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S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	5-17-8
Date of judgment	9 November 2017
Composition of court	Chairman: Priit Pikamäe; members: Hannes Kiris, Indrek Koolmeister, Jüri Pöld and Tambet Tampuu
Case	Review of constitutionality of § 83(1) of the Basic Schools and Upper Secondary Schools Act
Basis for proceedings	Application of 15 May 2017 by Jõelähtme Rural Municipal Council
Hearing	Written procedure

OPERATIVE PART

- 1. To grant the application of 15 May 2017 by Jõelähtme Rural Municipal Council.**
- 2. To declare unconstitutional the failure to pass legislative acts laying down state budget financing for obligations imposed on a local authority under § 83(1) of the Basic Schools and Upper Secondary Schools Act where the local authority has enabled all its residents on the population register to study at its municipal school.**

FACTS AND COURSE OF PROCEEDINGS

1. On 9 June 2010, the Riigikogu adopted the Basic Schools and Upper Secondary Schools Act, which entered into force on 1 September 2010.

2. By resolution No 466 of 11 May 2017, Jõelähtme Rural Municipal Council decided to lodge with the Supreme Court an application to declare unconstitutional the situation where the Republic of Estonia had failed to lay down regulatory arrangements to ensure state budget funding for fulfilling the duty laid down in § 83(1) of the Basic Schools and Upper Secondary Schools Act (BSUSSA) if the Supreme Court finds that that duty is a state-level duty. Alternatively, if the Supreme Court finds that the duty laid down in § 83(1) of the BSUSSA is not a state-level duty, Jõelähtme Rural Municipal Council requested a declaration that § 83(1) of the BSUSSA is unconstitutional and that it be repealed.

REASONS PROVIDED BY JÕELÄHTME RURAL MUNICIPAL COUNCIL

3. Section 83(1) of the BSUSSA obliges a local authority to bear costs related to pupils shown on the population register as residing within its boundaries but who attend another local authority's municipal school. This obliges local authorities to fulfil a state-level duty for which funds should be provided from the state budget as required by § 154(2) (second sentence) of the Constitution. However, no necessary regulatory provisions exist to cover this expenditure from the state budget.

4. Section 37 of the Constitution requires local authorities to provide free-of-charge general education and to maintain educational institutions to that end.

5. Under § 6(2) of the Local Government Organisation Act (LGOA), the functions of local authorities include arranging to maintain basic schools and upper secondary schools in a rural municipality or city if these are owned by the local authority. Under the same provision, partial payment of certain expenses of these institutions from the state budget or other sources may be prescribed by law. According to § 1(2) of the BSUSSA, the BSUSSA also regulates the activities of municipal schools administered by rural municipality or city authorities. Section 10(1) of the BSUSSA obliges a local authority to enable individuals residing within its administrative boundaries to receive a basic education. Under § 7(2) cls 2) and 3) of the Republic of Estonia Education Act, local authorities establish, reorganise and close municipal educational institutions under the procedure prescribed by legislation, and ensure that economic support and financing is provided for municipal educational institutions within their administrative jurisdiction.

6. The Supreme Court Constitutional Review Chamber in para. 55 of the judgment in constitutional review case No 3747126714 held that the financial obligation of local authorities under § 37 of the Constitution relates to municipal schools and a local authority is required to uniformly enable everyone to attend a municipal school. In para. 59 of the same judgment, the Constitutional Review Chamber held that arising from § 37(2) of the Constitution a local authority is required to enable individuals required by law to attend school and who reside within its administrative boundaries to receive a basic education in a municipal school. If a local authority has enabled all individuals required by law to attend school and residing in that local authority area to receive a basic education through municipal schools, it has complied with its public duty. Even though in the judgment cited the Supreme Court assessed the constitutionality of § 22² of the Private Schools Act, the position expressed therein concerning the duties of local authorities to enable individuals to receive a basic education is also relevant for assessing the constitutionality of § 83(1) of the BSUSSA. In the opinion of the municipal council, the Supreme Court judgment cited above demonstrates that the functions of a specific local authority in ensuring basic education relate to maintaining the local authority's own municipal schools. A local authority is not required to contribute to covering the maintenance costs of municipal schools of other local authorities. This is also clearly evident from the provisions of the LGOA, BSUSSA and the Education Act cited above which link arranging to maintain basic schools and upper secondary schools specifically to a local authority's own municipal schools. It should also be kept in mind that a local authority has no control over opening, closing or reorganising

municipal schools in another local authority.

7. Section 83(1) of the BSUSSA imposes on local authorities a universally applicable duty to contribute to covering expenses related to another local authority's municipal school regardless of whether the first local authority has fulfilled its duty to ensure basic education through its own municipal schools. If a local authority has fulfilled this duty through its own schools, then imposing on that local authority a duty to contribute to covering the expenses of maintaining another local authority's municipal school is neither substantively justified nor proportionate.

8. The original text of the draft BSUSSA did not contain a universal duty to contribute to covering the operating expenses of a municipal school in another local authority. The reasons why the initially planned regulatory provisions were replaced with the current wording of § 83(1) in the course of proceedings of the draft BSUSSA are not evident from the materials of the proceedings of the Draft Act.

9. The duty arising from § 83(1) of the BSUSSA fails to take into account whether a local authority has fulfilled the duty under § 37 of the Constitution through its own municipal school. Thus, in cases where a local authority has fulfilled the duty arising from § 37 of the Constitution, this amounts to an additional financial obligation imposed on a local authority by the state. However, this is not a duty of local authorities arising from § 37 of the Constitution; rather, it is a duty assumed by the state but imposed on local authorities to fulfil.

10. The fact that § 83(2) of the BSUSSA enables local authorities to agree on a different procedure than that laid down in the Act to contribute to covering the operating expenses of municipal schools is irrelevant. Despite this opportunity, § 83(1) of the BSUSSA nevertheless lays down a clear obligation for local authorities to contribute to covering expenses and does not relieve a local authority from the duty to contribute to financing another local authority's school.

11. Section 154(2) (second sentence) of the Constitution stipulates that funds to cover expenditure related to state-level duties imposed by law on a local authority are provided from the national budget. Covering the relevant expenses from the state budget must be legally regulated, but the BSUSSA does not contain the relevant regulatory provisions. On that basis, absence of legal regulation for allocating state budgetary resources to fulfil a state-level duty imposed on local authorities under § 83(1) of the BSUSSA contravenes § 154(2) (second sentence) of the Constitution.

12. If the Supreme Court finds that the duty laid down in § 83(1) of the BSUSSA is not a state-level duty, then § 83(1) of the BSUSSA must be declared unconstitutional and repealed because it disproportionately interferes with the right of local authorities to decide local issues independently.

13. The municipal council relies on the premise that the aim of laying down § 83(1) of the BSUSSA was first and foremost a desire to proceed from the interests of pupils and to enable pupils and their parents to choose another local authority's municipal school which better suits them. This aim can be considered legitimate in terms of constitutional guarantees of local authorities.

14. Since § 83(1) of the BSUSSA does not directly concern enabling pupils and their parents to choose another local authority's municipal school for study, the appropriateness of the regulatory provisions is questionable. The duty of local authorities arising from § 83(1) of the BSUSSA is also not appropriate for attaining its aim because it is only linked to a person's residence as shown on the population register. However, the data in the population register are often inaccurate and might not reflect a person's actual residence. Therefore, § 83(1) of the BSUSSA may lead to a situation where a financial obligation is imposed on a local authority in respect of a pupil who does not actually reside within the administrative boundaries of that local authority.

15. Since the duty to ensure free-of-charge general education is implemented through a local authority's own municipal schools, and a local authority cannot influence the opening, closing or operation of schools within

the boundaries of another local authority, a local authority must in any case maintain a sufficient number of municipal schools to ensure free-of-charge general education. The possibility that a certain number of pupils enrol at another local authority's schools does not relieve the local authority where they reside of this duty and related expenditure. A person attending a school in another local authority must still be able to enrol at a municipal school of the local authority where they reside if they so wish.

16. Therefore, paying expenses related to pupils enrolled at another local authority's municipal school does not involve saving expenses for the local authority but leads to duplication of expenses. This is particularly important in the case of local authorities located close to regional centres of gravity where a large number of pupils who actually reside in smaller local authorities may be studying. However, those smaller local authorities must still fulfil their duty to ensure free-of-charge general education through their network of municipal schools. Such duplication of expenditure means that a local authority can afford fewer expenses for other purposes, undermining fulfilment of its functions.

17. Since the entry into force of the current version of § 83(1) of the BSUSSA, every year Jõelähtme rural municipality has paid considerable sums to other local authorities, thus reducing its own capacity to use money to cover other expenses related to local issues. On that basis, the duty arising from § 83(1) of the BSUSSA disproportionately interferes with the constitutional guarantees of local authorities.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

18.-49. [not translated]

CONTESTED PROVISION

50. Section 83(1) of the Basic Schools and Upper Secondary Schools Act (RT I 2010, 41, 240; 16.06.2016, 8):

“(1) Other rural municipalities or cities contribute fully towards covering the operating expenses of a municipal school in proportion to the number of pupils enrolled at the school who according to the population register reside within the administrative boundaries of those rural municipalities or cities.”

OPINION OF THE CHAMBER

51. Jõelähtme Rural Municipal Council has lodged two alternative applications with the Supreme Court. The applicant seeks a declaration of unconstitutionality of the fact that the Republic of Estonia has failed to lay down regulatory provisions to ensure that the expenses incurred by local authorities in connection with fulfilling the state-level duty laid down by § 83(1) of the BSUSSA are covered from the state budget as prescribed by § 154(2) (second sentence) of the Constitution. If the Supreme Court finds that the duty laid down in § 83(1) of the BSUSSA is not a state-level duty, the Rural Municipal Council seeks a declaration of unconstitutionality and repeal of § 83(1) of the BSUSSA since this provision disproportionately interferes with the right of local authorities under § 154(1) of the Constitution to decide local issues independently.

52. The application by the Rural Municipal Council complies with the requirements of § 7 of the Constitutional Review Court Procedure Act and § 45(5) (second sentence) of the LGOA as well as the case-law of the Supreme Court (Supreme Court judgment of 10 March 2010 in case No 3?4?1?8?09 [1], para. 74; Supreme Court Constitutional Review Chamber judgment of 20 December 2016 in case No 3?4?1?3?16 [2], para. 81) and is admissible because the Rural Municipal Council seeks a declaration of unconstitutionality of failure to issue a legislative act laying down constitutional guarantees of local authorities, or alternatively a declaration of unconstitutionality and repeal of the legal provision, on account of a conflict with § 154(1) of the Constitution, and the application forms an appendix to a resolution adopted by a majority of votes of the members of the Rural Municipal Council.

53. Section 154(2) of the Constitution stipulates as follows: “Obligations may be imposed on a local authority only in accordance with the law or by agreement with the local authority. The funds to cover

expenditure related to state-level duties which have been imposed by law on a local authority are provided from the state budget.”

54. It follows from § 154(2) of the Constitution that if a state-level duty has been imposed on a local authority by law, the expenditure related to that duty must be covered from the state budget. Section 83(1) of the BSUSSA imposes on a local authority a duty to contribute to covering the operating expenses of another local authority’s municipal school.

55. In the opinion of the Chamber, first it is necessary to answer the question whether enabling basic education through another local authority’s municipal school, including contributing to covering its operating expenses, constitutes an essential function of a local authority. The answer to this question determines whether imposing on local authorities the duty laid down in § 83(1) of the BSUSSA also required the legislator to decide on financing this expenditure from the state budget in line with § 154(2) of the Constitution.

56. Under § 83(1) of the BSUSSA, a rural municipality or a city contributes to covering the operating expenses of another local authority’s school of general education in proportion to the number of pupils enrolled at the school and who are shown on the population register as residing within the administrative boundaries of the first rural municipality or city. This duty is matched by the right of a local authority that manages a municipal school to request another local authority to cover the operating expenses laid down in § 83(1) of the BSUSSA. In line with the second subsection of the same section, the Basic Schools and Upper Secondary Schools Act is followed in covering the operating expenses of a municipal school, unless otherwise agreed among the rural municipalities or cities. Section 83(2) of the BSUSSA rests on the premise that if pupils shown on the population register as residing within a local authority area are actually enrolled at another local authority’s municipal school, then the first local authority has the full duty to contribute to covering that school’s operating expenses for those pupils (cf. Supreme Court Constitutional Review Chamber judgment of 28 October 2014 in case No 374/1726/14 [3], para. 51).

57. Section 37 subsections (1) and (2) of the Constitution stipulate respectively: “Everyone is entitled to an education. Education for school-age children is compulsory to the extent specified by law, and is free of charge in general education schools established by the state and by local authorities.”; “In order to make education accessible, the state and local authorities maintain a requisite number of educational institutions.”

58. Previously, when explaining the limits of local authorities’ financial obligation arising from § 37(2) (first sentence) of the Constitution, the Chamber has noted that this relates to managing municipal schools. A local authority must uniformly enable everyone to attend a municipal school but no obligation exists to finance education through private general educational schools (Supreme Court Constitutional Review Chamber judgment of 28 October 2014 in case No 374/1726/14 [3], paras 55 and 56). However, the Chamber did not express an opinion on the issue whether the financial obligation arising from § 37(2) (first sentence) of the Constitution only includes maintaining the municipal schools of that local authority or also the obligation to finance the education of a pupil who resides in that particular rural municipality or city through another local authority’s municipal school.

59. Under § 7(2) cls 2) and 3) of the Education Act, local authorities establish, reorganise and close municipal educational institutions under the procedure prescribed by legislation, and ensure that economic support and financing is provided for municipal educational institutions within their administrative jurisdiction. Under § 6(2) of the LGOA, the functions of a local authority include arranging to maintain basic schools and upper secondary schools in that rural municipality or city if these are in the ownership of that local authority. Under § 7(2) of the BSUSSA, a rural municipality or a city enables children required by law to attend school and residing in the territory of the rural municipality or city to fulfil the duty to attend school and receive a basic education in compliance with the national curriculum for basic schools involving, where necessary, the owner of a private school. Under § 7¹(2) of the BSUSSA, local authorities are required, in cooperation with the state, to enable access to a high-quality general secondary education that offers diverse choices and complies with the national curriculum for upper secondary schools, keeping the required

number of upper secondary schools in each county based on the number of pupils. Under § 10(1) of the BSUSSA, a local authority is required to enable a person required by law to attend school and residing within that local authority to receive a basic education in a municipal school by assigning them a school based on residence. Under § 10(3) of the BSUSSA, another local authority's municipal school can be assigned as a pupil's school of residence only with the consent of the local authority that manages the school. Under § 27(1) of the BSUSSA, a basic school is required to admit everyone required by law to attend school who has expressed a wish to do so and for whom the school has been assigned as the school of their residence. Parents are free to choose a school for a person required by law to attend school, where the desired school has vacant pupil places.

60. These provisions allow for the conclusion that the legislator has construed the duty of local authorities arising from § 37(2) (first sentence) of the Constitution as a duty to enable receiving a basic education and general secondary education first and foremost through a local authority's own municipal school.

61. The justification for the existence of local authorities and the rationale for their activities is to discharge the functions of public authority at the level of public authority closest to people which is able to carry out the function effectively. Providing education at the level of public authority closest to a pupil who resides within a local authority is ensured if this takes place through the local authority's own school. The possibility to provide education through a local authority's own school presumably also better enables a pupil's parent or guardian as members of a local community to have a say in deciding issues related to education.

62. Local functions arise from a local community and concern issues that can be resolved within one local community or within several communities based on agreement between local authorities. In discharging a local function, including a mandatory local function, a margin of discretion in choosing the manner of discharging the function must remain to a local authority (see also para. 71 of the judgment). However, the imperative duty imposed by law on a local authority to finance another local authority's municipal school in discharging that function without entering into an agreement with the other local authority and without having the right of say cannot be considered as discharging a local function.

63. On that basis, the Chamber believes that the substance of a local authority's duty arising from § 37(2) (first sentence) of the Constitution should be that financing the study by a local authority's own residents at another local authority's municipal school is an inevitable constitutionally prescribed duty of a local authority only if the local authority has not enabled a person whom the population register shows as residing there to be educated at its own municipal school or has not ensured compliance of the education so provided with the recommendations of a counselling committee (§ 50(1) BSUSSA) for organising a pupil's study and education in line with their special educational needs. A local authority cannot be relieved of the duty to ensure the availability of education by not establishing its own schools, not creating a sufficient number of pupil places in those schools or failing to take account of a pupil's special educational needs.

64. However, § 37(2) (first sentence) of the Constitution does not give rise to a local authority's duty to contribute to compensating the educational expenses of a pupil whom the population register shows as residing there in every case where a pupil has enrolled for a vacant place in another local authority's municipal school by agreement between his or her parent or guardian and the other local authority (§ 27(1) (second sentence) BSUSSA). The right of a parent arising from § 37(3) of the Constitution to have the final say in choosing the education provided to their child does not also entitle them to request a local authority to finance the pupil's study at the educational institution chosen for the child if the local authority where the child resides has properly enabled the child to study.

65. In the instant case, the participants in the proceedings are of different opinion concerning the issue whether Jõelähtme rural municipality has enabled all the pupils shown on the population register as residing there to attend the local authority's municipal school. It may be concluded from the application by Jõelähtme Rural Municipal Council that in the opinion of the Council all pupils shown on the population register as residents of the rural municipality are ensured a place at the rural municipality's municipal schools.

However, the Minister of Education and Research in her opinion (p. 4 of the opinion) has noted that according to the information available to the Ministry of Education and Research, in the school year 2016/2017, 75 out of 864 pupils registered as residents of Jõelähtme rural municipality had not been ensured a place in line with their needs at the rural municipality's school.

66. Nonetheless, the Chamber does not consider it necessary to analyse in more detail whether Jõelähtme rural municipality has properly enabled all pupils shown on the population register as residing there to attend its own municipal schools. It may be concluded from the data contained in the appendix to the application lodged by Jõelähtme rural municipality (appendix to the application – the table of disbursements paid out in 2010–2016 based on § 83(1) of the BSUSSA) that the number of residents of Jõelähtme rural municipality who were enrolled at municipal schools of other local authorities in 2016 and whose education expenses the rural municipality contributed to covering, exceeded in any case the number of pupil places allegedly lacking in municipal schools of Jõelähtme rural municipality as indicated by the Minister of Education and Research.

67. For constitutionally compliant aims, the state may also assume duties that do not explicitly derive from the Constitution. If the legislator has decided that a local authority also has the obligation to contribute to financing another local authority's general educational municipal school in the case of pupils enabled to receive an education at a school of the local authority where they reside, this constitutes a duty imposed on local authorities. In essence, imposition of that duty on local authorities by § 83(1) of the BSUSSA should be interpreted as a state-level duty. In this respect, the Chamber's conclusions are analogous to the opinion expressed earlier in connection with the duty imposed on local authorities by § 22² of the Private Schools Act to bear the operating expenses of private schools (Supreme Court Constitutional Review Chamber judgment of 28 October 2014 in case No 3?4?1?26?14 [3], para. 56).

68. If the state obliges local authorities to bear the operating expenses of general educational schools of other local authorities in a situation where a local authority is able to provide a place at its municipal schools for all those entitled, this may lead to weakening the ability of local authorities to discharge their main function. The funds that a local authority could use to discharge its own duties should then be spent on discharging duties imposed by the state. However, this may compromise the fundamental right to high-quality free education in a local authority's schools as laid down in § 37(1) of the Constitution. This situation would not conform to the purpose or spirit of § 37(2) (first sentence) of the Constitution.

69. In accordance with § 154(2) (second sentence) of the Constitution, funds to cover expenditure related to state-level duties imposed by law on a local authority are provided from the national budget. Thus, covering expenditure related to state-level duties must be laid down legally, which however has not been done in the present case. Even though based on § 42(2), § 82(3), (4), (6), (6¹), (7¹) of the BSUSSA and § 48 of the State Budget Act the state budget provides for earmarked funds to cover expenditure related to operating municipal schools (e.g. support intended for the labour costs of teachers, directors and assistant heads of general education schools, for in-service training, acquiring study literature, and school lunches), the law does not provide for specific compensation from the state budget of expenses paid by local authorities under § 83(1) of the BSUSSA. Other state budget support provided to local authorities, such as support paid from the equalisation fund based on § 46(1) cl. 1) and § 47 of the State Budget Act, cannot be interpreted as funds provided as compensation earmarked for expenses paid under § 83(1) of the BSUSSA either. It also follows from § 83(4) cl. 3) of the BSUSSA that the legislator wished to clearly distinguish between expenses of local authority municipal schools covered from state budget appropriations and expenses paid under § 83(1) of the BSUSSA from one local authority to another local authority. Thus, under current legal regulation a local authority must pay for the operating expenses of another local authority's school from financial resources intended for discharging local functions.

70. In line with the case-law of the Supreme Court, state budget in § 154(2) of the Constitution is intended to mean the state budget within the meaning of § 115(1) of the Constitution, i.e. the Act passed by the Riigikogu for each year, laying down all state expenditure and revenue. The state budget must also reflect those government expenses which in line with § 154(2) (second sentence) of the Constitution are incurred

while covering expenses related to state-level duties imposed on local authorities (the principle of all-inclusiveness), and the state budget must set out clearly and transparently how much money is allocated for discharging one or another state-level duty imposed on local authorities (the principle of transparency) (Supreme Court *en banc* judgment of 16 March 2010 in case No 3747178709 [1], para. 76).

71. On the basis of the foregoing, the Chamber is of the opinion that under § 37(2) of the Constitution the duty deriving for local authorities from § 83(1) of the BSUSSA to finance the operating expenses of another local authority's schools does not amount to an essential function of local authorities. This is a duty imposed on local authorities which in line with § 154(2) (second sentence) of the Constitution must be financed from the state budget. Therefore, if a local authority has enabled all its residents shown on the population register to study at its own municipal school, then failure to adopt legislative acts laying down financing from the state budget of the duties imposed on local authorities by § 83(1) of the BSUSSA is contrary to § 154(1) and (2) (second sentence) of the Constitution. Since § 83(1) of the BSUSSA lays down the duty of the state, § 83(2) of the BSUSSA should be understood as enabling local authorities to enter into agreements in a situation where a local authority has not enabled all those shown as its residents on the population register to study at its municipal school, as well as agreements concerning covering expenses set out in § 83(4) of the BSUSSA.

72. Since the Chamber grants the application by Jõelähtme Rural Municipal Council and declares unconstitutional the failure to adopt legislative acts laying down financing from the state budget of the duties imposed on local authorities by § 83(1) of the BSUSSA, no need exists to assess the Rural Municipal Council's alternative application for declaration of unconstitutionality of § 83(1) of the BSUSSA.

Dissenting opinion of Supreme Court Justice Priit Pikamäe to the Supreme Court Constitutional Review Chamber judgment of 9 November 2017 in case No 571778.

1. I expressed dissent in adjudicating the instant case, being ultimately of the opinion that the application by Jõelähtme Rural Municipal Council should have been dismissed.

2. The main problem in the case, which has a direct bearing on the final outcome of the dispute, lies in the issue whether the duty of local authorities laid down in § 83(1) of the Basic Schools and Upper Secondary Schools Act (BSUSSA) to contribute to covering the operating expenses of another local authority's municipal school can be interpreted as a state-level duty within the meaning of § 154(2) of the Constitution. As the majority of the Chamber in its judgment justifiably notes, the answer to this question determines whether establishing the duty laid down in § 83(1) of the BSUSSA also required the legislator to decide on financing the duty from the state budget.

3.1. In my opinion, § 83(1) of the BSUSSA does not contain a state-level duty within the meaning of § 154(2) of the Constitution. There is no doubt that in order to make education available local authorities must also maintain educational institutions alongside the state. This is a duty imposed on local authorities directly on the basis of § 37(1)–(2) of the Constitution, as an extension of which the legislation regulating organisation of education lays down the task of local authorities to service and finance municipal schools within their administrative boundaries in a manner that enables each child required by law to attend school and residing within a particular local authority's territory to receive a basic education (for precise references to legislation, see para. 59 of the judgment). In the instant case, no one disputes the fact that such a duty constitutes an essential function of local authorities in the field of education arising from the Constitution itself. In other words: a local authority must enable all children within its territory to comply with the duty to attend school. This is one of the few duties which the Constitution itself directly outlines as an essential duty of local authorities. This makes even more incomprehensible the opinion of the majority of the Chamber that at a point where the legislator has tried to regulate the issue – inevitably linked to the fulfilment of compulsory school attendance – concerning how to organise financing of municipal schools in a situation where pupils residing within the boundaries of one local authority attend another local authority's municipal

school, the essential duty of local authorities suddenly becomes a state-level duty within the meaning of § 154(2) of the Constitution. Operating any school, including a municipal school, cannot be an end in itself but is intended to ensure availability of education. Therefore, I do not agree with one of the central conclusions of the judgment that the duty of a local authority to ensure an education for a child residing within its territory ends as soon as it meets the boundary of that local authority. The latter also including for the reason that funds for fulfilling pupils' duty to attend school are planned according to their residence.

3.2. I am of the opinion that the relevant conclusion in the judgment (para. 62) is also substantively unjustified: it is not hard to notice that the judgment does not contain essential criteria as to the basis on which the duties which constitutionally have a local government character and the state-level duties transferred to local authorities for discharge should be delimited, thus further increasing the uncertainty existing in this field. The majority of the Chamber has built its opinion with regard to this issue to a large extent on the Supreme Court Constitutional Review Chamber judgment of 28 October 2014 in case No 3747126/14, but has disregarded the fact that applying the conclusions of that judgment with regard to private schools to the instant case is arbitrary. This is so already for the reason that operators of private schools acting on private initiative must generally actually finance such a school themselves and any support allocated from public funds is not self-evident, let alone required by the Constitution. I share the opinion that the situation where the decision to provide financial support to private schools was taken by the state but where their actual financial support was left for the budgets of local authorities to bear amounted to imposing on local authorities a state-level duty within the meaning of § 154(2) of the Constitution, which should also have been accompanied by allocation of the relevant funds.

4. I am of the opinion that the duty laid down in § 83(1) of the BSUSSA is a “state-level” one only insofar as it has been enforced in respect of local authorities based on an Act enacted by the parliament as a state institution. In substance, the rule laid down in § 83(1) of the BSUSSA is a levelling mechanism between the budgets of local authorities for instances where pupils residing within the territory of one local authority are enrolled in a municipal school operated by another local authority. The existence of such a levelling mechanism is inevitable in a situation where, on the one hand, a local authority must ensure maintenance of schools owned by the local authority and an opportunity to receive education for each child required by law to attend school and residing within its administrative boundaries while, on the other hand, a parent has no obligation to send a child specifically to a municipal school of the local authority within whose administrative boundaries the child resides. Moreover so because § 37(3) of the Constitution explicitly states that parents have the decisive say in choosing education for their child. It would be extremely difficult to justify that the “decisive say of the parents” mentioned in this provision of the Constitution means everything else but in any case not their right to choose a school for their child. It is understandable that, in a sense, a double burden falls on the budgets of those local authorities where children residing within a local authority's administrative boundaries attend a municipal school in another local authority – on the one hand, anyway they have to maintain schools within their administrative boundaries in line with the number of children required by law to attend school and residing there while, on the other hand, § 83(1) of the BSUSSA also directs them to bear the operating costs of another local authority's municipal school in proportion to the number of pupils enrolled in that school who reside in their territory. At the same time, in the current situation of school organisation, which is relatively local authority centred, it would be completely unreasonable to require one local authority to assume the costs of teaching pupils who have enrolled at its municipal schools from other local authorities. The current wording of § 83(1) of the BSUSSA resolves this dilemma unequivocally in favour of local authorities with ‘more popular’ municipal schools, which is perhaps not the optimal solution but, in any case, whether the particular regulatory arrangement is fortunate or unfortunate does not turn the duty set out in the provision in question into a state-level function within the meaning of § 154(2) of the Constitution.

5. In conclusion, I cannot fail to note that the solution the Supreme Court has reached in the instant case might not bring Jõelähtme rural municipality the result it sought. The aim of the instant case is essentially to oblige the state to allocate to local authorities additional resources from which they could cover the expenses of pupils who have enrolled in another local authority's municipal school. Even though at the will of the

majority of the Chamber the Supreme Court found the provision of § 83(1) of the BSUSSA to be a state-level duty within the meaning of the Constitution, the state still has a large margin of discretion as to how to resolve the problem dealt with in the present judgment. On the one hand, nothing prevents the parliament from repealing § 83(1) of the BSUSSA, which would however deteriorate the situation of local authorities with municipal schools at which pupils from other local authorities wish to enrol. An indirect effect of such a decision could also be reduced interest of local authorities to accept in their schools pupils from other local authorities, thus leading to a restriction of access to education provided in so-called elite schools. Definitely, a result of such a decision would be an increase in fictitious migration of people to other local authorities in order to secure an opportunity to study in that local authority's municipal school for their child who is under a duty to attend school. In this respect, it should also be kept in mind that a parent's wish to provide an education for their child at another local authority's municipal school could be driven by purely objective reasons, such as proximity to their residence. Secondly, it is not ruled out that the state might decide to further deepen nationalisation of the school network started already by the creation of state-operated upper secondary schools, which would allow direct targeting of educational expenditure by the state without involving local authorities in this and without creating any regulatory arrangements aimed at levelling. In general, such a solution would increasingly bring under the spotlight the eternal question as to what issues should then be entrusted to local authorities at all in a small country like Estonia. Thirdly, the state also maintains the possibility to change the current financing scheme of the school network dramatically, for example by creating a mechanism in which educational funds would, figuratively speaking, move along with a child to the school at which the child actually studies. Of course, this brief list of alternative solutions to the issue in question is not and cannot be exhaustive, but in any case following the Supreme Court judgment in the instant case the issues related to roaming fees of pupils need to be newly analysed.

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