



JUDGE OF THE CONSTITUTIONAL COURT

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SEPARATE OPINION of Justice of the Constitutional Court

Gunārs Kusiņš

in Riga, on 8 December 2017

in Case No. 2017-07-01

“On compliance of Para 1 of Section 50 of the Education Law, insofar it denies a person, who has been punished for a serious or a particularly serious crime, the right to work as a teacher, with Article 106 of the *Satversme* of the Republic of Latvia”

1. On 24 November 2017, the Constitutional Court passed the judgement in case No. 2017-07-01 “On compliance of Para 1 of Section 50 of the Education Law, insofar it denies a person, who has been punished for a serious or a particularly serious crime, the right to work as a teacher, with Article 106 of the *Satversme* of the Republic of Latvia” (hereinafter – the Judgement), by which it recognised the contested norm as being incompatible with Article 106 of the *Satversme*.

I uphold the statements made in the Judgement that the contested norm restricts a person’s rights established in the first sentence of Article 106 of the *Satversme*, that this restriction has been established by law and it has several legitimate aims: protecting other persons’ rights, protecting public morals and welfare.

However, I cannot uphold the findings made in the Judgement that served as the grounds for recognising the restriction included in the contested norm as being incompatible with the principle of proportionality.

In substantiating my view, I shall use abbreviations used in the Judgement.

2. It is noted in the Judgement that the prohibition included in the contested norm should be considered as being absolute (*see Para 12.3. of the Judgement*). Absolute prohibition to work in certain professions for persons, who have been punished for committing certain criminal offences, are envisaged also in several other regulatory enactments. From the findings included in the Judgement, in general, it follows that the legislator has the right to establish such prohibitions (*see also Para 16.1. of the Judgement*). The existence of an absolute prohibition *per se* does not immediately mean incompatibility with the *Satversme*.

In the present case, the Constitutional Court in addition to the criteria from “the test of a restriction on fundamental rights” used previously points to several other criteria that must be verified in assessing the constitutionality of an absolute prohibition (*see Para 19 of the Judgement*). I.e. a special methodology for examining, in particular, the constitutionality of an absolute prohibition is established by referring to findings of the European Court of Human Rights. I agree that a methodology is needed for an objective and comprehensive examination of the constitutionality of an absolute prohibition. However, a higher standard of substantiation and assessment in the legislative procedure is set by the new methodology referred to above. Therefore the requirements set for the legislator by this standard should be not only clear and precise but also well-considered and should take into account the specific features typical of the legislative process.

The requirements to evaluate the nature of an absolute prohibition and the consequences of application thereof are set for the legislator in the Judgement (*see Para 19.2. of the Judgement*). Moreover, it clearly follows from several findings included in the Judgement that such evaluation should be very detailed. Thus, the Judgement refers to the fact that the Special Part of the Criminal Law includes 200 sections that envisage liability for serious and particularly serious crimes, the total number of dispositions in the sections applicable to the aforementioned crimes is said to be 322. In view of the above, the Constitutional Court finds that the legislator has had to assess, which interests are jeopardised by the aforementioned crimes and

provide substantiation why a prohibition to work as a teacher should be established for persons punished for any of them (*see Para 19.2.1. of the Judgement*).

It has been recognised in the Constitutional Court's rulings that the legislator must establish the most significant rules, applicable for a longer period of time, rather than describe minutely the elements of each legal qualification. Laws should not become too rigid and casuistic because then they no longer will be fair (*see, for example, Judgement of 16 December 2008 by the Constitutional Court in Case No. 2008-09-0106, Para 7.2.*). It is impossible to regulate all probable situations by a legal norm, it must be ensured a sufficient degree of abstraction (generality). In my opinion, because of this the legislator, also in substantiating an absolute prohibition, has the right to group or typify in a certain way situations, to which this prohibition could apply, rather than examine absolutely all probabilities and examine the elements of crime in all criminal offences.

Hence, I believe that the requirements that are set for the legislator with respect to examination of an absolute prohibition, cannot be excessive. Otherwise, these requirements become infeasible.

3. The Constitutional Court has recognised that it has to verify whether, in the particular case, more lenient measures exist for reaching the legitimate aim of the restriction on fundamental rights. Upon establishing that there is even one measure that is less restrictive on fundamental rights, there are grounds to recognise that the contested norm is incompatible with the principle of proportionality (*see, for example, Judgement of 23 April 2009 by the Constitutional Court in Case No. 2008-42-01, Para 17.2.*). However, a more lenient measure is not just any other measure but such that allows reaching the legitimate aim in at least the same quality (*see, for example, Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 14*).

It is recognised in the Judgement that there are more lenient measures with respect to the restriction on fundamental rights, which, in view of the interests jeopardised by the criminal offence, would restrict a person's fundamental rights established in Article 106 of the *Satversme* to a lesser extent (*see Para 19.4. of the Judgement*). I.e., a possibility to assess, whether a person, who has been convicted for

committing an intentional serious or particularly serious crime, may work as a teacher, would allow reaching the legitimate aims of the restriction on fundamental rights in the same quality as at present (*see Para 19.3.2. of the Judgement*).

It has been repeatedly noted in the Constitutional Court's rulings that a measure that is less restrictive on a person's rights but at the same time requires incommensurate investment from the state, *inter alia*, additional financial resources, cannot be considered as such that allows reaching the legitimate aim of the restriction in the same quality (*see, for example, Judgement of 6 October 2010 by the Constitutional Court in Case No. 2009-113-0106, Para 19.2.*).

Individual assessment of all persons, who have been convicted of serious or particularly serious crimes, would significantly increase the workload of the Quality Service. Inevitably, to ensure assessment like this, employees would be needed to conduct the assessment, additional time and financial resources also would be required. Moreover, in view of the fact that a decision by the Quality Service can be contested at the Ministry of Education and Science, whereas the Ministry's decision can be appealed against at the administrative court, the workload of these institutions will increase. If, in the Constitutional Court's opinion, the aforementioned measure is more lenient and can reach the defined legitimate aims in the same quality, the Court had to indicate why the finding, expressed in its case law thus far, regarding measures that require additional investment from the state is not applicable in the present case. This has not been included in the Judgement.

Therefore I consider that the measure that has been recognised in the Judgement as being more lenient will not allow reaching the legitimate aims of the restriction – protecting other persons' rights, protecting public morals and welfare – in the same quality as they are reached at present.

Justice of the Constitutional Court

G. Kusiņš