JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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

SEPARATE OPINION

of Justices Ineta Ziemele, Sanita Osipova and Daiga Rezevska

of the Constitutional Court

of the Republic of Latvia

in Riga, on 4 January 2018

in Case No. 2017-03-01

"On Compliance of the Fourth and the Sixth Part of Section 30, the Fifth and the Sixth Part of Section 48, Para 5 of Section 50, and Para 2^1 of the First Part of Section 51 of the Education Law with the First Sentence of Article 100 and the First Sentence of Article 106 of the *Satversme* of the Republic of Latvia"

1. On 21 December 2017, the Constitutional Court passed the judgement in case No. 2017-03-01 "On Compliance of the Fourth and the Sixth Part of Section 30, the Fifth and the Sixth Part of Section 48, Para 5 of Section 50, and Para 2^1 of the First Part of Section 51 of the Education Law with the First Sentence of Article 100 and the First Sentence of Article 106 of the *Satversme* of the Republic of Latvia" (hereinafter – the Judgement) and recognised the

fourth and the sixth part of Section 30, the fifth and the sixth part of Section 48, Para 5 of Section 50, and Para 2^1 of the first part of Section 51 of Education Law (hereinafter – the contested norms) as being compatible with the first sentence of Article 100 and the first sentence of Article 106 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*).

The case had been initiated with respect to an application submitted by twenty members of the *Saeima*.

The contested norms were included in the Education Law gradually. First of all, by the law of 18 June 2015 "Amendments to the Education Law", Section 30 (4) of the Education Law was amended and the fifth part was added to Section 48 (hereinafter – amendments of 18 June 2015). On 23 November 2016, the *Saeima* adopted the law "Amendments to the Education Law". It includes part of the contested norms. The sixth part was added to Section 30 and Section 48 of Education Law, whereas Section 50 of the Education Law was supplemented by Para 5. The *Saeima* also amended the first sentence of Section 30 (4) and Section 48 (5) by adding the following words to these norms: *"inter alia*, does not breach the prohibition of discrimination and differential treatment of a person". Moreover, Para 2^1 was added to Section 51 (1) of the Education Law, providing that also the following obligation was included in a teacher's general duties: "to bring up decent, honest, and responsible people – patriots of Latvia, to strengthen affiliation with the Republic of Latvia". I.e., the content of the loyalty requirements and the legal consequences that would set it if a person, who worked as a teacher or a head of an institution of education, was recognised as being incompatible with the loyalty requirements (hereinafter – amendments of 23 November 2016) were made clearer. The respective draft law was included in the package of draft laws accompanying the draft law "On the State Budget for 2017", recognised as being urgent and adopted in two readings.

We concur with the findings including in the Judgement regarding the compliance of the amendments of 18 June 2015 with the first sentence of Article 100 and the first sentence of Article 106 of the *Satversme* and

also concur with the Substantive Part of the Judgement insofar it applies to the aforementioned amendments. However, we do not concur with the findings expressed in Para 17 of the Judgement, i.e., we do not concur with the finding that the restriction on fundamental rights, which was introduced by the contested norms included in the amendments of 23 November 2016 was established by a law adopted in due procedure.

2. Thus, we concur with the findings expressed in the Judgement regarding the important role of a teacher in a democratic state governed by the rule of law in raising the next generation of civil society (*see Para 13 and Para 18 of the Judgement*). In view of the teacher's special role, it must be recognised: setting a requirement for teachers to be loyal to the State and the principles included in the *Satversme*. The loyalty requirements have a legitimate aim and there are no alternative solutions to setting loyalty requirements (*see Para 19 of the Judgement*). However, in a democratic state governed by the rule of law, the general principles of law must be complied with. It is the consistent compliance with the general principles of law in all fields of public life that ensures the strength of a democratic state governed by the rule of law in the long-term.

The *Satversme* sets certain requirements with respect to any decision, which pertains to a matter of importance in the life of the state and society, ensuring that the respective decisions are adopted in compliance with the basic norm of a democratic state governed by the rule of law. The *Satversme* mainly entrusts the *Saeima* with exercise of the legislative power. In a democratic state governed by the rule of law, the legislative power has an invaluable role since it is the foundation for the existence of a state governed by the rule of law (*see: Pleps J., Pastars E., Plakane I. Konstitucionālās tiesības, Rīga, 2014, 233. lpp.*). Therefore it is the quality of the legislator's work that defines the quality and strength of a democratic state governed by the rule of law. The legislative power is in the relationship of checks and balances with the executive and the judicial power. The legislative power also must take into

account that the purpose and meaning of the principle of separation of powers is "to decrease the dangerousness of the state power for an individual's freedom, to achieve moderation in the actions by power, to increase the level of rationalism in its decisions" (*see the Opinion of 10 May 2011 by the Committee on Constitutional Law on the President's Functions within the Framework of the Latvian System of Parliamentary Democracy, Para 18*). Hence, the *Saeima*, in exercising the right to legislate, enjoys discretion insofar the general legal principles and other norms of the *Satversme* are not violated (*see Judgement of 19 October 2017 in Case No. 2016-14-01, Para 25.2.*). The Constitutional Court has recognised that, in a democratic state governed by the rule of law, the procedure, in which a legal act, which restricts fundamental rights guaranteed in the constitution is adopted, should instil in society conviction that the adopted act is legal. Haste and the fact that society was not prior informed about the respective amendments cannot be assessed positively in the context of preparing and adopting the contested norms. These circumstances hinder the development of public conviction that in the course of adopting the contested norms the need to restrict the fundamental rights guaranteed in the *Satversme* had been carefully assessed (*see Judgement of 26 November 2009 by the Constitutional Court in Case No. 2009-08-01, Para 17.2.*).

3. It is recognised in the Judgement that the contested norms restricted the human rights established both in the first sentence of Article 100 and the first sentence of Article 106 of the *Satversme* (*see Para 13.4. of the Judgement*). It is also established in the Judgement that the contested norms differ as to the subject they regulate. Some norms define the loyalty requirements and some norms define the legal consequences that set in if the loyalty requirements are violated (*see, for example, Para 12 of the Judgement*). Amendments of 18 June 2015, for the first time specify *expressis verbis* the loyalty requirements in the Education Law. Whereas the primary meaning of amendments of 23 November 2016 is to establish the procedure for applying legal consequences. The loyalty requirements are further specified also in these

amendments; however, this is rather editorial than ideological specification. In both instances, the legislator had to weigh carefully the restrictions on fundamental rights referred to above. Amendments of 18 June 2015 were adopted in the regular legislative procedure – in three readings, and materials in the case do not cause doubt that these amendments had been discussed on their merits (*see, for example, transcripts of the* Saeima *sittings of 27 November 2014, 16 April 2015, and June 18 2015*). Amendments of 23 November 2016, in turn, were included in the package of draft laws accompanying the draft law "On the State Budget for 2017" and were adopted in two readings. In this case specifically, the Constitutional Court had to ascertain, whether, in this context, the restriction on fundamental rights was examined on its merits.

The Constitutional Court has noted that all restrictions on fundamental rights, first and foremost, must be established by a law adopted in due procedure. A special procedure for drafting and adopting the annual state budget exists in the Latvian legal system. The first part of Article 66 of the *Satversme* provides that, annually, before the commencement of the financial year, the *Saeima* decides on the State Revenues and Expenditure Budget, the draft of which is submitted to it by the Cabinet. In examining, whether a restriction on fundamental rights has been established by a law adopted in due procedure, the Constitutional Court must verify, whether:

1) in adopting it [the law] the procedure set out in regulatory enactments has been complied with;

2) it has been promulgated and is publicly accessible in accordance with requirements of regulatory enactments;

3) it has been worded with sufficient clarity so that a person would be able to understand the content of rights and obligations that follow from it and whether it ensures sufficient protection against arbitrary application thereof (*see Judgement by the Constitutional Court of 8 April 2015 in Case No 2014-34-01, Para 14*).

Section 20, 21 and 22 of the law "On Budget and Financial Management" provide for a special procedure for examining the annual draft

budget law (package of budget draft laws) at the Cabinet and for submitting it to the *Saeima*. Para 2 of the second part of Article 114 of the Rules of Procedure of the *Saeima* provides that the draft state budget law and the package of draft laws related to it is examined by the *Saeima* in two readings, hence, in a special procedure that differs from the procedure for examining other draft laws (*see Para 87[1], 90, 90[1], 95, 95[2], 96, 98, 99, 101 and 114 of the Rules of Procedure of the* Saeima).

Article 87[1] of the Rules of procedure of the *Saeima* provides that the package of budget draft laws consists of the draft state budget law and draft laws that set forth or amend the state budget, or budget-related draft laws. The Constitutional Court has recognised that, in view of the special procedure established for examining the package of draft state budget laws, the *Saeima* has the duty to examine, whether all draft laws submitted by the Cabinet and included in the package of state budget laws comply with the criteria indicated in Article 87[1] of the Rules of Procedure of the *Saeima*. If a draft law does not comply with these criteria the *Saeima* must exclude it from the package of the draft state budget laws (*see Judgement of 25 March 2015 in Case No. 2014-11-0103, Para 18.1*). Since the basis for planning state financial resources is the calculations of state revenues and expenditure, the legislator has the right and, simultaneously, the obligation to regulate in the annual state budget law and the related package of draft laws only such matter that pertain to the particular financial year and are closely related to the use of the financial resources of the state (*see Judgement of 19 December 2011 by the Constitutional Court in Case No. 2011-03-01, Para 18, and Judgement of 19 October 2017 in Case No. 2016-14-01, Para 25.1.*).

In other democratic states governed by the rule of law, likewise, in the course of adopting the state budget attention is entirely focused on the analysis and legalisation of the state's financial plans for the next year, without encumbering it by amending or supplementing norms that are not directly related to it. For example, the Constitutional Council of France has followed very meticulously, whether the annual state budget law stays within its limits

and no other norms, unrelated to the state's annual revenues and expenditure, are included in it (*see Judgement of 29 December 2016 by the Constitutional Council of France in Case No. 2016-744 DC, Paras 98–106*).

Hence, it could be recognised in this case that the restrictions on fundamental rights included in amendments of 23 November 2016 have been established by a law adopted in due procedure if the legislator had ascertained that the respective draft law: 1) pertained to the specific financial year; 2) was closely related to the use of the sate's financial resources, and 3) had examined these restrictions on fundamental rights on their merits in accordance with the methodology for examining restrictions on fundamental rights established by the Constitutional Court.

I.e., the Constitutional Court's test, whether a restriction has been established by a law adopted in due procedure, includes both procedural and material aspects.

4. After the process of discussing the budget was analysed in detail, the majority of Justices of the Constitutional Court established that it had been noted in the initial impact assessment (hereinafter – annotation) of amendments of 23 November 2016 that the draft law did not deal with the monetary evaluation of administrative costs (*see Case Materials p. 112*).

It is also noted in the annotation that the draft law would be implemented within the limits of the existing human resources and that establishment of new institutions or reorganisation of the existing ones was not necessary (*see Case Materials p. 115*). However, taking into account the wording of the articles of the draft law and explanations submitted for the second reading, the Constitutional Court found that the legislator had ascertained the close connection between the draft law and the use of the state's financial resources. The majority of Justices were satisfied with the fact both at the sitting of the *Saeima* Budget and Finance (Taxation) Committee and at the sitting of the *Saeima* as well as further sitting with the President, particular amounts and the number of job places needed by the State Education Quality

Service (hereinafter – SEQS) to ensure implementation of amendments of 23 November 2016, had emerged. Minister for Education and Science K. Šadurskis substantiated the link between the draft law and the state budget by noting "there is a connection in the amount of 244 thousand euros, which would be needed for reinforcing the capacity of the State Education Quality Service [..] If we do not make these amendments, it will not resonate well [..] Therefore I considered it as my duty to remind, once again, that there is a link to the budget" (*see transcript of the sitting of the* Saeima *of 23 November 2016*).

However, we established that SEQS planned and performed all support and advisory measures, as well as measures for preventing violations and possibility thereof, in accordance with the regulation set out in SEQS internal regulation of 4 June 2013 No. 8 "Regulation on Organising and Providing Support and Advisory Measures and Measures for Preventing Violations and Possibility thereof". This regulation does not set out a special procedure for controlling compliance with the loyalty requirements. The norms, which already envisaged the loyalty requirements, were adopted by amendments of 18 June 2015 and were not related to additional financial needs in the annual state budget. They entered into effect on 16 July 2015. Hence, a conclusion compatible with the legal system of a democratic state governed by the rule of law would be that SEQS, within the limits of its competence, already controlled compliance with the loyalty requirements since the date this law entered into force. No amendments have been introduced in the procedural laws either after the amendments of 18 June 2015 or 23 November 2016 had entered into force, for example, the Administrative Procedure Law, to ensure that these new functions are performed.

5. Accepting the fact that after the doubts of the members of the *Saeima* and, in particular, the *Saeima* Education, Culture and Science Committee regarding the close link between amendments of 23 November 2016 and the annual state budget were heard, a particular amount was defined that was

needed for reinforcing SEQS's capacity to introduce the administrative procedure for determining the legal consequences for failure to meet the loyalty requirements, and it was assumed that this amount was a matter of state finances, we, nevertheless, consider it necessary to note that almost all decisions of national importance are linked to state's finances. Pursuant to the Constitutional Court's findings regarding ways to determine, which draft laws are genuinely related to the annual state budget law, the *Saeima* had to ascertain, whether, indeed, the requested reinforcement of SEQS' capacity pertained to the particular financial year. Neither materials in the case nor the Judgement provide an answer to this question.

As we noted, the performance of any of the state's functions may require certain financial resources. The *Saeima* enjoys great discretion in the matters of state budget, and this has been emphasized by the Constitutional Court in its judicature. However, a fine line exists between discretion and arbitrariness. Therefore each and every substantiation found within the framework of a discussion between the executive power and the legislator, cannot be held automatically to be compatible with the *Satversme*. Does the fact that the additional financial resources needed for reinforcing SEQS' capacity were defined means that the restriction on fundamental rights, established by amendments of 23 November 2016, was discussed on its merits? I.e., if the legislator has chosen to include a particular draft law in the package of draft budget laws, this by far does not mean that the proportionality test of the restriction on fundamental rights envisaged in this draft law is not necessary. **Inclusion of a norm in the package of draft laws accompanying the annual draft state budget law *per se* may not influence the scope of testing the constitutionality of a restriction on fundamental rights in the legislative process**. This is an important limit to the *Saeima*'s discretion, compliance with which promotes trust in the State of Latvia and law.

6. Thus, we are of the opinion that the Constitutional Court had to ascertain, whether the legislator, in examining the contested norms in the

special procedure envisaged for adopting the state budget, performed a comprehensive assessment of the restriction on fundamental rights included in it. Constitutionality of the restriction had to be substantiated by legal arguments on its merits. I.e., the legislator's action, in envisaging a restriction on fundamental rights, not only had to comply with the established legislative procedure but also had to include quality assessment of the restriction on fundamental rights on its merits.

Substantially, the amendments of 23 November 2016 regulate the legal consequences of the failure to meet the loyalty requirements. The annotation explains aims of the loyalty requirements, characterises problems present in the current situation as well as provides some considerations regarding constitutionality of the contested norms, i.e., suitability for reaching the legitimate aims and the benefit that society will gain through application of the contested norms (*see Case Materials, pp. 101–116*). However, the annotation does not point to any possible alternative solutions, the adverse consequences that a person will incur because his or her fundamental rights are restricted, compared to the benefit that society in general will gain from this restriction, have not been comprehensively evaluated either. The legislator has not performed a legal assessment of these aspects.

The Constitutional Court has recognised that, in assessing compatibility of a restriction on fundamental rights with the *Satversme*, it should be taken into account, *inter alia*, whether a mechanism has been incorporated in the contested norms for restricting a person's rights as little as possible (*see, for example, Judgement of 15 November 2016 by the Constitutional Court in Case No. 2015-25-01, Para 11.3.3.*). In the circumstances of the present case, it should be taken into account that teachers and heads of educational institutions are employed in the framework of legal labour relationships and that these relationships have been established on the basis of the Labour Law (the founder of the institution is the employer of the head of educational institutions is, the head of the respective educational institution is the teacher's employer). Whereas SEQS's decision regarding incompatibility of a teacher or a head of

an educational institution with the loyalty requirements is an administrative act, which has been adopted with respect to a particular natural person who has the right to contest this decision at the institution and to appeal against it at the administrative court in the procedure established in the Administrative Procedure Law. Moreover, it should be taken into consideration that SEQS does not have the right to terminate legal labour relationship with a teacher or a head of an educational institution. Termination of legal labour relationships, by applying the contested norms, is envisaged in the procedure established in the Labour Law.

The contested norms impose an obligation on the employer to terminate immediately legal labour relationships with a head of an educational institution or a teacher who does not meet the loyalty requirements in the procedure set out in the Labour Law. It is noted in the annotation: "[..] upon establishing incompatibility of the actions by a teacher or a head of educational institution with office held, adopt a decision on terminating legal labour relationships with the particular employee, choosing actual substantiation that is appropriate for the case and a respective norm of the Labour Law." Section 101 of the Labour Law sets out a number of cases, where the employer has the right to give an employee a notice of termination. Depending on the actual grounds for termination, different legal consequences set in for persons, *inter alia*, with respect to the term for giving the notice of termination and severance benefit. Thus, in applying the contested norms to a particular teacher or a head of an educational institution, in the meaning of the Labour Law, different legal consequences may arise, depending on the "actual substantiation" chosen by the employer, although, substantially, labour relationship has been terminated due to violation of loyalty requirements defined in the Education Law. In this case, the dispute between the employer and the employee must be resolved at a court of general jurisdiction in the procedure established in the Civil Procedure Law. If a person does not agree to SEQS's decision on the violation of loyalty requirements and, hence, notice on terminating legal labour relationship, the parties may achieve legal resolution in two legal proceedings, that substantially

differ, – in administrative procedure and civil procedure. I.e., in administrative procedure the principle of objective investigation is applicable; in civil procedure, however, this principle is not applicable. In the materials related to adoption of amendments of 23 November 2016 no substantiation can be found that the legislator had examined the contested norms in this aspect; i.e., had verified the effectiveness of the mechanism for protecting a person's rights and the rationalism of the respective approach. The *Saeima* Education, Culture and Science Committee has sent a letter to the *Saeima* Budget and Finance (Taxation) Committee, underscoring that members of the *Saeima* have not become convinced that the norms of the draft law had been comprehensively discussed and that a legally well-considered, correct solution had been found (*see Letter by the* Saeima *Education, Culture and Science Committee of 18 October 2016 regarding draft law No. 725/Lp12 "Amendments to the Education Law")*. Thus, essentially, the effectiveness of the mechanism for protecting a person's rights has not been discussed and other possible alternative solutions have not been considered.

It is found in the Judgement that a court will be available to a person and it is concluded that this solution is compatible with the *Satversme* (*see Para 17.5. of the Judgement*). Undoubtedly, in a democratic state governed by the rule of law, any restriction on fundamental rights is a matter to be examined at a court; however, the legislator is responsible for identifying the most expedient and rational mechanism for regulating the relationship between the State and an individual. A mechanism like this can be identified as the result of quality discussions. This is the purpose of the legislative procedure. Therefore the question, whether the legal consequences of failure to comply with loyalty requirements had been thoroughly discussed, belongs to the quality criteria of a law, which a court examines prior to assessing the proportionality of a restriction. However, neither in Para 19 of the Judgement has the Court analysed, whether the legislator has found the most effective mechanism in the case of the particular restriction on fundamental rights but has weighed the legitimacy and proportionality of loyalty requirements as a restriction on

fundamental rights. We fully support the Court's analysis insofar it extends to this point.

The legislator must examine comprehensively and on its merits each restriction on fundamental rights that has been established, *inter alia*, verifying, whether a clear and effective mechanism for rights protection is available to a person. Since the protection of fundamental rights is one of the State's basic functions, in a democratic state governed by the rule of law, the legislator has the obligation to ascertain the legitimacy and proportionality of a restriction on fundamental rights. If this is not done then, respectively, compliance of the legislative process with the general principles of law and other norms of the *Satversme* is not ensured. This should be considered to be a substantive violation of the legislative procedure.

Hence, in the adoption of the contested norms, which are included in the amendments of 23 November 2016, the procedure set out in regulatory enactments has not been complied with.

Therefore, the restriction established by the contested norms, which are included in the amendments of 23 November 2016, has not been established by a law adopted in due procedure.

Ineta Ziemele Sanita Osipova Daiga Rezevska