



# JUDGE OF THE CONSTITUTIONAL COURT

---

1 Jura Alunāna Street, Riga, LV 1010. Phone: 67830735, 67210274. Fax: 67830770. E-mail: tiesa@satv.tiesa.gov.lv

## SEPARATE OPINION of Justice of the Constitutional Court

Aldis Laviņš

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).

**I cannot uphold the findings made in the Judgement regarding the incompatibility of the contested norm with Article 106 of the *Satversme*.**

In substantiating my opinion I shall use the abbreviations introduced in the Judgement.

2. It is found in Para 19.4. of the Judgement that the *Saeima*, in establishing an absolute prohibition, had not verified whether alternative measures existed and

had not provided substantiation why in the case of a criminal record for committing an intentional serious or particularly serious crime an absolute prohibition to work as a teacher had to be established.

The Constitutional Court has held that the prohibition referred to above is absolute since it applies to all persons who have been punished for committing an intentional serious or particularly serious crime and did not permit any exemptions. Moreover, this prohibition has been established for life (*see Para 12.3. of the Judgment*). I am of the opinion that in the particular case the Constitutional Court has not granted sufficient importance to the fact that the contested norm envisages a prohibition of this kind only for persons who have committed an intentional serious or particularly serious crime, not just any criminal offence. It is correctly established in Para 16.1. of the Judgement that absolute prohibitions to work in certain professions have been set for persons, who have been punished for committing criminal offences of various categories, in a number of regulatory enactments. However, examples included in the enumeration of professions indicated by the Constitutional Court (judges, sworn advocates, officers of municipal police) apply to persons who have been punished for committing any criminal offence or an intentional criminal offence. I.e., these, essentially, apply to all criminal offences. Such prohibitions differ significantly from the contested norm, which establishes a differential approach, depending on the severity of the criminal offence that the person has committed.

In the case examined in the Judgement, the legislator had identified existence of an absolute prohibition and had eliminated it by the law of 5 July 2012 “Amendments to the Education Law”, amending Para 1 of Section 50 of the Education Law and establishing the differential approach referred to above (*see annotation to the draft law No. 296/Lp11 “Amendments to the Education Law” submitted to the Saeima on 14 June 2012 and audio recordings of the sittings of the Saeima Education, Culture and Science Committee of 20 and 26 June 2012, Case Materials, Vol. 1*). In view of the above, the main issue analysed in the Judgement was, whether the legislator had the right to differentiate the approach depending upon the severity of the criminal offence committed by a person. I.e.,

the Constitutional Court had to examine whether the *Saeima*, in accordance with the nature and harmfulness of the threat to the interests of a person or society, could define such criminal offences, the perpetrators of which had to be recognised as being unsuitable for a teacher's work without individual assessment, and whether the legislator's considerations had to be considered as being reasonable.

3. The central question of the examined case was the following: in the particular instance, which fundamental rights should be given priority – persons' right to freely choose their employment and to retain the existing employment, or the rights of students, including children, to education. To my mind, the Constitutional Court in its Judgement has focused excessively only upon one of the fundamental rights mentioned; i.e., to the right to freely choose employment, included in the first sentence of Article 106 of the *Satversme*.

This case was initiated on the basis of a constitutional complaint, the submitter of which had worked with children. Moreover, a large part of the students is children. In its previous case law, the Constitutional Court had consistently recognised that, in legal relationships that affect the child and in all activities with respect to a child, the child's rights and best interests take the priority. The legislator must ensure that the regulatory enactments that are adopted provide the best possible protection of a child's lawful interests (*see Judgement of 11 October 2004 by the Constitutional Court in Case No. 2004-02-0106, Para 11*). A child's rights and lawful interests are affected not only when a decision that pertains the child directly has to be made but also in the case where the decision could be applicable to a child or affect a child indirectly. Recognising any other priority without a serious reason or justification is inadmissible (*see, for example, Judgement of 22 December 2005 by the Constitutional Court in Case No. 2005-19-01, Para 11*).

I believe that with respect to the issue, whether the possibilities to work as a teacher should be restricted, any decision made by the legislator should be based, first and foremost, on the principle that a child's best interests take the priority.

There may be cases, where the legislator has not only the right but also an obligation to restrict a person's possibilities to work as a teacher and, thus, protect the rights and best interests of children.

Pursuant to Section 2 of the Education Law, the purpose of this law is to ensure that every resident of Latvia has the opportunity to develop his or her mental and physical potential, in order to become an independent and a fully developed individual, a member of the democratic state and society of Latvia. Corresponding to the age and needs of a student, he or she must be ensured an opportunity to:

1) acquire knowledge and skills in the field of humanities, social, natural and technical sciences;

2) acquire knowledge, skills and experience in relationships, in order to participate in the life of the state and society;

3) for moral, aesthetic, intellectual and physical development, by promoting the development of a knowledgeable, skilful and socialised individual.

It follows from the above that a student, in particular, a child has the right to receive appropriate education that instils in him respect for universal values, sense of responsibility for fellow human beings and environment and ensures that the student will be able to become a full member of a democratic society in the future.

**Hence, the legislator has the obligation to restrict a person's right to work as a teacher to the extent that ensures that children's right and best interests to receive appropriate education are not jeopardised even indirectly.**

4. In Para 1 of Section 50 of the Education Law, the *Saeima* has established differential treatment, defining such criminal offences, the perpetrators of which are not suitable for a teacher's work, and has not envisaged case-by-case assessment. I.e., a person who has been punished for committing a serious or a particularly serious crime has been totally denied the right to work as a teacher. Whether a person, who has committed an intentional criminal offence or less

serious crime, may work as a teacher and whether this will not harm students' interests, is assessed by a committee established by the Quality Service.

It is recognised in Para 19.3. of the Judgement that the Constitutional Court does not gain confirmation from the documents related to drafting and adoption of the contested norm that the absolute prohibition to work as a teacher for all persons, who have been punished for committing an intentional serious or particularly serious crime, is the only measure for reaching the legitimate aims of the restriction on fundamental rights. At the same time, the Constitutional Court conceded that the legislator, having assessed the need of a prohibition, could determine that an absolute prohibition was the only means for reaching the legitimate aims in the case of some intentional serious or particularly serious crimes. In view of the above, it is found in Para 19.4. of the Judgement that there are more lenient measures, which, in view of the interests jeopardised by the criminal offence, would be less restrictive on a person's fundamental rights.

**4.1.** It follows from the audio recordings of the sittings of 20 and 26 June 2012 of the *Saeima* Education, Culture and Science Committee that the legislator had considered the proposal made by the Ministry of Education and Science to define particular criminal offences, the perpetrators of which would not be allowed to work as teachers even if the criminal record had been set aside or extinguished (*see, for example, audio recording of the sitting of 26 June 2012 of the Saeima Education, Culture and Science Committee from 5:40, Case Materials, Vol.1*)

The legislator has been aware of the way and criteria for classifying criminal offences, according to the threat to the interests of a person or society. It follows from the discussions during the sittings of the *Saeima* Education, Culture and Science Committee that there is no need to assess separately each particular intentional serious or particularly serious crime since it is obvious that if a person, who had committed an intentional serious or particularly serious crime, worked as a teacher it would be contrary to the best interests of a child (*see, for example, audio recording of the sitting of 26 June 2012 of the Saeima Education, Culture and Science Committee from 17:36, Case Materials, Vol.1*)

In view of the above, I believe that the legislator had examined, on its merits, the need to assess separately whether the committing of each serious or a particularly serious crime jeopardises interests.

**4.2.** Para 19.2.1. of the Judgement points to the sittings of 20 and 26 June 2012 of the *Saeima* Education, Culture and Science Committee where the a probability had been discussed where a teacher had committed an intentional criminal offence by defending another person but overstepping the limits of defence and inflicting bodily injuries, or where a teacher, being also a member of the Latvian National Guard, had violated the rules of detention and, thus, committed a less serious crime. However, a similar discussion with respect to intentional serious and particularly serious crimes, taking into consideration the elements of these crimes and the nature of interests jeopardises by these crimes, had not taken place during the Committee's sittings.

I draw attention to the fact that such discussions have taken place. The members of the *Saeima* Education, Culture and Science Committee have dismissed the possibility that persons, who have committed serious or particularly serious crimes, could work as teachers as obviously unacceptable (*see, audio recording of the sitting of 26 June 2012 of the Saeima Education, Culture and Science Committee from 19:11, Case Materials, Vol.1*). If the Constitutional Court sets the need for such a discussion as a formal requirements regarding the compatibility of a legal norm with the *Satversme* then also those restrictions with respect to judges, prosecutors and representatives of 16 more professions referred to in the Judgement could be recognised as being incompatible with the *Satversme* due to the absence of discussions. I believe that a requirement that the legislator should organise discussions on matters that are undoubtedly clear to the members of the *Saeima* does not follow from the *Satversme*.

**4.3.** All interests of persons, society or the state that are protected by the Criminal Law are linked to a sense of responsibility for fellowmen and environment. Hence, all intentional serious or particularly serious crimes, which the Constitutional Court has pointed to s requiring separate analysis, in my

opinion, jeopardise all those interests, respect towards which should be instilled by the teacher in all students.

At the sitting of the *Saeima* Education, Culture and Science Committee of 20 June 2012, several members of the Parliament noted to the fact that the committee established by the Quality Service was unable, in all instances, to assess without doubt the suitability of any person for a teacher's position. Allegedly, the assessment always will be subjective therefor, to avoid risks, the committee should be granted only the right to assess the suitability for a teacher's position of such persons, who have committed criminal offences or less serious crimes. A minimal risk is said to exist already with respect to persons who have committed criminal offences; therefore such system should be established that would decrease this risk to the extent possible in the best interests of a child (*see, for example, audio recording of the sitting of 20 June 2012 of the Education, Culture and Science Committee of the Saeima from 33:55 and 57:30, as well as audio recording of the sitting of 26 June 2012 from 42:50, Case Materials, Vol.1*).

It is noted in Para 19.3.2. of the Judgement that the committee established by the Quality Service in examining, whether permission to work as a teacher given to a person with criminal record will not harm students' interests, also considers whether issuing of such permission will not be contrary to the restrictions set in the Education Law and the Law on the Protection of Children's Rights. In assessing the foreseeable impact on children, the committee must take into account the restrictions set in the Law on the Protection of Children's Rights, which apply to employees of any institution where children are staying, including teachers. Section 72 (5) of this law prohibits from working as a teacher persons who have been convicted of criminal offences that are related to violence or threats of violence as well as criminal offences against morals and sexual inviolability. I draw attention to the fact that the Law on the Protection of Children's Rights applies to any person working in an institution where children are staying including service staff, whereas a teacher's role significantly differs, therefore the Education Law sets stricter requirements, in particular, for teachers.

**4.4.** The Constitutional Court has referred to Para 108 in the Judgement by the European Court of Human Rights of 22 April 2013 in the case “*Animal Defenders International v. the United Kingdom*”, application No. 48876/08, developing on the basis of its elements in the constitutionality test. However, an important aspect referred to in the judgement by the European Court of Human Rights has not been analysed in this Judgement – the state may envisage individual assessment in connection with the setting of a restriction; however, if this causes certain difficulties such assessment should not be envisaged in all cases.

In the legal issue under examination, the possible outcome of the assessment affects the best interest of a child; hence, such difficulties can be established. Namely:

1) Para 19.2.2. of the Judgement refers to examples where a person, who has previously committed an intentional serious or particularly serious crime, can change during his or her lifetime. However, it cannot be guaranteed that a person, who previously committed an intentional serious or particularly serious crime, will not re-offend. Therefore the assessment by the committee established by the Quality Service cannot exclude this and may be subjective;

2) a person’s suitability for a teacher’s job can be re-examined if violations are identified, which the Constitutional Court, in Para 19.3.2. of the Judgement does not exclude either. Thus, the Court has accepted a situation that violations, due to which a person’s suitability for a teacher’s job has to be re-examined, can happen. However, the probability of even one case demonstrates the incompatibility of this system with the principle that a child’s best interests take priority since the consequences of a violation may be irreversible.

In view of the above, the legislator has identified a risk that by the assessment of the suitability of persons, who have committed serious or particularly serious crimes, for a teacher’s position may cause irreversible violation of children’s rights and best interests. In this situation, the legislator, I emphasize, had the obligation to establish prohibition for the persons referred to above to work as a teacher.

It is noted in Para 19.3. of the Judgement that, in a democratic state governed by the rule of law, the legislator may include absolute prohibitions in legal norms; however, in such a case the legislator must gain assurance also that by envisaging exemptions to such prohibition it would be impossible to reach the legitimate aim in equivalent quality. In the reviewed case, it is impossible to ensure that the legitimate aim (protection of other persons' rights and public morals) is reached by other measures in the same quality, since the matter pertains to ensuring the interests of children in schools.

**In my opinion, the legislator has established that no alternative measures exist for reaching the legitimate aim of the restriction on fundamental rights included in the contested norms and has reasonably balanced the fundamental rights granted to different persons by Article 106 and Article 110 of the *Satversme*.**

5. In addition, I draw attention to some findings made in the Judgement that I cannot uphold.

5.1. The Constitutional Court, in establishing the legitimate aim of the restriction on fundamental rights included in the contested norms, has recognised in Para 16.2. of the Judgement the existence of doubts whether a person, who has been convicted for committing an intentional serious or particularly serious crime, will be able to instil in students the right attitude towards the norms that are in effect in society. I underscore that the rights and lawful interests of a child and a student are affected also in the case where doubts exist regarding a person's suitability for a teacher's work.

5.2. It is important that not only students themselves but also their parents and other family members have trust in a teacher's work. It is also stated in Para 19.3.2. of the Judgement that students' family members and society in general benefits if teachers who are able to ensure due teaching process work in institutions of education. However, information about the opinions of students' parents (for example, non-governmental organisations that represent parents'

interests) regarding the existence of alternative measures for reaching the legitimate aim in the same quality has not been examined in the Judgement.

**5.3.** The Constitutional Court has noted in Para 19.3.2.: taking into consideration only the fact that a person has been punished for an intentional serious or particularly serious crime and without individually assessing the particular case, it is not always possible to ascertain fully that the fact of a criminal record has had an irreversible impact on the personality of the potential teacher. The conclusion that the right to freely choose employment prevails over the best interests of a child follows from these considerations, but this, in my opinion, is inadmissible.

The Special Part of the Criminal Law comprises such serious and particularly serious crimes that are committed against a person's life, health, fundamental rights and fundamental freedoms, liberty, morals and sexual inviolability. Also some crimes against the family and minors that are included in Chapter XVII of the Criminal Law are serious or particularly serious. There are also such serious or particularly serious crimes that target natural environment, property, general security and public order, traffic safety, accounting records and jurisdiction. 29 separate criminal offences in economy, state authority service and in military service are defined in the Criminal Law as serious or particularly serious crimes. Offences against humanity, peace, war crimes, genocide as well as a crime against the state are also serious and particularly serious crimes

In such circumstances, the possibility that a person, who has been convicted for committing a serious or a particularly serious crime, has the right to work as a teacher, must be excluded. This is the only way to ensure long-term protection of society's fundamental values included in the Preamble to the *Satversme* since the foundation for the coming generations are children. I do not doubt that a person is able to change; however, the values enshrined in the *Satversme* must be complied with and, in examining Article 106 of the *Satversme*, the provisions of Article 110, which clearly point to the priority of the best interests of a child in a corresponding situation, also should be respected.

**In view of the above, I hold that the contested norm complies with Article 106 of the *Satversme*.**

Justice of the Constitutional Court

A. Laviņš