements on every decision that is relevant to the State and society that ensure decision-making according to the principles of a democratic and rule of law-based state *(see: Para 11.2 of the judgment of 3 February 2012 of the Constitutional Court in the case No. 2011-11-01).* In a democratic state governed by the rule of law, the process of adopting a legislative act that restricts the fundamental rights of a person should give the public confidence that the act adopted is legal. The society must be assured that in the course of adopting of the contested norm the necessity to restrict fundamental rights established in the *Satversme* has been carefully weighed (*see, for example, Para 17.2 of the judgment of 26 November 2009 of the Constitutional Court in the case No. 200908-01*). Namely, the legislative process must comply with the formal requirements established by regulatory enactments, as well as promote trust of the members of the society towards the State and their rights (*see, for example, Para 21.3 of the judgment of 12 April 2018 of the Constitutional Court in the case No. 2017-17-01*).

The fundamental principals of a democratic state operating under the rule of law include certain requirements regarding the legislative process (*see, for example, Para 11.2 of the judgment of 3 February 2012 of the Constitutional Court in the case No. 2011-11-01*). According to the aforementioned, the legislator must examine the compliance of the draft legal norm with higher-ranking law, including the Constitution, legal norms at the international level and that of the European Union (hereinafter — EU), and harmonize the legal norms provided by the draft law and the existing legal provisions of the legal system in accordance with the principle of a rational legislator *(see Para 18.1 of the judgment of 12 April 2018 of the Constitutional Court in the case No. 201811-01*). The Constitutional Court has concluded that the legislator, when adopting a legal norm, must evaluate arguments regarding the possible incompatibility of this norm with the Constitutional Court's case-law on the relevant issue (*see Para 22.3 of the judgment of 6 March 2019 of the Constitutional Court in the case No. 2017-17-01*).

The Constitutional Court already analysed in 2005, in its judgment No. 2004-18-0106, whether the set proportion of language usage at the level of secondary education determined by the legislator is to be considered as compliant with the *Satversme*. Thus, it can be concluded that a case law of the Constitutional Court exists, which the legislator had to evaluate and take into account.

Para 20.2.3 of the judgment of the Constitutional Court in the case No. 2004-18-0106 states that there must be objective, comprehensive, professional, regular, scientifically substantiated mechanisms for evaluation of the alterations of quality of education and the educational process. The state has a duty to ensure that such data is available and should be the basis for sound decision-making; the state also has the duty to inform the public, students and their parents regarding fluctuations in the quality of education and the overall process of the educational process. The Court expressed concern about the effectiveness of the control mechanisms of education quality in place at that time, stating that it seems to be designed more towards obtaining quantitative rather than qualitative data. The Court noted that the absence or ineffectiveness of such a mechanism could lead to any change in the education system failing to achieve its purpose and rendering the educational process meaningless. The Judgment also indicates that the findings of the Constitutional Court in the case No. 2004-18-0106 are referable to to the question of the quality of education received by students, i.e. the guarantees against a decline in its quality.

Likewise, the Constitutional Court has recognized that the envisaged legal regulation, if necessary, must be duly substantiated with an explanatory research. It is the process of discussion of the proposals that provides the opportunity to assess whether there are alternatives to the envisaged legal framework (*see Para 25.2 of the judgment of 19 October 2017 of the Constitutional Court in the case No. 2016-14-01*).

Thus, when adopting the contested provision, the legislator had to observe the Constitutional Court's case-law regarding the necessity to establish and use an effective mechanism for assessing the consequences of alterations introduced in the education system.

From the information available in this case, it does not follow that in the

process of adopting the contested provision the legislator based its considerations nor on qualitative analysis of the impact of the education reform implemented thus far, nor on the potential impact of the contested norms on the quality of education. The Constitutional Court also bases its judgment on a presumption that at the moment there is no reason to conclude that the contested provision as well as other legal norms related thereto would cause a decrease in the quality of education. Although some studies have compared exam results reported by students in Latvian-language educational establishments and students in ethnic minorities educational establishments, there is a lack of qualitative and systematic analysis of the data obtained, not least the causal relationship between the language of instruction, and the impact of the examination and the impact of altering the language of instruction on the quality of education.

The Judgment indicates that the State has established a mechanism for monitoring and controlling the quality of education — the State Education Quality Service (hereinafter – the Service). Its functions include collecting, compiling and analysing information for education policy development and implementation, as well as assessing the quality of education. However, it is not possible to conclude from the materials available in this case that the Service has comprehensively analysed the impact of legal norms implementing the transition to education in official language. It is possible to agree with the conclusion of the Judgment that the availability of various courses and methodological materials to the education staff can be evaluated positively, however, providing such an approach cannot be considered as an alternative to effective control of education quality.

It should also be kept in mind that in the legal relationship affecting the child and in all actions relating to the child, his or her rights and best interests shall prevail. The legislator shall ensure that the adopted regulatory enactments protect the legitimate interests of the child in the most effective way possible (*see: Para 16.2 of the judgment of 16 May 2019 of the Constitutional Court in the case No. 2018-21-01*). Article 112 of the *Satversme* establishes the rights of persons, including children, to education, which essentially means the entitlement of every student qualitative education (*see Para 15 of the judgment of 2 May 2007 of the Constitutional Court in*

the case No. 2006-30-03).

In order to ensure that the reform of the language of instruction does not adversely affect the best interests of children belonging to ethnic minorities and their right to education, the legislature had to carefully consider the potential impact of the education reform so far on the quality of education. A comprehensive analysis of the impact of the transition to education on the quality of education would not only protect the best interests of children of ethnic minorities, but would also contribute to the goals of the education reform, highlighting the reasons why almost thirty years after the restoration of the independence of the Republic of Latvia certain graduates of ethnic minority schools have difficulty in using the official language, including when studying in state-established universities.

3.2. During the legislative process, the legislator must assess the compliance of the legal norms envisaged in the draft law with all the legal provisions of higher-ranking legal norms, including international legal provisions (*see: Para 18.1 of the judgment of 12 April 2018 of the Constitutional Court in the case No. 2018-11-01*).

As it has been noted also in this Judgment, the aim of the constitutional legislator should be to achieve harmony of human rights norms included in the *Satversme* with international human rights provisions (*see, for example, Para 16 of the judgment of 19 December 2017 of the Constitutional Court in the case No. 2017-02-03*). In case of doubts regarding the content of human rights norms included in the *Satversme*, they shall be interpreted as much as possible in accordance with the interpretation used in the practice of applying international human rights norms (*see Para 5 of the Conclusion of the Judgment of 30 August 2000 of the Constitutional Court in the case No. 2000-03-01*). Thus, when adopting the contested provision, the legislator had to take into account its compliance with international legal provisions.

Latvia has ratified the Framework Convention for the Protection of National Minorities. The Advisory Committee has emphasized the need for a regular monitoring of the quality of education during the reform process in the context of educational reforms, in particular those aimed at increasing usage of the official language in ethnic minority schools (*see the Advisory Committee's third thematic comment in the Framework Convention for the Protection of National Minorities — the linguistic*

rights for persons belonging to national minorities — Para 80. Available at: www.rm.coe.int/).

When adopting the contested provision, the legislator was obliged to consider and analyse the Advisory Committee's instructions regarding the assessment of the language of instruction and quality standards. The preparatory materials related to the contested norm do not confirm that such considerations were made.

4. Nor can I agree with the conclusion in Para 21 of the Judgment that no alternative means exist to achieve the legitimate aim for the restriction of fundamental rights in this case that would ensure the same level of quality of the deliverables.

Unlike in case No. 2018-12-01, the case under examination essentially relates to a negative obligation on the part of the state, namely the obligation to allow ethnic minorities to establish and organize their own private institutions of education. I agree with the conclusion of the Judgment that the state, when issuing a document certifying education obtained in private institutions of education, is obliged to ensure a proper acquisition of the official language and the quality of education received therein.

International studies have found that in private schools exam scores tend to be higher than in public schools. Such a trend can also be observed in Latvia (*see: Krasnopjorovs O. Why Is Education Performance So Different Across Latvian Schools? Eurosystem Study of the Bank of Latvia No. 3/2017. Available at: www.bank.lv*). Therefore, taking into account the conclusions of international studies regarding the quality of education in private institutions of education, their autonomy and the obligation of the state to refrain from disproportionate interference in the activities of private institutions of education, the legislator had to assess whether granting broader discretion to private institutions of education would help to achieve the legislative goals included in the contested provision.

The preparatory materials of the contested provision do not confirm that within the particular context of private institutions of education and the quality of education provided therein justified the necessity to apply the same requirements to private institutions of education regarding the language of instruction as state and municipal institutions of education.

5. I do not agree with certain conclusions included in the Judgment regarding

the contested provision's compliance with Article 91 of the *Satversme*. First of all, I consider that the contested provision envisages different treatment of groups in comparable circumstances — students receiving education in an institution of education that provides an ethnic minority education programme in a language other than the official language of the EU, and students receiving education by studying a language of one of the EU Member State at an advanced level. Secondly, the contested provision envisages equal treatment of all ethnic minorities irrespective of the threat to their language and linguistic self-sufficiency.

5.1. I do not agree with the conclusion expressed in Para 23.2 of the Judgment that students that are acquiring education while simultaneously studying any of the languages of an EU Member State in-depth are not comparable to students who have opted for the State prepared curriculum in institutions of education implementing ethnic minority education programmes in other languages.

The Judgment refers to the judgment in the case No. 2018-12-01 and states that unlike in ethnic minority education programmes the possibility of obtaining education in one of the official languages of the EU under Para 2^1 of Part 2, Section 9 of the Education Law is provided with the aim to promote in-depth kowledge of a foreign language, and not with the aim to foster knowledge of the culture and identity of the relevant EU Member State. I cannot agree with this conclusion for several reasons.

I cannot agree that private institutions of education, which can provide education in one of the official languages of the EU, have only one purpose - to promote in-depth knowledge of a foreign language. Educational establishments providing education in the ethnic minority languages of Latvia that are at the same time an official EU languages (e.g., Polish or Lithuanian), have the same objective as institutions of education providing education for persons belonging to ethnic minorities in languages other than the official EU languages.

Looking at the goals and visions set by several private institutions of education providing education in one of the languages of the EU Member States, it can also be concluded that many of these institutions are founded specifically for the development and promotion of the culture of various countries. For example, the private school *International School of Riga* positions itself as an educational institution offering

international education in English with a Western pedagogical philosophy. Latvian language learning is not compulsory at this educational establishment (*see International School of Riga Self-*A*ssessment Report 2019-2020. Available at: www.isriga.lv)* . The private school, *Jules Verne Riga French school* has signed a partnership agreement with the Agency for French Education Abroad (AEFE) and ensures that its curriculum complies with the French education system. In this educational institution, studies do not take place on both Latvian and French official holidays (*see the Internal Regulations of the Jules Verne Riga French school. Available at: www.ecolejulesverne.lv/*). The *Exupery International School* - a private pre-school and secondary institution of education where studies take place in English and French also states that it aims at creating an international environment by integrating many languages into the curriculum and by welcoming students from different cultural and academic backgrounds (*see: Education at the International School in Exeter. Available at: www.exupery.lv*). Enrolling in these private institutions of education is often connected with the fact that most of the students plan to continue studies in institutions of higher education in a particular foreign country or abroad in general.

The situation is similar in state and municipal institutions of education. For example, the Riga Lithuanian Secondary School believes that its mission is to offer an opportunity to obtain competitive education strengthening every person's sense of nationality, developing interest in the Lithuanian language, Lithuanian history and culture (*see the Self-assessment Report 2019 of the Riga Lithuanian Secondary School. Available at: www.rlvs.lv*). Ita Kozakevich Polish Secondary School points out that it is helping all people of Polish heritage living in Riga and its surrounding area to integrate in an effort of restoring and developing their lost identity and culture, and to integrate into the Latvian environment (*see: About Ita Kozakevich Polish Secondary School. Available at: www.ikpvs.edu.lv*). The Riga Estonian School has recognised that its main task is to teach the Estonian language and to provide the option to get acquainted with Estonian culture, literature, music, history and traditions (*see: About Riga Estonian School. Available at: www.rivsk.lv*).

As can be inferred from the examples above, it would not be correct to assume

that all private institutions of education that provide education in one of the official languages of the EU aim only to provide intensified study process of a foreign language. In institutions of education where the language of instruction is one of the official EU languages students can also acquire knowledge about the cultures and traditions of their respective peoples, reinforcing their sense of belonging to a particular country, or becoming more acquainted with an international environment. Institutions of education providing education in ethnic minority languages also provide opportunities for the relevant ethnic minorities to maintain their identity in the educational process.

As a result, students in private institutions of education which are proficient in one of the languages of the EU Member States are in a comparable situation to students who have chosen to study the content of public education in private institutions of education where the programmes are carried out in a language other than that of a EU Member State. Therefore, the Constitutional Court had to analyse whether the different attitude towards these comparable groups had an objective and reasonable basis.

5.2. The contested provision envisages equal treatment, namely, identical use of the official language and the language of the ethnic minority in the process of obtaining basic and general education in respect of all ethnic minorities whose native language is not an official language of the EU, irrespective of the risk and linguistic self-sufficiency of that particular language. However, all the ethnic minorities to which the contested provision applies are not in the same conditions in Latvia. The Judgment points to the statement of the invited party Ms I. Druviete that the linguistic self-sufficiency of Russian speakers hinders the development of Latvian language skills among persons belonging to ethnic minorities. However, there are different ethnic minorities in Latvia, and this conclusion cannot be applied to those minorities whose possibilities to use their native language in the public environment are very limited.

According to the Central Statistical Bureau of Latvia, 25.2% of the total population of Latvia are Russians, 3.2% — Belarusians, 2.2% — Ukrainians, 2.1% — Poles, 1.2% — Lithuanians and 3.9% — other nationalities *(see: National Composition of Latvian Population. Central Statistical Bureau, 2018. Available at:*

www.csb.gov.lv). Examination of the said data leads to the conclusion that the number of persons belonging to different ethnic minorities differs significantly in Latvia. The representative of the *Saeima* at the hearing in the case No. 2018-12-01 noted that persons belonging to the Russian national minority in Latvia have had much greater opportunities to develop their language and culture than other minorities, as Russian is widely available in the public sphere. Thus, the opportunities of different minorities to use their native language in their everyday lives are different and it should not be considered that all ethnic minorities in Latvia are linguistically self-sufficient.

Thus, different ethnic minorities are in different situations, but the contested norm envisages the equal treatment of all of them. The proportion of the official language and the ethnic minority language in the education process is the same for all ethnic minorities whose native language is not one of the official languages of the EU, irrespective of the opportunity to practice the use of that language in everyday life.

In assessing whether there is a reasonable and objective basis for such a treatment, the legislator should have taken into account the Advisory Committee's guidance that states should not be ignorant towards ethnic minorities whose representation is numerically low and the acquisition of those languages must not suffer in the contest between the official language and statistically more represented ethnic minorities when creating their education policy (*see Third Opinion of the Advisory Committee on Bulgaria, No. ACFC/OP/III(2014)001,Para 131 and 132, and the Second Opinion on Latvia, No. ACFC/OP/II(2013)001, Para 113*). Moreover, particular attention should be turned towards the educational and linguistic opportunities and rights of the ethnic minorities whose representation is numerically low or such ethnic minorities that do not have their own related country or who have suffered from previous repression, (*see Third Opinion of the Advisory Committee on Lithuania, No. ACFC/ OP/III(2013)005, Para 89 and Fourth Opinion on Croatia, No. ACFC/OP/IV(2015)005rev, Para 78*). Moreover, according to the doctrine language policy should be nuanced and customized according to the numerical representation, localisation and other characteristics of each ethnic minority (*see: Busch B. Commentary of Article 14 of the Framework Convention for the Protection of National Minorities. In: Hofmann R., Malloy T. H., Rein D. (Eds.) The Framework Convention*

for the Protection of National Minorities: A Commentary. Leiden: Brill Nijhoff, 2018, p. 264).

The fact expressed in Para 22.2 of the Judgment that the Russification policy pursued by the occupation authorities also affected the educational system is indisputable. However, it must be taken into account that the Russification policies also affected ethnic minorities whose native language is not Russian by denying children and young people belonging to these ethnic minorities access to education in the minority language and even their native language. The representative of the *Saeima* at the court hearing in the case No. 2018-12-01 noted that the Russification policy suppressed the national identity of all other nationalities. Thus, when significantly restricting the use of the ethnic minority language in the educational process, the legislator had to assess whether the contested regulation could apply equally to all ethnic minorities whose native language is not one of the official languages of the EU, irrespective of the threat to their identity, and thus to their language.

Thus, Part 1^1 of Section 9 of the Education Law is to be declared non-compliant with the second sentence of SArticle 91, first sentence of Article 112 and Article 114 of the *Satversme*.

Artūrs Kučs