JUDGE OF THE CONSTITUTIONAL COURT

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SEPARATE OPINION

of the Justice of the Constitutional Court

Daiga Rezevska

in Riga, 2 November 2017

in Case No. 2016-14-01

"On Compliance of Section 3, 5, 6, 7 and 9 of the law "On Solidarity Tax" with the First Sentence of Article 91 and Article 109 of the *Satversme* of the Republic of Latvia"

1. On 19 October 2017, the Constitutional Court passed the judgement in Case No.2016-14-01 "On Compliance of Section 3, 5, 6, 7 and 9 of the law "On Solidarity Tax" with the First Sentence of Article 91 and Article 109 of the *Satversme* of the Republic of Latvia" (hereinafter – the Judgement) and recognised Section 6 of the law "On Solidarity Tax" as being incompatible with the first sentence of Article 91 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme)* and void as of 1 January 2019 and terminated legal proceedings in the part regarding compliance of Section 3, 5, 6, 7 and 9 of the law "On Solidarity Tax" with Article 109 of the *Satversme*, as well as in the part regarding compliance of Section 3, 5, 7 and 9 of the law "On Solidarity Tax" with the first sentence of Article 91 of the *Satversme*.

The case was initiated on the basis of a constitutional complaint, which, in turn, was initiated on the basis of thirty-seven applications by natural persons.

I cannot uphold a number of findings included in the Judgement.

In providing reasoning for my opinion, I shall use the abbreviations used in the Judgement.

2. I uphold the decision by the Constitutional Court to terminate legal proceedings the case in the part regarding compliance of Section 3, 5, 6, 7 and 9 of the law "On Solidarity Tax" with Article 109 of the *Satversme*. Likewise, I agree that Section 6 of the law "On Solidarity Tax" is incompatible with the first sentence of Article 91 of the *Satversme*. However, I do not uphold the decision to terminate legal proceedings in the case in the part regarding compliance of Section 3, 5, 7 and 9 of the law "On Solidarity Tax" with the first sentence of Article 91 of the *Satversme*, as well as a number of arguments included in the Judgement because of the considerations provided below.

3. Latvia is a democratic state governed by the rule of law. That is the decision by the sovereign (the people) of Latvia and the basic norm of the Latvian legal system. The general principles of law, which determine the content and structure of the legal system, are derived from it. The basic norm, in interconnection with the general principles of law, safeguards the sovereign's values. Solidarity is one among these values, which, *inter alia*, manifests itself also in decreasing and preventing social inequality. Thus, the protection and ensuring of solidarity in conditions of a democratic state governed by the rule of law must proceed in compliance with the general principles of law and the basic norm – a democratic state governed by the rule of law.

The ultimate aim of the legal system of a democratic state governed by the rule of law is justice and ensuring of it. To implement justice in each particular case a number of requirements must be met, i.e., the following must be ensured: 1) concord/ and balance; 2) equality of persons in similar and comparable circumstances and 3) distribution of benefits proportionally to merits. Justice is ensured only if the activities of the State to resolve the particular matter comply with all these criteria. Thus, also decreasing and preventing social injustice, i.e., facilitation of solidarity, within the Latvian legal system must proceed in

compliance with the principle of justice. However, the legislator, in adopting the law "On Solidarity Tax", has violated a number of elements in the principle of justice.

4. Para 23 of the Judgement is based on the case law of the Constitutional Court that, in the field of tax law, the legislator has the right to select the tax object and the circle of taxpayers (*see, for example, Judgement of 6 December 2010 by the Constitutional Court in Case No. 2010-25-01, Para 10*) and that the legislator's decision on what tax would be necessary is an issue of expedience (*see, for example, Judgement of 30 April 2008 by the Constitutional Court in Case No. 2007-23-01, Para 7 and Para 11*). I agree that the limits of the legislator's discretion in introducing a new tax are a matter of political decision linked to the priorities of the national development. However, the constitutional obligation of a person arises only if these taxes have been established in due procedure (*compare to, for example, Judgement of 6 December 2010 by the Constitutional Court in Case No. 2010-25-01, Para 10*). Thus, to recognise that the subject and the object of the tax, which have been defined in Section 3 and Section 5 of the law "On Solidarity Tax", as well as the procedure for paying the tax, which has been set out in Section 7 and Section 9 of the law "On Solidarity Tax" do not cause a violation of the equality principle, it should be established that the solidarity tax had been introduced by a law adopted in due procedure.

5. In a democratic state governed by the rule of law, a law adopted in due procedure, first and foremost, is a law, which is aimed at reaching justice as the ultimate goal of the legal system. I.e., a law, which has been adopted in due procedure, must ensure concord and balance, equality of persons in similar and comparable circumstances, and division of benefits proportionally to merits of persons. Hence, in a democratic state governed by the rule of law, the principle of justice restricts the legislator's discretion in adopting a law, beginning with the choice of the aim, subjects and objects of the law. However, the materials of the case under review did not provide confirmation that the legislator, in selecting

the aim, subjects and the object of the law "On Solidarity Tax" had duly considered, whether this law would ensure that all the criteria of the equality principle referred to above would be met.

In a democratic state governed by the rule of law, considerations of economic effectiveness is an element that specifies the general principle of law – justice, it is encompassed by the requirements for concord and balance, equality and proportional distribution of benefits. The jurisdiction of the judicial power comprises assessment whether the specification of the principle of justice, done by the legislator, on the basis of considerations regarding economic effectiveness, in each particular case complies with the basic norm – a democratic state governed by the rule of law.

The consideration of economic effectiveness has not been examined in the Judgement and has not been used in the legal reasoning. However, the principle of justice in the legal system of a democratic state governed by the rule of law requires the State to adopt economically effective decisions regarding regulation of the sovereign's life, as this is the only way to reach concord and balance, to ensure equality and proportional distribution of benefits. The theory that the use of economic and political considerations in legal reasoning is inadmissible is incompatible with the basic norm of a democratic state governed by the rule of law. In this respect, it should be taken into consideration that in compliance with the understanding of law prevailing in the legal system of a contemporary democratic state governed by the rule of law the content of a norm is significantly broader than the textually perceivable (posited) part of it. The parties applying the law cannot ignore the fact that every legal regulation is founded on a certain political decision, which is based upon political and economic considerations (*see, for example: Pētersons M. Ekonomiskās efektivitātes apsvērumi juridiskajā argumentācijā. Jurista Vārds, 2013. gada 10. septembris, Nr. 37*). The considerations of economic effectiveness give the possibility to analyse legal norms by applying theories of micro-economy. Each law should facilitate economic effectiveness (*see, for example: Posner R. A. The*

Economic Analysis of Law, Ninth Edition. New York: Wolters Kluwer Law & Business, 2014). Similarly, the Justices of the Constitutional Court Kaspars Balodis and Sanita Osipova in their Separate Opinions in Case No. 2014-12-01 "On Compliance of Para 1 and 2 of Section 3, Para 1 of Section 4, and Section 5 of Subsidized Electricity Tax Law with Article 1 and Article 105 of the *Satversme* of the Republic of Latvia" noted that, notwithstanding the significant specificity of the constitutional review in the field of taxation, the Constitutional Court should not exert self-restraint without grounds, in verifying compliance of taxes with the *Satversme*, and it should examine also the economic impact of the tax upon the applicants (*see Separate Opinion of the Justices of the Constitutional Court in Case No. 2014-12-01, Para 4*).

The materials of the case under review indicate that the solitary tax had been introduced not to ensure justice but to "create a sense of justice in society" (*see Transcript of the Court Hearing of the Constitutional Court on 6 September 2017, Case Materials, Vol. 11, pp. 13- 40*). In fact, only a small part of Latvia's inhabitants (in 2016 – 5933) – employees with the annual income above 48 600 *euro* – pursuant to the law "On Solidarity Tax", indeed, were involved in ensuring solidarity, whereas other persons, whose annual income also exceeded 48 600 *euro,* were not encompassed by this law, its aim, and were not involved in ensuring solidarity (*see Transcript of the Court Hearing of the Constitutional Court on 5 September 2017, Case Materials, Vol. 11, p. 5*).

Egils Baldzēns, the Chairman of LBAS, also noted that the law "On Solidarity Tax" had been adopted without due assessment of the economic effectiveness. I.e., the legislator, by attempting to balance the revenue as effectively as possible, should take complex measures to achieve progressivity of the taxation system because, quite frequently, the most prosperous part of society does not receive the income in the form of a salary from work but from dividends, interest payments and return of capital (*compare: Para 10 of the* Judgement). Edvards Kušners, the representative of the Bank of Latvia, at the court hearing, taking the perspective of economic sustainability, characterised the

solidarity tax as economically unfounded and noted that, in principle, the progressivity of taxation system should be supported, however, in the case of the solidarity tax it created fiscal incentives for not taking a certain action – to not pay higher salaries. Allegedly, Latvia has neither legal nor economic grounds to provide incentives to entrepreneurs not to pay higher salaries and, thus, not to create highly remunerated jobs. From the perspective of sustainable economic development, this situation is said to be very dangerous for the society as a whole, since the competitiveness of the state decreases. In implementing the principle of a socially responsible state in the field of taxation policy, the State should take such measures that would be sustainable, balanced, fair, and proportionate (*see Transcript of the Court Hearing of the Constitutional Court on 6 September 2017, Case Materials, Vol. 11, pp. 70 and 89).*

Thus, the choice of such aim and subjects of the law ensured neither concord and balance, nor equality between all persons in the State whose annual income exceed 48 600 *euro*, nor proportional distribution of benefits. At the same time, it decreases the sovereign's trust in the State (Latvia) and the law.

What loyalty to Latvia means is clearly shown in the text of the Preamble to the *Satversme*. I.e., a cohesive society is based upon the Latvian language as the only official language, liberty, equality, solidarity, justice, honesty, work ethic and family. These values shape the constitutional identity of Latvia and integrate us into the European cultural space and the circle of Western law. Thus, various concrete constitutional obligations follow from the Preamble to the *Satversme* and from other provisions of the *Satversme*, the meaning of which is to ensure existence and functioning of the State of Latvia (*see: Balodis R. Latvijas Republikas Satversmes ievads. Grāmata: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2014, 133. lpp.*).

Respecting the fact that the *Saeima* is a constitutional institution, which most immediately implements the sovereign's will and that its jurisdiction includes the issue of establishing the taxation system, *inter alia*, introducing the

solidarity tax, without contesting that a law like this could serve as measure for ensuring the public welfare, nevertheless, I conclude that in the respective case the *Saeima* did not act in compliance with the *Satversme*.

The *Saeima*, in adopting the law "On Solidarity Tax", has not facilitated trust in Latvia and the law, because it has used the concept of "public welfare", included in the *Satversme,* as a justification for a shortsighted economic policy. Exactly the way, in which the legislator introduced the solidarity tax, did not facilitate trust in Latvia and the law.

It is correctly underscored in the Judgement that "in examining the compliance of the legislative procedure with the *Satversme,* it must be taken into account that the adoption of the state budget is an important function of the *Saeima,* which it performs as an institution, which is directly responsible before the people of Latvia" (*see Para 25.2. of the Judgement*). It is, indeed, the *Saeima*'s direct responsibility before the sovereign that requires implementation of such legislative procedure that complies with the basic norm – a democratic state governed by the rule of law – and the general principles of law. Hence, the process of legislation cannot be viewed only as such set of activities that envisages only implementation of certain procedures. The process of legislation must be viewed as an act of implementing the sovereign's will, which is purposefully aimed at reaching justice.

6. I uphold the conclusion made in Para 26 of the Judgement that, in the implementation of taxation policy, the legislator's actions must comply with the general legal principles and the norms of the *Satversme*. It follows from the basic norm – a democratic state governed by the rule of law – and the principle of a socially responsible state that is included in the Preamble to the *Satversme.* Likewise, I uphold the additional requirements set with respect to a law that regulates the tax law. The Constitutional Court for the first time specified the principles that follow from the basic norm and the legislator is obliged to comply with in the legislative process, *inter alia,* also deciding on taxes and developing

the state budget. It is noted in the Judgement that the legislator, in exercising its discretion in the field of taxation policy, must comply with the principles of effectiveness justice, solidarity, and timeliness. The legislator's obligation in the field of taxation is to establish a solidary and fair – based upon certain criteria – mechanism for levelling out socioeconomic differences that is aimed at sustainable national development; moreover, not only in the formal meaning of it but also by ensuring an effective functioning of this mechanism, as well as to introduce the necessary changes to the taxation policy in a well-considered and timely manner (*compare: Para 26 of the Judgement*).

However, the law "On Solidarity Tax" is incompatible with a number of principles referred to here.

The principles of justice, solidarity, effectiveness and timeliness are mentioned in the Judgement as reference-points that allow ensuring the existence of such society that lives in prosperity and strives for sustainable welfare. It follows from the reasoning of the Judgement that abiding by these principles is not an end-in-itself but is aimed at the existence of the State of Latvia. However, the compliance of the regulation on the solidarity tax with the defined principles is not examined in the Judgement, and, thus, a perspective on the current tax regulation in Latvia and the policy implemented by the legislator, which should serve to ensure public welfare, is not offered.

The procedure of adopting the law "On Solidarity Tax" does not prove that the law had been aimed at sustainable national development – this law was amended already during the first year after it entered into force; nor of well-considered and timely introduction of changes to the taxation policy – the law was included in the general package of the state budget laws rather than being adopted as the result of well-considered and timely procedure aimed at ensuring justice and solidarity. This finding is based on the case materials. At the court hearing, the representative of the Bank of Latvia Edvards Kušners expressed the opinion that in the long-term the regulation on the solidarity tax would have a negative impact upon the competitiveness of Latvia's employers (*see Transcript*

of the Court Hearing of the Constitutional Court on 6 September 2017, Case Materials, Vol. 11, pp. 68 – 69) and also drew attention to the fact that since the draft law had ben very rapidly progressed with, the Bank of Latvia had not had sufficient time to participate in the discussions thereof (*see Transcript of the Court Hearing of the Constitutional Court on 6 September 2017, Case Materials, Vol. 11, p. 67*) At the court hearing, the Chairman of LBAS Egils Baldzēns explained that that social partners had participated in the drafting of the law and, in discussing possible solutions for decreasing the regressivity of taxation system, had proposed examination of such alternatives that would comprise complex solutions rather than targeting only one group of employees; however, there had been no time for introducing complex changes to the taxation system (*see Transcript of the Court Hearing of the Constitutional Court on 6 September 2017, Case Materials, Vol. 11, p. 101).*

Legislation and the development of the state budget is not a formal process, in which only compliance with certain procedures should be ensured. This process should be aimed at reaching justice, increasing trust in the State of Latvia and the law. The law "On Solidarity Tax" was drafted, reviewed and discussed formally, since the focus had been placed on expanding the fiscal space as fast as possible and gaining more resources for the state budget, rather than examining constructive proposals and searching for the best possible alternative solutions. The *Saeima* has abided by the procedure of legislation but has done that formally, following the letter and not the spirit of the *Satversme* (*see: Meļķisis E. Likuma burts, likuma gars, Satversmes tiesa. Satversmes tiesas pirmais spriedums. Sprieduma teksts, atsauksmes, analīze, vērtējumi. Rakstu krājums. Rīga: LU žurnāls „Latvijas vēstures fonds", 1998, 42. lpp.*). The developed legal norms are a simplified answer to the question on how to expand the fiscal space and increase the amount of state budget resources. The *Saeima* has not examined, substantially, how this tax would impact Latvia's competitiveness and would facilitate sustainable development. The developed solution for administering the solidarity tax is aimed at fast and inexpensive tax collection rather than a fair

distribution of the tax burden among various groups of persons and, thus, substantially, is not aimed at reaching long-term goals and promoting the general public welfare.

In a democratic state governed by the rule of law, there are very few cases, where significant procedural violations have been made because the norms of the *Satversme* and the principle of justice guide the legislator step by step. Therefore the legislator is able, almost always, to abide by the letter of the *Satversme* in the process of legislation. However, due process of legislation is such process that is oriented towards adoption of a good law. By good legislation the sovereign's will is implemented in such a way as to promote trust in Latvia and the law. A formal approach to the process of legislation will never succeed in creating a good law.

The law "On Solidarity Tax" cannot be considered as being a model of good legislation because it was adopted in haste, without due consideration. Although the *Satversme* does not envisage the minimum terms that should be met in order to consider that the process of legislation is aimed at adopting a good law, the legislator's decisions in the field of taxation policy, nevertheless, should be such as to allow persons to plan their economic activities reasonably. The usual practice in Latvia shows that the changes to the taxation regulation become known only a couple of weeks before they enter into force. Likewise, the principles of protecting legal certainty and legitimate expectations cannot be considered as being formal (*see, for example, Judgement of 25 October 2004 by the Constitutional Court in case No. 2004-03-01, Para 9.2.*). These principles require ensuring such transition to the new legal regulation that would allow persons to understand their rights and obligations and also to seek advice of a lawyer or an expert of the field and, thus, verify the correctness of their conclusions (*see Para 25.3. of the Judgement*).

The principle of protecting the legal certainty and the legitimate expectations are of particular importance in the field of taxation policy because persons must not only be aware of the scope of their rights and obligations but also should be able to plan their economic activities for the duration of several

taxation periods. Hence, the principle of timeliness in the field of taxation policy requires the legislator to introduce reforms to the taxation regulation considerable time before the taxation period begins, so that any person, in particular, a person engaged in commercial activities, could prepare for the new regime of paying the taxes.

Thus, in the future, the Constitutional Court should integrate in its case law findings on reasonable *vacatio legis*. This principle envisages separating the date when a legal act enters into effect from the date, when this legal act is promulgated, applying *vacatio legis (see, for example: Prokop K. The Principle of Proper Legislation in the Republic of Poland. In: The Quality of Legal Acts and its Importance in Contemporary Legal Space. Riga: University of Latvia Faculty of Law, 2012, p. 370*). The basic principle of *vacatio legis* included in Article 69 of the *Satversme* provides that a law enters into force within fourteen days following its promulgation, unless another term has been set in the law itself (*see more: Akmentiņš R. Likumu un rīkojumu spēkā nākšanas laiks Latvijā. Jurists, 1932. gada 9. janvāris, Nr. 1*). It is the shortest admissible term that gives persons the possibility to prepare for the expected changes in the legal regulation. In the case of changes to the tax regulation or of other significant reforms, *vacatio legis* should be such that would allow persons to prepare appropriately for the new legal reality, and, in terms of time, it should be at least several times longer than the shortest admissible term.

Thus, the law "On Solidarity Tax" cannot be considered as being a law adopted in due procedure.

Justice of the Constitutional Court D. Rezevska