

Schools as the battlefield for enhancing national unity: curtailing minority language rights

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Schools as the battlefield for enhancing national unity: curtailing minority language rights in education

Valiullina and Others v Latvia (56928/19, 7306/20 and 11937/20) and Džibuti and Others v Latvia (225/20, 11642/20 and 21815/20)

European Court of Human Rights (Chamber): Judgments of 14 September 2023 and 16 November 2023

Background

The cases of *Valiullina and Others v Latvia* and *Džibuti and Others v Latvia* both essentially concern the question of minority language rights in education. Since the Russian occupation, the Latvian education system provided both for education in Latvian, the state language, and for education in Russian in so-called minority schools. After a gradual reform of the education system decreasing the use of Russian in general education, legislative amendments in 2018 significantly increased the proportion of subjects that had to be taught in Latvian in both public (*Valiullina*) and private (*Džibuti*) schools. As a consequence, by the 2021/2022 school year, 50% of classes in the lower school grades (1–6) had to be taught in Latvian, 80% in the middle grades (7–9), and 100% in the higher grades (10–12). Although primary schools remained authorised to combine a primary education programme with a minority education programme following these changes, secondary schools no longer had this authorisation. These measures were justified by the need to strengthen proficiency in the state language. All applicants use Russian as the main language within the family and received education in a programme for minorities, where part of their curriculum was taught in Russian. They argued that the legislative amendments infringed their rights under art.8, art.2 of Protocol No. 1 taken alone and art.14 read in conjunction with art.2 of Protocol No. 1 due to the reduction of the availability of instruction in their mother tongue.

Held

- (1) The claim under art.8 was inadmissible due to non-exhaustion of domestic remedies.
- (2) The complaint under art.2 of Protocol No. 1 to the Convention was rejected for being incompatible *ratione materiae* with the Convention, which does not guarantee a right to education in a language of choice. The Court hereby reaffirmed the principles that had already been laid down in the 1968 *Belgian linguistic case*. The fact that the majority of Council of Europe member states have ratified the Framework Convention on the Protection of National Minorities, which includes specific educational rights for minorities, does not impact the scope of art.2 of Protocol No. 1.
- (3) There was no violation of art.14 read in conjunction with art.2 of Protocol No. 1 of the Convention. Although the applicants argued that discrimination existed on grounds of both their language and their ethnicity—as the majority of ethnic Latvians speak Latvian and ethnic Russians and non-Russian minorities speak primarily Russian—the Court chose to examine the case solely with respect to language as a possible ground for discrimination. It found that Russian-speaking pupils are in a relevantly similar situation to Latvian-speaking pupils, but they were treated differently as the latter could pursue education in their mother tongue and the former's access to such education was being significantly decreased. The main aim of the educational reform was to improve proficiency in the State language. The Court accepted that this aim was legitimate given the historical factors which led to the restriction of the use of Latvian for over 50 years and the Latvian language's constitutional value. A second legitimate aim pursued by the difference in treatment was “the principle of unity of the education system in order to facilitate equal access for pupils to the State education system, and, from a broader perspective, the need to eliminate the consequences of the segregation in education that had existed under the Soviet regime”.¹ These legitimate aims were equally valid in the case of private schools. The Court accepted the Latvian Constitutional

Court's finding that private schools formed part of the state education system and they therefore had to comply with the same rules concerning the language of instruction as public schools.

(4) Lastly, the Court found that the difference in treatment was proportionate. The State had to ensure better knowledge of Latvian so that Latvian-speaking individuals could regain their right to use Latvian in all spheres of daily life and simultaneously guarantee that minority groups could still learn their language and preserve their culture and identity. The legislative amendments, although significantly restricting the use of Russian as the language of instruction, had constituted a gradual and foreseeable change and did not discard its use entirely. In the Court's view, "questions pertaining to the need to protect and strengthen the State language go to the heart of the constitutional identity of the State",² and the ECtHR only has marginal powers of review of the measure. In addition, Latvia's historical context of Russification policies and the creation of a segregated education system justified the country's current measures to protect the Latvian language and ensure the unity of the education system. Furthermore, the wider framework of international human rights with respect to education, including art.14 of the Framework Convention and art.13 of the International Covenant on Economic, Social and Cultural Rights, does not contain an unequivocal principle requiring minorities to be provided education in their mother tongue within the general education system. Also concerning the right to education, States therefore have a wide margin of appreciation in organising their education systems. The State can regulate private schools so as to ensure that they provide a sufficient quality of education. As Latvia has maintained a possibility for Russian-speaking pupils to learn their language and preserve their culture and identity, the State has not overstepped this margin of appreciation. The measures that increased the use of Latvian as the language of instruction in the education system were objectively and reasonably justified.

(5) In the case of *Džibuti and Others v Latvia*, the applicants made two additional claims of discrimination under art.14 in conjunction with art.2 of Protocol No. 1, both of which were rejected by the Court.

Analysis

The cases of *Valiullina and Others v Latvia* and *Džibuti and Others v Latvia* are rich cases which merit a more thorough analysis than can be provided here. The current analysis will limit its focus to only three aspects of the cases: (i) the difference between public and private schools, (ii) the question of a right to education in minority languages, and (iii) the legitimate aim of enhancing the unity of the education system and eliminating the consequences of past segregation in education. A discussion of other relevant aspects such as how the Court uses constitutional identity as a trump for individual rights and the case's rich history in terms of Russian occupation and the denial of citizenship to the Russian-speaking minority can be found elsewhere.³

Are private schools public schools?

The cases of *Valiullina* and *Džibuti* are greatly similar and only meaningfully differ in one respect, namely that *Valiullina* is concerned with public schools and *Džibuti* with private schools. Although at first sight this seems to constitute a meaningful difference which prompted two separate judgments, the ECtHR comes to the same conclusion in both cases, following largely equivalent reasoning. It only briefly discusses the difference between public and private schools, quickly coming to the conclusion that for the content of the legislative amendments at hand this difference is irrelevant.

In effect, the term "private school" can encompass a number of school types, and the basis of the distinction between public and private schools differs across different countries. For instance, private schools can be truly independent schools which receive no funding or accreditation of the curriculum from the state. Private schools can also be schools which are (largely) privately funded but depend on accreditation by the state. In such cases, the private school has the freedom to organise its own educational process, but this education needs to comply with a number of quality standards. Lastly,

private education can be equivalent to public education. In this situation, private institutions comply with the same regulations as public institutions and are highly subsidised, but the education is not organised by the state itself.⁴

The Latvian education system can be considered to fall under the last category. Private schools in Latvia are therefore largely equivalent to public schools. In contrast to systems where private schools enjoy more educational freedom, in a system of equivalence it is completely fair to consider that private schools form part of the general education system and the state can impose the language of instruction used in such schools. Although the Court omitted to comprehensively clarify why private schools in Latvia could be considered to form part of the general education system and should be stringently regulated, the conclusion it came to is therefore warranted.

Right to education in minority languages

Central to both judgments is the Court's affirmation that the European Convention on Human Rights entails no right to education in a language of one's choice. This principle was first established in the 1968 *Belgian linguistic case* and persists to date. The Court's reasoning in coming to this conclusion is strong and well-substantiated. In affirming the principle, the Court takes into account developments in international human rights law and interpretations of the right to education in different treaties. Indeed, as the Court affirms, no international norm unequivocally establishes the right of a minority to receive education in their mother tongue. The Framework Convention on the Protection of National Minorities comes closest in art.14, containing an obligation on states parties to ensure adequate opportunities for minorities being taught the minority language or for receiving instruction in this language—an obligation that cannot prejudice the learning of the official language or teaching in this language. Even this minority-sensitive provision therefore does not mandate a right to education in the minority language. In any event, as the Court rightly notes, the scope of art.2 of Protocol No. 1 is narrower than that of the aforementioned provision in the Framework Convention.

The opposition between the parties' views on this question shows that different views on the central function of education can be held. Education can be seen as a process of transferring knowledge, skills, and values from one generation to another.⁵ In this process the individual's fullest development can be seen as of central importance. This is the applicants' view on education in the current case: implicit in their argument is that education should serve the central aim of developing an individual to its fullest potential. Research shows that mother tongue education best serves this aim.⁶ The respondent State, on the other hand, considers the transfer of the values, knowledge, and skills necessary to function as a proper citizen in the Latvian society to be of central importance. Not the individual's needs, but society's needs are put to the fore.⁷ This leads to a clear clash of views. Faced with these contrasting views, the Court takes a hands-off approach, granting a wide margin of appreciation to the State. Although human rights are typically seen as individual rights, education's function of creating a feeling of unity in society and thereby fostering democracy and peace cannot be underestimated. The question, however, thereby remains whether the current assimilationist approach by Latvian authorities is the best way to achieve this aim.

Unity of the education system and consequences of past segregation

In the cases at hand, one of the two legitimate aims raised by the government to justify the education reform is the need to eliminate the consequences of the segregation in education that had existed under the Soviet regime. Some context is required to further investigate this aim. Under the Soviet regime, a segregated education system was created and assimilation ("Russification") policies were pursued by the Russian authorities. Due to these evolutions, the previously unitary Latvian education system had become a segregated education system, with Latvian-language schools where Russian was taught and Russian-language schools. After the occupation period, Latvia's response was to keep the possibility of Russian language education but to include the teaching of Latvian, thereby recognising the diversity that had stemmed forth from the occupation period. Since then, Latvia has slowly been taking steps to

go back to a unitary system where Latvian is the language of education, thereby pursuing the aim of eliminating the consequences of the segregation in education that had existed under the Soviet regime.

However, on closer scrutiny, returning to a unitary education system such as existed before the Soviet occupation does not appear to be a defensible aim. Latvia's history of Soviet occupation cannot be erased and continues to have a clear impact, for instance in terms of demographics. The country's population has greatly diversified.⁸ In the past, during and after the occupation, rights have effectively been granted to the Russian-speaking minority. By requiring all pupils to receive their education primarily in Latvian now, Latvia is replacing an education system which recognises the—unsolicited—reality of diversity with one that embraces assimilation. As the Court has held in previous judgments on segregation of Roma children, combatting segregation may constitute a positive obligation under the Convention.⁹ It logically follows from this that the aim of combatting the consequences of segregation or its vestiges is not only a legitimate aim; it also tallies with the aims of the Convention itself. The Court states that the case at hand differs from the cases in which it established that combatting segregation may constitute a positive obligation.¹⁰ Nevertheless, in those cases, although the aims claimed to be pursued by the national authorities were to facilitate access to education and to tailor education to pupil's specific needs, the effects of these policies were segregation and exclusion.¹¹ In the cases of *Valiullina* and *Džibuti*, the national authorities claim to pursue the aims of combatting segregation in order to secure equal chances to all pupils—and all Latvian-speaking citizens.¹² Contrary to what the Court holds, the aims of the measures in the earlier segregation cases and in this case are therefore similar, namely securing equal chances to all pupils. However, simply because securing equal chances is one of its official aims does not necessarily mean that it is also the measures' effect. The Court recognised this in the Roma segregation cases. In the current case, however, the Court fails to scrutinise the actual effect of the legislative reform, which replaces a recognition of diversity with a policy aiming at assimilation by removing already recognised language rights in education under the guise of eliminating segregation.

Conclusion

In the cases of *Valiullina and Others v Latvia* and *Džibuti and Others v Latvia*, the ECtHR reaffirms that the Convention does not entail a right to education in a language of one's choice. In reaffirming this principle, it convincingly argues that although meaningful evolutions have taken place concerning minority rights in education since 1968, these do not impact the interpretation of art.2 of Protocol No. 1 in this matter. However, other parts of the judgment are less worthy of praise. In its analysis of the claim of discrimination, it grants a wide margin of appreciation to the State. As a consequence, the Court fails to meaningfully engage with the question of whether the current legislative amendments have the actual effect of securing equal chances to all pupils, or whether this purported aim is rather a façade by the government to ensure that it can pursue its assimilationist policies and "Latvianise" a culturally and linguistically diverse society in pursuit of a long-lost past of national unity.

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¹ *Valiullina and Others v Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), judgment of 14 September 2023 at [201]; *Džibuti and Others v Latvia* (App. Nos. 225/20, 11642/20 and 21815/20), judgment of 16 November 2023 at [134].

² *Valiullina and Others v Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), judgment of 14 September 2023 at [208].

³ S. Ganty and D. Kochenov, “Hijacking Human Rights to Enable Punishment by Association: Valiullina, Džibuti and Outlawing Minority Schooling in Latvia” (*Strasbourg Observers*, 23 November 2023) <<https://strasbourgobservers.com/2023/11/23/hijacking-human-rights-to-enable-punishment-by-association-valiullina-dzibuti-and-outlawing-minority-schooling-in-latvia/>>; S. Ganty and others, “Constitutional Identity vs. Human Rights: The ECtHR’s Bizarre Turn in Three Latvian Cases” (*Verfassungsblog*, 21 December 2023) <<https://verfassungsblog.de/constitutional-identity-vs-human-rights/>>.

⁴ A. Zancajo and others, “The Instrumentation of Public Subsidies for Private Schools: Different Regulatory Models with Concurrent Equity Implications” (2022) 21 *European Educational Research Journal* 44, 51–55.

⁵ K.D. Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (International Studies in Human Rights, Brill | Nijhoff, 2006) 18.

⁶ See *Valiullina and Others v Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), judgment of 14 September 2023 at [93]; S.F. Shaeffer, “Mother Tongue and Early Childhood Care and Education: Synergies and Challenges” (UNESCO 2020) 11–14.

⁷ See the interpretation of constitutional right to education in *Valiullina and Others v Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), judgment of 14 September 2023 at [46].

⁸ *Valiullina and Others v Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), judgment of 14 September 2023 at [6]–[9].

⁹ See *X and others v Albania* (App. Nos. 73548/17 and 45521/19), judgment of 31 May 2022 at [84]; *Szolcsán v Hungary* (App. No. 24408/16), judgment of 30 March 2023 at [55].

¹⁰ *Valiullina and Others v Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), judgment of 14 September 2023 at [201].

¹¹ *Oršuš and Others v Croatia [GC]* (App. No. 15766/03), judgment of 16 March 2010 at [157]; *DH and others v the Czech Republic [GC]* (App. No. 57325/00), judgment of 13 November 2007 at [197]–[198].

¹² *Valiullina and Others v Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), judgment of 14 September 2023 at [170]–[171], [201].