Riga and Venice on a Collision Course

On the Controversial New Constitutional Court Decisions on Minority Languages in Latvia

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After the judgment on minority languages in public schools more than a year ago, the Latvian Constitutional Court has passed several other judgments regarding the restrictions on using such languages in education. A recent opinion of the Venice Commission raises questions about the quality of analysis from the point of view of international law.

According to the latest census of 2011, 62% of the population in Latvia are ethnic Latvians, 27% Russians, the rest are Belarusians, Ukrainians, and Poles. 56% speak mostly Latvian at home, 34% Russian. After recent education reforms in Latvia, in secondary schools (10th-12th grade) only Latvian is allowed for teaching; however, schools are allowed to teach minority languages and subjects related to minority identity and integration, within a maximum amount of lessons. In primary schools, a mandatory minimum limit of teaching in Latvian has been introduced: 50% for the 1st-6th grade, 80% for the 7th-9th grade. The requirements apply also to private schools, which up to now have enjoyed full discretion in choosing their language. 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 in-depth knowledge of these languages.

Minority languages in private schools

The judgment on public schools was first in the series. It was delivered in April 2019, and no violations had been found (for criticism, see here and here). The judgment of 13 November 2019 mostly extrapolates to private schools the conclusions from this earlier case. The Constitutional Court found no problem whatsoever and declared the law in full compliance with the principle of good law-making, the right to education, the rights of national minorities and the prohibition of discrimination – as enshrined in the Constitution and international treaties (here, here or here).

Unlike the judgment on public schools, this one split the Court. Two judges published dissenting opinions. Justice Neimanis made a clear distinction between public and private schools; in his opinion, the state should not interfere too much in the work of private schools. The Justice concluded that the language reform was not compliant with the right to education.

The dissenting opinion by Justice Kučs is even more interesting. He considers that the principle of good law-making has not been respected: the legislator has not based its observations on a qualitative analysis of the potential impact of the education reforms or changes implemented so far on the quality of education. The obligation to consider and analyse the Advisory Committee's instructions on the interpretation of the legally binding Framework Convention for the Protection of National Minorities regarding the assessment of the language of instruction and quality standards had also not been fulfilled. In addition, the Justice pointed out that the legislator has never analysed the situation specifically in private schools. He also concluded that the prohibition of discrimination had been violated, as regards the distinction between the official languages of the EU and other languages; in fact, educational establishments providing education in the minority languages that are at the same time EU languages (e.g., Polish or Lithuanian), have the same objective as establishments providing education for other minorities. It seems, some of

Justice Kučs' conclusions could equally apply to the case regarding public schools.

Higher and pre-school education

Apart from the schools, the Constitutional Court also had to address the use of languages in pre-school and tertiary education. In the judgment of 11 June 2020 the Court assessed whether the extension of the language restrictions previously applicable to public higher education institutions to private schools and colleges was constitutional. According to the Law on Higher Education Institutions, the programmes in the languages other than Latvian are only available for foreign students and language and cultural studies; EU languages can be used in EU cooperation programmes and joint programmes. Beyond this, Latvian students may only study 20% of the curriculum in the official languages of the EU, the rest should be in Latvian (exams and bachelor's and master's thesis can only be in Latvian).

The Court did not question the legitimate aim and appropriateness of these restrictions in respect to private schools. Nevertheless, it concluded that there could be alternative solutions – for example, individual exceptions for private universities to teach in other languages if they ensure high quality. Although the restrictions were found to be non-compliant with academic freedom and autonomy (protected by the rights to education and scientific research under the Constitution), they remain in force – the legislator has to review the law until 1 May 2021.

The case was split into two parts, and the part regarding the right to property and EU law will continue – in that part a request for a preliminary ruling addressed to the CJEU is possible in July.

Finally, on 19 June 2020 the Constitutional Court delivered its judgment concerning kindergartens. According to the government's Regulations, since 1 September 2019, in both public and private minority kindergartens for children from the age of five, the main means of communication during play-based lessons is Latvian, except for special activities for the learning of the minority language and ethnic culture. The Court concluded that this provision complies with the powers of the government, as well as with the right to education, the rights of national minorities and the prohibition of discrimination.

The Court and its critics

In all those cases the Constitutional Court relied substantially on its previous judgment on public schools, so what I wrote on that occasion fully applies here, too. However, some nuances should be mentioned.

Again, the Court does not explicitly explain the changes of its case law. In 2005, the Court recognized that it was necessary either to completely stop the funding of private schools from the state or municipal budget, or to provide such funding without discrimination, regardless of the language of instruction. It concluded that it is possible to choose other means to achieve the legitimate aim – not by denying funding, but by specifically supporting the teaching of the official language in minority private schools. It is not clear why after 15 years, when proficiency in the official language has undeniably improved, the Court approves of more intrusive restrictions of fundamental rights: regulating not only the funding of private establishments, but also the use of languages.

Article 13(1) of the Framework Convention for the Protection of National Minorities explicitly provides for the right of persons belonging to national minorities to set up and manage private educational and training establishments. However, in the case on private schools the Constitutional Court mentions this norm only in passing and referring only to the Explanatory Report. Concerns mentioned in the First Opinion on Latvia of the Advisory Committee of the Framework Convention about the trend towards extending the obligation to use Latvian in private education go unnoticed.

The Advisory Committee also expressed concerns about recent reforms in the Third Opinion on Latvia; in response, in the case on kindergartens the Court stated that the Framework Convention does not impose any minimum proportion for the use of minority languages in education, and the views of the Advi-

sory Committee have to be adapted to the country-specific context.

The Court also dismissed quite easily the action letter by the Committee on the Elimination of Racial Discrimination and the letter of three UN Special Rapporteurs – as being based on their lack of comprehensive information. Overall, the Court seems to ignore the need to interpret international treaties in accordance with the Vienna Convention on the Law of Treaties and the standards of the International Law Commission.

A letter from Venice

Will this be noticed internationally? On 19 June 2020 the Venice Commission published its opinion on the recent amendments to the legislation on education in minority languages, in which it disagrees with the Constitutional Court on many important aspects. In principle, the Venice Commission considered that increasing the proportion of the use of Latvian in minority education programmes to improve proficiency of pupils attending such programmes is a legitimate aim. Nevertheless, it suggested to return to the previous "bilingual approach" in play-based lessons in kindergartens (in contrast with the judgment of the Constitutional Court delivered on the same day), to guarantee that public schools offer a minority education programme whenever there is sufficient demand for it, and to constantly monitor the quality of education received by pupils attending minority education programmes in order to ensure that the changes introduced into the education system do not undermine the quality of education and disproportionately reduce the opportunity for pupils to have good command of their minority language. According to the Venice Commission, the education authorities should also provide schools implementing minority education programmes with the necessary teaching materials and the teachers of these schools with adequate opportunities to continue to improve their Latvian and minority language skills in order to ensure their ability to implement the study process in Latvian, minority language and bilingually.

The most far-reaching recommendations concern private education establishments – again in contrast with the approach of the Constitutional Court. The Venice Commission suggests to exempt private schools from the mandatory proportions of the use of Latvian and to consider enlarging the possibilities for persons belonging to national minorities to have access to higher education in their minority language, either in their own higher education institutions, or at least in state higher education institutions.

Minority rights

It remains to be seen whether the legislator will consider the recommendations, or the Venice Commission's opinion will only be consulted in forthcoming cases in the European Court of Human Rights. Two aspects are especially worrying from the perspective of minority rights, though.

First, the application of restrictions to private educational establishments: as far back as 1935, the Permanent Chamber of International Justice noted that equality may require different treatment of majority and minorities. Since then, there was a wide agreement that the abolition of minority private schools would destroy equality of treatment by depriving minorities of their institutions, which cannot be replaced by government institutions.

Second, the emphasis on the necessity to communicate in the official language: the Constitutional Court pointed out that the ability of all persons belonging to ethnic minorities to communicate freely on any matter in the official language is invaluable in the context of preserving the democratic order and equally important to persons belonging to ethnic minorities and society as a whole, to communicate with the state. Thus, the Court actually allows state intervention not only to ensure communication in the official language with the state or with other persons according to the Official Language Law (for example, with consumers), but also with other persons beyond the scope of the Official Language Law. Moreover, the required level of proficiency in the official language is no longer measured against the performance of professional and official duties. The bar is set much higher:

"to communicate freely on any matter". Is such an intervention really legitimate in a liberal democracy? Do minority languages also have a place in public discourse, or should their use be considered an anomaly? And most important – it is important to establish clear limits for the state intervention. Otherwise the use of minority languages in private media, on the Internet, in unofficial communication in public might become the next targets in the fight against multilingualism.

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