A Dangerous Precedent for Minority Rights: the Latvian Constitutional Court's Ruling on Minority Schools

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01.05.2019 doi: 10.17176/20190517-144117-0

On 23 April 2019, the Constitutional Court of Latvia delivered its judgment in the case on minority schools. This judgment might become a dangerous precedent for the rights of persons belonging to minorities under the Union values enshrined in Article 2 TEU.

Schools with instruction in languages other than Latvian (the sole official language according to the Constitution) predate the independence of the Republic of Latvia. The first law on minority schools of 1919 even predated the Constitution. It created a system of public minority schools governed with the participation of relevant ethnic communities (as of June 1920, 72.6% of the population were ethnic Latvians, 5.7% – Russians, 5.0% – Jews, 4.1% – Belarusians, 3.6% – Germans, 3.3% – Poles). This progressive practice, however, had been suppressed after the authoritarian coup in 1934.

After the Soviet occupation and annexation, a dualist school system was established (teaching either in Latvian or in Russian). The ethnic composition of the population has also changed significantly due to the Holocaust, the repatriation of ethnic Germans in 1939 and migration from other parts of the former USSR. According to the latest census of 2011, 62.1% of the population are ethnic Latvians, 26.9% – Russians, 3.3% – Belarusians, 2.2% – Ukrainians, 2.2% – Poles. 56.3% speak mostly Latvian at home, 33.7% – Russian.

There were several reforms aimed at ensuring bilingual teaching in public schools after the restoration of independence. The new reform approved by the Parliament on 22 March 2018 (and to enter into force in 2019-2021) goes much further. First, in secondary schools (10th-12th grade) only Latvian will be allowed for teaching; however, schools will be allowed to teach minority languages and subjects related to minority identity and integration, without exceeding a maximum amount of lessons. Second, in primary schools a mandatory minimum limit of teaching in Latvian is introduced: 50% for the 1st-6th grade, 80% for the 7th-9th grade. Finally, the same requirements are applicable to private schools, which have enjoyed full discretion in choosing their language up to now. There are exceptions for schools established by international agreements, as well as for schools providing instruction in the official languages of the EU in order to ensure learning of these languages.

A group of opposition MPs contested the amendments to education laws before the Constitutional Court. In their opinion, the reform did not comply with the right to education, the prohibition of discrimination and the rights of persons belonging to minorities, as enshrined in the Constitution and international treaties.

The Court decided to postpone its judgment on private schools, as in parallel several persons submitted individual applications in that regard. That judgment is expected later this year.

As regards public schools, the Court discontinued the proceedings in respect of the right to education. In the Court's opinion, there was no interference with this right, as the right to education does not encompass the right to choose the language of instruction.

More interesting is the Court's approach to the prohibition of discrimination. In the case related to introduction of bilingualism in minority secondary schools of 2005 the Court stated that the principle of equality mandates equal treatment only in respect of persons who are in equal and comparable circumstances; this principle allows and even requires different treatment of persons in different circumstances. Back then the Court agreed with the applicant that a person belonging to a national minority is not in the

same situation as a person belonging to ethnic majority. Now the position of the Court is different: It sees no reason to conclude that persons whose native language is not the official language would have a right to demand different treatment in the public education system. It is regrettable that Court has not explicitly explained this change of its case law. The only relevant constitutional change was the adoption in 2014 of the new preamble to the Constitution. Its first paragraph, quoted by the Court, stipulates that the State of Latvia "has been established to guarantee the existence and development of the [ethnic] Latvian nation, its language and culture throughout the centuries".

This conclusion allowed the Court to avoid discussing the impact of the reform on the quality of education on minority schools, which was a cornerstone of the judgment in 2005. Now the Court simply denies that the proportion of language use is relevant, since it didn't consider different treatment necessary at all. Likewise, this approach has made it possible to avoid discussing whether a new reform is necessary in democratic society (for example, by analyzing the official language proficiency of minority school pupils). As a result, the verdict finds no violation of the prohibition of discrimination.

Another interesting point was the analysis of obligations under international treaties. The Court admitted that the UN Committee on the Elimination of Racial Discrimination and Advisory Committee for the Framework Convention for the Protection of National Minorities have expressed strong criticism of the changes. Nevertheless, it dismissed this criticism almost without explanation, just indicating that the expert committees might not have possessed all relevant information. The Court has not found any violation of minority rights either.

The Court's statement that persons belonging to national minorities do not have the right to demand differential treatment (at least in public domain) is quite revolutionary. It is not clear which implications it might have for the prohibition of indirect discrimination (e.g. in Directive 2000/43/EC). Does it mean that the new preamble to the Constitution really legitimize any measures related to the strengthening of the role of the official language, even if they negatively affect minorities?

The Court refers repeatedly to the principle of good faith in the interpretation of international treaties. After the ratification of the Framework Convention by Latvia in 2005, the Parliament has only limited minority rights rather than expanded them, but the Court still does not see any issue of good faith. And in particular, the outright dismissal of the criticism expressed by the expert committees might become a universal reply if all it takes is referring to the lack of information at the experts' disposal. It is also not clear why the Court totally ignored the opinion of the Venice Commission regarding very similar reforms in the education system of Ukraine.

The answer to these questions may be found in paragraph 23.2 of the judgment: 'The exercise of minority rights must not be aimed at the segregation of society or jeopardizing the unity of society'. The mere fact that education in minority languages according to the wishes of national minorities means segregation would be a novelty for the international protection of minority rights. One can only imagine the reaction provoked by such a statement in Slovakia, Romania or Finland. Secondly, this idea can also become a universal reservation against the respect for any kind of minority rights: the unity of society is above all.

Overall, the judgment in general could indicate that linguistic diversity in Latvia is accepted in private space (the judgment on private schools is still awaited), but not in public. It seems that the new preamble to the Constitution, which has been quoted several times by the Court, has become the basis for revising the interpretation of minority rights. Time will show whether a democratic legislator will be able to cope better with the linguistic unification of the public space than the authoritarian leader Kārlis Ulmanis in 1934-1940.

The judgment of the Court will certainly be followed by cases before the ECtHR. However, there is less scope

for this, as the European Convention on Human Rights does not protect minority rights explicitly. One could submit a complaint to the European Commission regarding a breach of the prohibition of indirect discrimination – even if education is not within the EU competence, the prohibition of discrimination is binding on the Member States also in the field of education. But it should be borne in mind that the Commission has full discretion in infringement cases. Still, the rights of persons belonging to minorities remain among the Union values enshrined in Article 2 TEU. Perhaps in the long run the federalization of the European Union would lead to a transfer of competences related to minority issues. If a Member State refuses to guarantee its citizens' rights, the Union must step in.

The author has advised pro bono the group of national MPs who had submitted the application in the case described. Responsibility for the information and views set out here lies entirely with the author.

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SUGGESTED CITATION

Dimitrovs, Aleksejs: A Dangerous Precedent for Minority Rights: the Latvian Constitutional Court's Ruling on Minority Schools, Verfassungsblog, 01.05.2019, doi: 10.17176/20190517-144117-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20190517-144117-0.