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In Memoriam. Kalvis Torgāns

We commemorate our colleague Kalvis Torgāns who passed away on March 12 this year, aged 81. He was a doctor of legal sciences, professor, full member of the Latvian Academy of Sciences, Senator of the Department of Civil Cases of the Supreme Court (2008–2014), Judge Emeritus (2015), sworn advocate; recipient of the Order of Three Stars (2009), the annual prize of the University of Latvia for establishing the scientific school in civil law (2011), Themis Award of the Supreme Court in the nomination "Person of the Year 2013", Grand Medal of the Latvian Academy of Sciences for establishing a modern school of civil law in the Latvian legal science and important contribution to introducing theoretical findings in practice (2018). K. Torgāns was also a member of the editorial board of "Journal of the University of Latvia. Law" since its establishment.

During 59 years that he worked at the University of Latvia, K. Torgāns served as the dean of the Faculty of Law (1976–1979, 1997–1998), the head of the Department of Civil Law (1991–2006), authored tens of books and several hundred other publications.

Enumeration of positions, awards and achievements is only a pale reflection of this personality, larger than life, whom we have lost with the passing of our longtime colleague. K. Torgāns is a symbol of an entire age both in the community of Latvian lawyers and academia.

Law making, legal proceeding, lawyer's ethics, research – all these areas of professional activities would not be like we find them today without K. Torgāns' contribution, but that is not all.

Without K. Torgāns, the culture of lectures, seminars, conferences, office meetings, but also the conduct of judges and lawyers, and even the culture of leisure activities would be different.

Many years will pass before we become fully aware of K. Torgāns' immense spiritual legacy. A great number of the master's apprentices stay behind, some of whom already having become rising stars in jurisprudence.

Remain amongst us forever, Kalvis, although no lecture-room will see your vigorous entry and your clear voice will no longer resonate in song high up against the ceiling of *Aula Magna*.

Prof. Jānis Rozenfelds

Chairman of the Council, Faculty of Law, University of Latvia

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Marriage Regulation in Spain. Current Situation and Challenges

Dr. **Carmen Garcimartín**
University of a Coruña, Spain
Professor, Faculty of Law
E-mail: *carmen.garcimartin@udc.es*

Marriage has changed profoundly during years. The current definition of marriage in Spanish law has abandoned the pattern of a stable union of a man and a woman aimed to raise the next generation. Several problems arise from this departure; the most important ones are figuring out which are the constitutive elements of marriage according to the laws in force, and trying to build a consistent regulation of this relationship. The article includes a general overview of the history and the current regulation of marriage, and subsequently explores the main challenges to the regulation of marriage in the near future.

Keywords: marriage in Spain, family law.

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Introduction

The institution of marriage for centuries has been a well-established relationship in Spain. Everybody was aware of its nature, aims, and its main characteristics. The law that regulated the marriage, either religious or civil (in the short periods during which the latter was allowed), corresponded to that general idea of the marital union: it was understood as a stable union of a man and a woman aimed

at rearing the next generation. From a sociological point of view, marriage was the principal way to create a family. Surely, other kinds of unions – mainly cohabitation, which had not been preceded by marriage – were known in the country, but only the marital union enjoyed the legal status and social recognition.

Since the last decades of the XX century, major changes took place in Spain regarding the structure of the families. Family units became more diverse; factual unions and same-sex unions, among others, were socially accepted and legally recognized. The regulation of these other kinds of unions followed a specific pattern: instead of enacting a new regulation for each of these unions, taking into account its aims and characteristics, most of them were embedded in the marriage. As a consequence, the marriage gradually lost its clear shape and became a union that barely resembled the one of thirty or forty years ago. At this point, some authors wonder whether it makes sense to regulate marriage as a distinctive institution in the Spanish Civil Law. Others try to figure out the essential elements of the current legal marriage, as new challenges are still ahead.

The current article has three parts. The first one is a historical approach to the regulation of marriage in Spain. The second one explains the current situation, and the third one addresses the prospective of marriage in the Spanish law.

1. Historical Overview

The regulation of the marital relationship in Spain has directly descended from the Canon Law. Although Spanish Law belongs to the Roman-Germanic tradition, marriage has not retained many features from the Roman marriage – which is the antecedent of current factual unions, not marriage[1].

The fall of the Roman Empire made Canon Law succeed in this field. After the Reformation, Europe split up into Protestant and Catholic countries, with Spain falling into the Catholic area. Thus, Catholicism became the official religion between 1492 and 1978. Hence, from the end of the Middle Ages until the end of the XIX century, Canon Law marriage was the only one regulated in Spain, and then the prevailing marriage until the end of the XX century[2]. There were two short breaks, with two laws of compulsory civil marriage[3].

The first modern law of civil marriage was enacted in 1870. It established that only the civil marriage would have civil effects, but it was ignored by most people who continued to marry according to the Canon Law[4]. To prompt the citizens to comply with the law, in 1872 the legislator approved a Decree that declared the children born within the Canon Law marriages illegitimate. Far from solving the problem, it worsened the situation, as thereby the number of illegitimate children in Spain increased. At that time, it was a major issue because of the succession

* I would like to thank Jaime Vázquez García, Law and Business UDC student for his research assistance.

** Only literature available in English is cited in this article, although a number of articles in Spanish have been consulted for this work.

1 Nonetheless, the modifications of the regulation of the marital union in the latest years have introduced nuances to the idea of marriage that was prevalent in the past.

2 In 1564, King Philip II ordered that the dispositions of the Council of Trent about marriage were published as Law of the country and in all territories dependent on the Spanish Kingdom.

3 *Cfr. Martínez-Torrón,* J. Religion and Law in Spain. 2nd edition. The Netherlands: Wolters-Kluver, 2018, p. 233.

4 Actually, this law was a kind of replica of the regulation of Canon Law marriage. It maintained impediments such as sacred orders and the vow of chastity in a religious institute, and considered the marital union indissoluble.

laws in force. This situation was resolved in 1875, when the Law of civil marriage was repealed and the children born within Canon Law marriages since 1872 were recognized as legitimate with retroactive effect.

A system known as "subsidiary civil marriage" was in force since 1875. It meant that Catholics should marry according to Canon Law, and those who did not belong to the Catholic Church, or had declared that they did not profess that religion, could celebrate a civil marriage. Besides, the decisions of ecclesiastical courts about the validity or nullity of marriages were granted civil effect.

The second attempt to implement a system of obligatory civil marriage took place during the Second Republic, in 1931, when for the first time ever, divorce was accepted as a way to dissolve the marital bond, to the point that it was formally recognized within the Spanish Constitution[5], leading to the enactment of the Spanish Divorce Law during the following year (1932). However, the aforementioned law still required a "justified cause" in order for the divorce to be accepted[6], and ended up being formally repelled in 1938, in the middle of a civil war that lasted from 1936 to 1939. Once the war ended, there was a return to the system of subsidiary civil marriage that remained in force until the contemporary Spanish Constitution was enacted, on December 27, 1978, and the Civil Code was modified to be consistent with the Constitution[7].

2. The Current Marriage System

2.1. The Constitution

The Spanish Constitution provides the framework for the regulation of marriage. It does not contain a definition of the marital relationship; it does not stipulate the marriage system that must be implemented, either[8]. As expected in the fundamental text of a juridical body, it solely encompasses the main features of marriage, leaving its regulation to the lawmakers. For the purposes of the current article, two main sections can be highlighted: Section 32 and Section 16.

Section 32 stipulates:

> *1. Man and woman have the right to contract matrimony with full legal equality.*
> *2. The law shall regulate the forms of matrimony, the age and capacity for concluding it, the rights and duties of the spouses, causes for separation and dissolution and their effects.*

---

5 Section 43 of the Spanish Constitution 1931: "Marriage is based on equal rights for both sexes, and may be dissolved by mutual dissent or at the request of either of the spouses with allegation in this case of just cause."

6 The grounds for divorce are contained in Section 3, and include bigamy, one of the spouses being charged with deprivation of liberty for over ten years; suffering a contagious and serious venereal disease acquired through sexual relations either outside of the marriage and after its celebration, or before it, had they been purposefully concealed from the other spouse at the time of concluding the marriage.

7 Law 30/1981, July 7, that modifies the Civil Code in matters of marriage, B.O.E. No. 181, July 30.

8 Marriage system, in this context, refers to the norms stipulating the kinds of marriages which are granted civil effects, and on what conditions it is done.

Section 16 states:

> *1. Freedom of ideology, religion and worship is guaranteed to individuals and communities with no other restriction on their expression than may be necessary to maintain public order as protected by law.*
>
> *2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs.*
> *3. There shall be no state religion. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.*

Some elements pertaining to marriage can be deduced from these articles.

The mention of the "full legal equality" between the spouses in Section 32 could be rendered, nowadays, as an open door to same-sex marriages. However, it was not the particularly feasible rendering of this concept at the time when the Constitution was firstly enacted. The reference to the equality between men and women in the marital relationship refers to the unequal relationship between husband and wife that existed until a few years before the Constitution was approved. During that time, women were subjected to their spouses' will, to the point that they required their husbands´ permission for a number of juridical acts.

The current Spanish Constitution interdicts such a difference of status, guaranteeing that the inequality which has existed until the previously mentioned era would not be permitted to continue by reflecting this commitment in the constitutional text[9].

Nonetheless, a reference to the heterosexuality of marriage is given in order to better understand the subject at stake. The wording of Section 32 of the Constitution neither explicitly requires nor bans the same-sex marriage. This is quite understandable, given the time when the Constitution was enacted – only three years after ending of Franco regime. The same-sex marriage, as well as other relationships like polygamy or civil partnerships were not among the main concerns of the authors of the Constitution. Their attention was focussed instead on other topics like divorce (not allowed then) or the transition from a confessional to a secular marriage system.

The most important item to highlight is that Section 32 uses the words "man" and "woman" instead of "all persons", "all", "everyone", "citizens", "all citizens", "Spaniards", or "all Spaniards". This is the only Section that explicitly indicates the gender distinction, hence, it may be significant. The Constitutional Court understood it when stated, in 1994, that "[T]he heterosexual element of the marriage is consistent with the Constitution. Public authorities can grant advantages to the family constituted by a man and a woman in opposition to homosexual unions. It does not preclude the legislator from enacting a regime where homosexual partners may enjoy the same rights and legal advantages offered by marriage. [..] The union between persons of the same biological sex is neither a regulated juridical institution nor a constitutional right; on the contrary, marriage between man and woman is a constitutional right"[10].

---

[9] See, in this regard STC No. 198, Nov. 6, 2012, FJ 8. Available: http://hj.tribunalconstitucional.es/en/Resolucion/Show/23106 [last viewed 04.20.2021].

[10] STC No. 222, July 11, 1994. Available: http://hj.tribunalconstitucional.es/en/Resolucion/Show/16344 [last viewed 04.20.2021].

The same-sex marriage was recognized in Spain in 2005[11], after a rigorous social debate and an appeal to the Constitutional Court[12]. The Court issued a ruling in 2012 where it tried to dismiss its previous interpretation by saying that Section 32.1 of the Constitution cannot be understood as the establishment of the heterosexual principle of marriage[13]. However, the Court added that it cannot be understood either to mean that the heterosexual-only option was excluded. It comes to the conclusion that considering marriage only as a heterosexual union, and not granting marital benefits to same-sex unions would be consistent with the Constitution, as it recognizes the same-sex marriage. In other words, it considers that there is no pre-legal definition of marriage; marriage will be interpreted by the legislator any given time.

Another sensitive issue, not solved by the Constitution, concerns the kind of marriage – civil or religious – which the Constitution accepts or favours. The Constitution does not impose a mandatory civil marriage. It is clear, pursuant to Section 16-2, that it prohibits the system of compulsory religious marriage or subsidiary civil marriage, as Spain is no longer a confessional state and its citizens cannot be obliged to pledge allegiance to its ideology or religion to obtain the benefits of the law. Certainly, Section 16 recognizes the freedom of religion, stipulating that the state must take into account the religious beliefs of the society, but it does not imply the recognition of religious marriages.

To sum up: the Spanish Constitution merely provides some negative clues as to which marriage systems are not acceptable in Spain. Other legislative sources must be considered on order to ascertain the characteristics of the current Spanish marriage system.

2.2. Other Norms

The Spanish Civil Code does not contain a definition of marriage. Instead, it relies on a universal idea of marriage, and regulates it. This way, Section 44 states that "Men and women are entitled to marry in accordance with the provisions of this Code. Marriage shall have the same requirements and effects when both prospective spouses are of the same or different genders." It continues with the requirements of consent, the impediments to marriage and the diverse forms of marriage.

The most important element of marriage, the consent, attracts little attention; only a short article (45) refers to this aspect, asserting that it is necessary for the constitution of a valid marriage, and it cannot be conditioned or in any other way limited[14]. Such consent, as the Spanish legal doctrine points out, lies within the premise that those who are going to marry must "have the ability to understand and want the act that is performed"[15]. The impediments are treated similarly – simply mentioned without any other explanation. On the contrary, the legislator pays much

[11] Law 13/2005, of 1 July, amending the Civil Code concerning the right to marry, B.O.E. No. 273, Nov. 15, 2005.

[12] Appeal of unconstitutionality No. 6864-2005, in relation to Law 13/2005, of 1 July, amending the Civil Code concerning the right to marry, B.O.E. No. 273, Nov. 15, 2005.

[13] STC No. 198, Nov. 6, 2012, cit.

[14] Section 45: "There shall be no marriage without matrimonial consent. Any condition, term or mode limiting consent shall be deemed not to have been written."

[15] *Ortega Gimenez, A.* Back to the "Marriages of Convenience" in Spain. Commentary on the Judgments of the Provincial Court of Barcelona of November 19, 2019 and January 29, 2020.

more attention to the form and the critical aspect of marriage (the end of either the marital bond or the community of life)[16].

The Civil Code regulates two possible ways to celebrate the civil marriage: in a civil form, before a public officer, a judge or a mayor, and in a religious form[17]. The requirements and the effects of the marriage, as well as the registration, are identical in all cases. The only difference lies in its celebration, which can be civil or religious.

The possibility of celebrating a religious marriage other than Catholic became open immediately after the Constitution. In 1980, the Law on Religious Freedom was enacted; Section 2 of the aforementioned law stipulated that religious freedom secures the right to hold religious marriage ceremonies[18]. In 1981, an amendment to the Civil Code permitted the celebration of marriage according to the rites of the religious communities that signed an agreement with the State or in the terms provided by the State legislation[19]. By means of the Agreements of 1992, Jewish, Evangelical and Islamic communities were allowed to celebrate marriages according to their rites[20]. Until recently, no recognition of other religious marriages had been established either through an agreement or through unilateral State legislation. In 2015, the Law on Non-Contentious Judicial Proceedings granted civil effects to the marriages celebrated according to the form of religious denominations with recognized "deep roots" in Spain[21]: as of now, they are the Church of Jesus Christ of the Latter-Day Saints, Jehovah's Witnesses, Buddhists and Orthodox Churches[22].

The position of the Canon Law marriage has been confusing since the commencement of the constitutional regime. The norms related to this type of marriage are scattered across different laws, and they are not always fully coherent, even within the same legal body (the Civil Code, for example). There has not been much litigation on this issue lately, but mostly because the parties at stake prefer a practical accommodation. This fact does not preclude indicating the unclear aspects in the regulation of the civil effects of Canon Law marriage.

To begin with, Spain signed an Agreement with the Holy See in 1979, where it was stated that "The State recognizes the civil effects of marriages celebrated according to the Canon Law. Canon law marriage is considered legal under civil law from the moment of the celebration. For full recognition of these effects, the marriage must be registered in the Civil Registry; this may be done with the presentation of the church certificate of the existence of the marriage."[23] These norms, however, have been further elaborated by the reforms of the Civil Code

[16] I will not refer to the economic effects of marriage, and to the procedural aspect of this relationship. I will rather focus on the definition of marriage and the constitution of the marital relationship.

[17] Section 59: "Matrimonial consent may be given in the form provided by a registered religious confession, in the terms agreed with the State or, in the absence thereof, in the terms provided by State legislation."

[18] Organic Law 7/1980, July 5, of Religious Freedom, B.O.E. No. 177, July 24.

[19] Law 30/1981, July 7, that modifies the Civil Code in matters of marriage, B.O.E. No. 181, July 30.

[20] The Agreements with the Evangelical, Jewish and Islamic communities were approved respectively by Laws 24, 25 and 26/1992, November 10 (B.O.E. No. 272, November 12). Section 7 of the Agreements recognize the civil effects of marriages celebrated before the religious ministers (or equivalent) of these religions, yet registration on the Civil Registry is needed for the full recognition (*erga omnes*) of those effects.

[21] Law 15/2015, July 2, on Non-Contentious Judicial Proceedings, B.O.E. No. 158, July 3.

[22] On the contrary, marriages celebrated according to the Gipsy customs and traditions, are not recognized in Spain, although in this case, it is an ethnic, not a religious minority.

[23] Agreement on Juridical Issues between the Spanish State and the Holy See, January 3, 1979, sect. VI.

subsequent to the Agreement, despite the fact that the Agreement with the Holy See is an International Treaty, while the Civil Code is a State Law[24].

Article 59 of the Civil Code, as already seen, stipulates that matrimonial consent may be given in the form provided by a registered religious confession, in the terms agreed with the State or, in the absence thereof, in the terms provided by State legislation. This article refers, in general, to religious marriages, without any reference to the special regulation of Canon Law marriages. However, Article 60 states that a marriage performed *in accordance with the provisions* of Canon Law *or in any of the religious forms* mentioned in the agreements between State and religious denominations shall have civil effects.

Thus, the Civil Code singles out Canon Law marriages among all other religious marriages; it suggests that non-Catholic religious marriages will obtain civil recognition only as forms of celebration, while canon law marriage would be a whole system of marriage recognized by the State. The nominal differentiation of canon law marriage, together with the expression in accordance *with the norms* [and not form] of Canon Law, supports this interpretation; therefore, all rules on this kind of marriage, not only those dealing with the form, would be recognized by the Spanish State. However, this article is not clear, instead, it is sufficiently ambiguous to raise doubts about its intended meaning and scope[25].

In practice, Canon Law marriages are celebrated according to the norms of Canon Law. Nevertheless, they must fulfil the prescriptions of the Civil Code, as well. Otherwise, the registration in the Civil Registry (required to obtain the civil effects of the marriage recognized *erga omnes*) will be denied. The potential discordances, that is to say, valid Canon Law marriages that cannot be registered in a civil form, are very few: marriages with an impediment dispensed in the Catholic Church but not in the civil arena, and marriages of a catholic who is already part of a civil marital union.

In order to avoid conflicts, the Catholic Church requires a special license of the Bishop to celebrate the Catholic marriage in those cases, targeting to solve the controversy before the wedding, by way of asking for a civil dispensation in the first case, or breaking the previous civil union in the latter one[26]. Nonetheless, marriages celebrated without license would still be valid; thus, the problem in these cases would remain unsolved; however, to be fair, these are very unusual situations, and do not deserve much attention.

In short, it can be asserted that the marriage system in Spain conveys several types or kinds of marriage: civil marriage regulated by the Civil Code and celebrated in a civil form; civil marriage celebrated in a religious form other than Catholic; and Canon Law marriage, regulated by the Code of Canon Law, but to which norms of the Civil Code are also applied.

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[24] Regarding this, see *Martínez-Torrón, J.* Religion and Law in Spain, p. 236.

[25] Ibid., pp. 236–237.

[26] The impediment of age is a tricky one. The Canon Law allows marriage from 14 years of age for women and 16 – for men (cfr. canon 1083). However, the Spanish Conference of Bishops stated that, if the prospective spouses are below 18 years of age (the legal age for civil marriage), they should ask for authorization of the Bishop (cfr. Decreto General de 26 de noviembre de 1983). If the answer is positive, the Bishop would not grant a dispensation but a license. The rationale of this rule is that bishops cannot modify the Code of Canon Law, but may issue a prohibition in their countries, if they consider it expedient.

3. Challenges of the Regulation of Marriage

3.1. General Approach

There is an urgent need for a profound consideration of marriage and its regulation in Spain. It is not only a problem of updating the laws or solving some minor problems. The rapid changes in society anticipate more challenges ahead; thus, the legislator should have a clear idea of marriage and why the State should (if it should) enact laws on marriage, especially given the key role legal certainty holds within the Spanish system, as the Vice-President of the Spanish Constitutional Court points out quite precisely: the principle of legal certainty, as set out in article 9-3 of the Spanish Constitution, prevents leaving the application of constitutional principles such as equality and freedom in the hands of individuals. Therefore, it is necessary to have legal rules regulating the family system. But changes occur so quickly and so deeply that once lawmakers decide to regulate this system (Article 9.2 CE), they immediately must decide what kind of legislation is best suited for this task"[27].

Most of the big debates related to marriage that have taken place in Spain since the enactment of the Constitution have focused on particular elements of this relationship that were being amended or modified. The social reaction to these changes was not uniform. For instance, the introduction of divorce in 1981 brought about a harsh controversy in the Spanish society[28]. Several decades later, in 2005, the approval of same-sex marriage triggered a similar conflict. Indeed, there have been other amendments that did not have a great impact in the social arena, although they also affected the structure of marriage. That is the case of the suppression of the impediment of impotence (marriage ceases to have a sexual content in its definition)[29] or the introduction of non-fault divorce (stability no longer is a target of the relationship)[30].

The regulation of marriage has a moral and ideological content. That is why some modifications launch such a big controversy. Despite the greater or lesser juridical relevance of the amendments to that regulation, only two opposed stances on marriage lie in the debates about this relationship. The absence or presence of social conflict can be traced back to how the amendment could entail any changes to the core of those stances. The first of them considers that marriage is a pre-legal relationship, with some constitutive elements that define it: it is viewed as a union between a man and a woman in order to establish a stable community of life aimed at rearing the next generation. This specific kind of union has existed in some form in all known societies, since it corresponds to the social nature that characterizes human beings. Consequently, this trend argues that those particular features of the

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[27] *Roca Trias, E.* Family Law as a Right to Freedoms: The Case of Same-Sex Marriage in Spain. *International Journal of Law, Policy and the Family*, No. 31, 2017, p. 80. She states that "My impression is that neither lawmakers nor their advisors are aware of what they have to deal with and even less of the role judges play in the whole system, since their role is far more limited as is clearly outlined in Article 117.11 of the Spanish Constitution, according to which judges are subject 'exclusively' to the rule of law, which means that formally they do not play a decisive role in innovating the legal system, although they may do so when they adapt rules designed for outdated conditions, which are not very unlike despite seeming different on the surface". (Ibid.).

[28] Law 30/1981, July 7, cit.

[29] Ibid.

[30] Law 15/2005, July 8, that amends the Civil Code and the Code of Civil Proceedings in matters of marriage and divorce, B.O.E. No. 163, July 9.

definition of marriage are binding to lawmakers, and it is beyond the scope of public powers to change them because they are inherent to the marital relationship. Thus, the regulation of the marriage can change in some aspects but it must always respect its essential elements [31].

The second stance on marriage regards this relationship as whatever the legislator decides it to be, without relying on any previous reality whatsoever. Although it may have retained a certain form for centuries, it was merely due to historical and cultural reasons, but there is nothing off limits for lawmakers when it comes to the regulation of marriage. Therefore, the marital relationship has the shape that the legislator decides at a certain time and place; that is, its definition may vary, as there are no essential elements of the relationship that would be off-limits to the legislative power: marriage is what the legislator says it is, according to the social demand – or the political interest of the public powers.

3.2. Defining the Essential Elements of Marriage

From the evolution of the marriage regulation in Spain we can infer that the contemporary Spanish legislators do not perceive marriage as a pre-legal institution. Historically – and ever since, it has firstly been regulated by positive law – marriage has been aimed at the procreation and education of the offspring. Other kinds of personal unions have been known, and even received legal recognition[32], yet marriage enjoyed a special status due to its social function. In the last decades, marriage has gradually been deprived of the elements that have shaped it for centuries.

Currently, according to the law, marriage is a relationship with very indefinite outline. It is a union of two persons who must help and respect each other at least for three months[33]. Nothing else is required from a legal point of view. Undoubtedly, the union of a man and a woman with their offspring corresponds to this concept, but many other unions do, as well: two friends that share an apartment, despite the absence of sexual relations between them; two aged siblings living together so as to care and accompany each other; people who want a temporary relationship, and other unions not related at all to the pre-legal idea of marriage noted above. However, once the legislator departs from that idea of marriage, its regulation raises several challenges.

The first one is finding a distinctive element of marriage. The Spanish Constitutional Court issued a definition of marriage when it decided on same-sex marriage. Since the generation of children could not be the aim of marriage if same-sex couples were allowed to marry, the Court had to identify another distinctive element of marriage. In the ruling, it stated that marriage is a "community of affection that generates a bond, or a society of reciprocal help between two people who have the same position within this institution, and who voluntarily decide to

[31] To offer an example: a constitutive element of sale is the price that a person pays for something. This price can be satisfied in different ways, and the legislator can adopt measures to avoid fraud or malice in payments, or may favour one method over another, but he cannot revoke the payment of price without completely distorting the idea of what a sale is. Even more, if there is no price, there is no sale; it would be a loan, a gift, or something else, but definitively not a sale.

[32] For example, concubinage was regulated in Spain in the Middle Ages. Cfr. https://dej.rae.es/lema/barragan%C3%ADa. It is also well known, if we look beyond the country, that same-sex relationships were usual in some periods of the Roman and Greek Empires.

[33] According to Sections 86 and 87 of the Civil Code, the spouses may divorce three months after the celebration of marriage.

join in a common family life project, giving their consent about the rights and duties of the institution and expressing it through the formalities established in the system. Thus, the equality of the spouses, the free will to marry to the person of their own choice and the manifestation of that will are the essential notes of marriage"[34].

The definition of marriage as a "community of affection" is problematic. The law regulates rights and duties, but it does not deal with affection, understood as a feeling, even in cases where the affection should be more obvious than in a marriage, as in parental authority. The free will of the spouses can be verified, whereas affection is difficult to grasp in the juridical field. In practice, marriage can be celebrated, and be valid, even if *affection* is absent, as far as the prospective spouses agree to live together and respect and help each other.

Nonetheless, the idea of the community of affection is not new within the Spanish law, as it was used to define quasi-marital unions. Before they were regulated, when the legislator wanted to take into account *de facto* unions that were similar to marriage, it referred to marriages and "similar relationships of affection". The problem was that marriage was not defined by the affection, but by the will of the spouses and the aims of the union. This idea of community of affection tried to convey the aims of marriage (raising children in the most accurate environment and helping each other) depriving them of any reference to the generation. The issue here is that the community of affection depicted by the Constitutional Court may include some profiles as far from marriage as divorced couples, who still love each other (or at least they say so), have a common family project, freely stated, and hold an equal position in the relationship.

Besides the difficulty to find a distinctive element of marriage, those that still remain in the definition or in the content of the marital relationship may be queried, as well. Some uncertainties have been mentioned, but some others may arise. One of them is the establishment of a real community of life. It seems one of the few characteristics that remains in the current concept of marriage. However, the phenomenon of *living apart together* as an alternative way of stating a stable relationship would challenge that requirement. The rationale of those who defend this way of living is precisely maintaining the stability of the relationship by means of avoiding the difficulties that are incurred by living together.

A similar statement can be made about the open marriages, where the marriage does not preclude spouses from having sexual relations with other people. If they become not only socially acceptable, but legal, as well, the husband's presumption of paternity regulated in the Civil Code would need to be redesigned.

The absence of a clear concept of marriage in legislation elicits some incoherencies. It has already been mentioned with regard to the ban on marriage between close relatives, and more cases can be easily found. For example, since same-sex marriage was approved, the terms "wife" and "husband" were replaced by "spouse", or "progenitor A" and "progenitor B" when related to children. However, sometimes the law goes back to the "traditional" concept of marriage, using the term "husband". It happens when it regulates the presumption of paternity; the Civil Code says that children born after the wedding are presumed to be fathered by the husband[35]. This presumption cannot operate in a same-sex marriage. It appears that the legislator thinks that most marriages will be a man-woman union, aimed to bear children, and that is the reason why the general regulation of marriage makes sense.

[34] Cfr. STC No. 198, Nov. 6, 2012, cit., FJ 9.
[35] Section 116 of the Civil Code.

In this situation, the marriages of convenience lose most of its rationale; it is not worth faking a marriage, as celebrating a real marriage and divorcing after three months may appear less risky to obtain the expected benefit[36]. Although the Spanish Government tries hard to avoid this kind of marriage, acting in that way would not entail a proper fraud according to law, as the divorce is allowed without restrictions after three months of marriage, if both parties agree to it. Nevertheless, the phenomenon of marriages of convenience seems to be on the rise within the Spanish territory, thus, it deserves a few notes.

A marriage of convenience in Spain is understood in line with a common definition within all the European countries, as it was stated in the Council Resolution of December 4, 1997, on the measures to be adopted in the fight against fraudulent marriages[37]: "the marriage of a national of a Member State or of a national of a third country regularly residing in a Member State with a third-country national, for the sole purpose of circumventing the rules on entry and residence of third-country nationals and obtaining, for the third-country national, a permit residence or a residence permit in a Member State", and marriages of convenience are actually considered an abuse of rights in several European regulations[38].

It appears rather striking that, although the marriages of convenience do fulfil both the consent and form requirements in order to become proper marriages, they are considered to be completely null and void both by the Spanish administrative institutions and the Spanish courts. In this sense, a resolution of the General Directorate of Registries and of the Notary (DGRN) of 31 January 2006 clearly states that this type of marriages "alter the meaning of the marriage institution since there is no true will to establish a marriage as a conjugal union and community of life between the spouses aimed at forming a family."

From the aforementioned resolution, it can be easily inferred that despite not being mentioned at all within the Spanish marital regulation, the cause for a marriage does play a fundamental role that may condition its own validity. The Spanish Supreme Court reaches the same conclusion when talking about marriages of convenience, asserting that the DGRN refers to the "cause" as a necessary element of marriage.

It is worth mentioning that the problems related to the marriage of convenience are expanding within the Spanish territory to "*de facto* unions"[39], although the same solutions expect to be applied due to the similarities that they share.

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[36] The same opinion is shared the Spanish Supreme Court, which affirms "The differences between the valid marriage and the marriage of complacency are no longer clear, as of the 2005 legal reforms in the institution of marriage, which allow its dissolution due to divorce, at the request of only one of the spouses, once three months have passed from the celebration of the marriage, without any cause. This necessarily affects the content of the matrimonial consent, due to the difficulty of integrating it with specific conjugal duties, beyond its issuance in the manner required by law." (Vid: Spanish Supreme Court, Criminal Matters, Sentence 261/2017 of 6 Apr. 2017, Rec. 649/2016).

[37] See Council of Europe, Resolution December 4, 1997 (97/ C 382/01).

[38] For instance, The Article 35 "Abuse of rights" of Directive 2004/38/EC of the European Parliament and of the Council, of April 29, 2004, on the right of citizens of the Union and members of their families to move and reside freely in the territory of the Member States specifically mentions them as such: "Member States shall take the necessary measures to deny, terminate or withdraw any right conferred by this Directive in the event of abuse of rights or fraud, such as marriages of convenience [..]"

[39] Vid. Court of Soria, Judgement 62/2018 of June 25, 2018, Rec. 30/2018.

Factual unions today pose several problems beyond those related to the legal fraud. The regulation of marriage is within the powers of the State, according to the Constitution[40]. Nonetheless, all the autonomous communities have enacted their own laws that regulate *de facto* unions. Therefore, the possibilities of establishing a community of life in Spain vary depending on the territory where it is intended to be established. This is contrary to the equality of citizens who must have the same rights and duties in the entire territory of Spain. Therefore, it is the State who must decide on the types of union that will be recognized.

Unifying of the regime depends on the definition of marriage. However, if marriage has become an amorphous union, it makes no sense to maintain the regulation of *the facto* unions. It had a rationale when marriage kept most of their features. Those who did not want a stable, heterosexual union, aimed at caring for the next generation, could define another kind of union regulated by the State. Meanwhile, nowadays marriage provides for all those needs. Thus, there is no real need to multiply the regulations, when all of them fit in the regulation of marriage as it is now.

The regulation of other unions – under whatever name – is logical, if marriage is singled out in consideration of its aim. In this case, there would be marriage, with a very specific profile, and communities of life, that would be valid for any other unions that, respecting the basic principles of freedom, equality and public order, could be stated to satisfy the needs of affection, companionship, or any other.

3.3. Should All Unions be Allowed into the Marriage Definition?

Given that marriage is defined by the Constitutional Court as a community of affection established by free people, some restrictions to marriage lose their meaning. That is the case of the prohibition of marriage between close relatives or restriction of marriage to only two persons.

In the first case, that of the marriage between relatives, if the free will is the only requirement to marry, there is no clear reason for banning marriage between close relatives. Usually, a medical reason is alleged to when forbidding these unions: the offspring would have a high chance of carrying a genetic disease. However, on the one hand, sex is not a compulsory part of marriage, and therefore, siblings, for example, may decide not to bear children (or not to have sex at all), and they still might marry fulfilling all the legal requirements. On the other hand, medical reasons are not consistent with the general regulation of marriage; some people are aware that they may transmit a genetic disease, and they still can marry; their free will is the only grounds for this decision.

The same reasoning should apply to all kinds of unions. In fact, the only reason to maintain the prohibition or marrying close relatives would be that the Spanish legislator had the "traditional" marriage in mind as the model for marriage as such. Sexual relations between the consanguineous members of a nuclear family were not allowed in order to preserve the aim of the marital union, raising the new generation. The lack of sexual expectations makes the relationships among family

[40] Section 149 of the Constitution.

members completely different to those with outsiders, contributing to building an accurate environment for the growth and education of the children[41].

Something similar could be argued regarding the so-called polyamorous unions. Polygamy, in its version of polyandry as a union of a man and several women (typical of some cultures, mainly under the Muslim area of influence) is usually despised and forbidden because it vulnerates the principle of equality and it is presumed to be imposed upon women against their free will. However, polyamory conveys a free will to have more than one partner; if they decide to have an equal position in the community, why should the law ban those unions? There is no clear answer, since the free will is now the supreme norm regulating the establishment of any kind of marital union.

Ultimately, marriage might even cease to be solely a union between human beings. The *multispecies family*, that which would include pets as members of the family, is making its way into the social field, and controversies already arise as to the juridical regime of animals in case of divorce. If pets are approved as members of the family, it will not be long until somebody demands to marry his or her dog, cat or whatever animal that person chooses to be his or her partner.

The problem is not whether these possibilities sound weird or resemble juridical fiction. The real problem will be finding a reason to deny entering into marriage to somebody who wants to state a union, once the free will is the only element that must be taken into account to create the marital bond. Even though the Constitutional Court labels the marriage as an institution, the lack of a permanent content of that institution diminishes the special protection it could carry. As the Vice-President of the Constitutional Court states, "the Constitution requires public authorities to provide social, economic, and legal protection for families" (Article 39.1 CE). However, from the earliest interpretations of constitutional rules, it has been highlighted that there is no constitutional concept to identify the type of family to which Article 39.1 CE refers. True, STC 222/1992 stepped beyond what we might call "traditional" interpretations and stated: "No constitutional problem would exist if the concept of family provided for in Article 39.1 of the Constitution were understood to refer exclusively to families based on marriage." Our Constitution has not equated the family to be protected with the families based on marriage, a conclusion imposed not only by the regulation that clearly differentiates between one institution and another (Articles 32 and 39). The aforementioned judgment states: "This protection is a consequence linked to the "social" character of our state (Articles 1.1 and 9.2) and therefore to the actual reality of the models of cohabitation existing in our society. Consequently, the meaning of these constitutional norms is not consistent with restricting the concept of families to matrimonial families, however relevant these may be in our culture", and adds: "Thus, there is no need to seek any necessary differentiation in article 39.1 between families based on marriage and those that are not, and nor was this differentiation mentioned by STC 184/1990."[42]

[41] That is also the reason why some countries forbid marriage between persons who have lived in a close union, even though there is not any blood relationship among them. It is the case of step-parents, who are not allowed to marry their step-children, and children who are not siblings living together in a reconstituted family.

[42] Roca Trias, E. Family Law as a Right to Freedoms, pp. 85–86.

Summary. The Future of the Regulation of Marriage

The discussed issues lead us to an essential question: does marriage, as understood in the Spanish law, actually need a regulation at all? The law does not regulate personal relations (sexual relationships, or friendship, for example) unless there is a pronounced general interest thereof, as it happens with parenthood. Admittedly, marriage may generate economic effects and other obligations, like caring of the prospective offspring. However, children born out of wedlock enjoy the same protection as those born to a married couple[43], hence, marriage adds almost nothing to the status of the latter. Regarding the economic effects, they might be regulated as a general community or society, without any specialty.

This situation led some authors to wonder whether regulation of marriage is really needed in the society of today. Families based on marriage used to be a cell of society. Despite the fact that the society is organized in families, the "family status" does not have the importance it has enjoyed for centuries. It is not the basic economic unit anymore; besides, parental rights and duties are recognized despite the bond that exists between the mother and the father, and the same can be said of other fields, like inheritance. Thus, if marriage still survives as a useful institution, it is because the majority of marriages fit the traditional definition, not because it is essential to the functioning of society. It appears that the public powers do not have a clear aim as to what marriage is or should be, although they appeal to the traditional idea of marriage when it is needed to maintain a certain measure or policy, as it happened with the marriages of convenience. In that case, the aforementioned Resolution of the DGRN 2006 refers to the community of life and the "specific aims of marriage" when no clear aims can be deduced from the current legal regulation of this kind of union.

If marriage is regulated and protected because of its benefits, a logical conclusion is that if the new idea of marriage depicted by the law does not necessarily provide for those benefits, the grounds for regulation and protection of that marriage may not be the same as those of traditional marriage. The developments of these past decades – non-fault divorce, same-sex marriage and others – have completely changed the shape and aims of the marital relationship. It still has to be demonstrated that all unions which now fall under the umbrella of civil marriage purport a benefit to society, because their aim is not to create and educate the new generation. Clearly, some individual unions can contribute to this goal, however, it has ceased to be an inalienable target of marriage. Then, if the marital unions are only self-fulfilling unions, without an outcome that may be of general interest, even if they are satisfactory for individual persons, why should public powers regulate them? There is no undisputable reason for the state to regulate these unions. Marriage appears as a relationship based on affection that demands economic benefits for no other special reason than two persons living together; something that good friends living together without having sex could demand, as well, following the same rationale. Besides, it is difficult to label a bond that does not have a real expectation of being sufficiently permanent to form the foundation of society. While the bond of true marriage is a bond, where both parties commit themselves permanently to certain rights and duties, it is not the same in the regulation of marriage currently in force, where one can opt out from that relationship so easily: it

[43] Section 108 of the Civil Code.

is a relationship existing today and dissolved tomorrow without much more trouble than returning an unwanted item bought in a store.

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The Procedure for Amending the *Satversme* of the Republic of Latvia and the Substance of Restrictions Established by It

Dr. iur. **Ringolds Balodis**
Faculty of Law, University of Latvia
Professor at the Department of Constitutional and Administrative Law
E-mail: *Ringolds.Balodis@lu.lv*

The article is dedicated to the mechanism for protecting the *Satversme* [Constitution] of the Republic of Latvia (hereafter – the *Satversme*) – procedure for amending it and elements thereof – restrictions (quotas of participation, approval, readings, etc.), examining the amendments to the general and basic articles, as well as the theory of core. The parliament and the people may amend the *Satversme* in a referendum, therefore the article also turns briefly to the institution of the people's vote or plebiscite or referendum (Latin – *referendum*). The article aims to elucidate the effectiveness of the procedure for amending the *Satversme* and provide answers to the following questions: (1) Whether the procedure for amending the *Satversme* ensures protection of the national constitutional order on sufficient level and does not permit introduction into the *Satversme* of ill-considered or antidemocratic proposals; (2) Whether the legislator, aiming to ensure constitutional stability, has not set the exaggeratedly high quorum of voters' participation in the referendum for all articles of the *Satversme* and whether the mechanism of referendum in Latvia has not become incapable of functioning? In the framework of the article, the author also will try to reach concrete proposals that would improve the procedure for amending the *Satversme*, would increase citizens' involvement in the matters of public administration, which, in turn, would reinforce the people's trust in their State. In considering the proposals, the author will focus also on the issue of national security because amendments to the *Satversme* and referendums, clearly, may be used as factors for destabilising the State.

Keywords: *Satversme* [Constitution], restrictions to amending constitutions, amendments to *Satversme*, procedure for amending *Satversme*, basic articles of *Satversme*, core of *Satversme*, referendum, participation and approval quorums in a referendum.

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Introduction

The Republic of Latvia was proclaimed on 18 November 1918.[1] The *Satversme* [Constitution] of the Republic of Latvia (hereafter – the *Satversme*) was adopted by the democratically elected Constitutional Assembly on 15 February 1922,[2] following the authoritarian coup, organised by Kārlis Ulmanis, the *Satversme* was suspended on 15 May 1934 and later, during the years of occupation by Nazi Germany and the Soviet Union, existed only *de iure* until the basic articles of the *Satversme* were reinstated *de facto* when, on 4 May 1990, the transitional parliament of the Republic of Latvia *Augstākā padome* (the Supreme Council) adopted the Declaration of Independence[3] and later also defined in the constitutional law[4] that the *Satversme* determined the status of the restored State of Latvia. The full functioning of the *Satversme* on the territory of Latvia was renewed by the first convocation of the *Saeima* elected after the restoration of independence by the special announcement of 6 July 1993.[5] The first convocation of the *Saeima* of restored Latvia was able to set up, within a couple of months, a functioning system of the bodies of the State power, and legal regulation, envisaged in the *Satversme*.[6] Already within a year following its reinstatement, the *Satversme* was amended. At the time of writing this article – autumn of 2020 – the *Satversme* had been amended, in total, fifteen times.

[1] Latvijas pilsoņiem!: Tautas Padomes Latvijas Republikas proklamēšanas akts [For Latvian citizens!: Proclamation Act of the People's Council of Latvia] (18.11.1918). *Latvijas Pagaidu Valdības Likumu un Rīkojumu Krājums*, No. 1, 15.07.1919.

[2] Latvijas Republikas Satversme [*Satversme* [Constitution] of the Republic of Latvia] (15.02.1922). *Valdības Vēstnesis*, No. 141, 1922.

[3] Par Latvijas Republikas neatkarības atjaunošanu: Augstākās padomes deklarācija [On the restoration of independence of the Republic of Latvia: Declaration of the Supreme Council] (04.05.1990). *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, No. 20, 17.05.1990.

[4] Par Latvijas Republikas valstisko statusu: konstitucionālais likums [On the State status of the Republic of Latvia: constitutional law] (21.08.1991). *Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs*, No. 42, 24.10.1991.

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[6] *Kusiņš, G.* Valsts iekārtas un tiesību sistēmas atjaunošana [Renewal of the national equipment and legal system]. In: Latvijas Valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri [Sources of Latvian State Law. Establishment of the state – restoration of independence. Documents and comments]. Rīga: Tiesu namu aģentūra, 2015, p. 238.

Except the first amendment to the *Satversme* (1933), all others were adopted after the restoration of independence. On all occasions, the amendments to the *Satversme* were initiated by the members of the *Saeima* and were approved by the *Saeima*, whereas all attempts to amend the *Satversme* through a referendum have failed. It must be noted that, following the restoration of independence, certain regularity in the adoption of amendments to the *Satversme* can be observed, which is, on average, one amendment per two years. Amendments to the basic law of the Latvian State have increased its original length[7] by one third, although, regardless of this, the *Satversme* has been able to retain its status of a concise document.

The primary object of research for this article is *ratio legis* of the procedure for amending the *Satversme,* therefore, before examining it, it seems that insight into the genesis of the *Satversme* would be useful. The formula for amendments, which has remained unchanged since its beginnings, as well as, *inter alia*, the basic provisions regarding a referendum were created by the Constitutional Assembly. In 1921, after hearing most diverse proposals regarding the procedure for amending the *Satversme*[8] decided in favour of the proposal made by a member of the small German faction[9] Paul Schiemann. The proposal made by the German-speaking member of the Constitutional Assembly was based on the norms of 1919 Weimar Constitution[10] and was founded on the concept that amending the constitution should be sufficiently burdensome for it not to be implemented too often; however, it should be flexible enough, allowing the parliament, if necessary, to do that. As regards the involvement of the people in amending the *Satversme*, Schiemann was guarded, expressing the opinion that the people should be involved in the process of amending the constitution "only in exceptional, definite cases"[11], moreover, "*saspīlējot tās [tautas] gribu*" – "constraining its [the people's] will" by a high quorum.[12] Taking into account even only the experience of Latvia and the tragedy of the Baltic Germans (loss of former titles, immense estates and power, etc.), P. Schiemann's attitude (regarding the high quorum) is understandable; however, the unanimous support by the civic parties and leftist parties for this procedure is surprising. Thus, for instance, at the sitting, Jānis Purgailis fully reiterates Pauls Schiemann's position – the people should participate in the referendum "being entirely prepared with clear conviction, clear awareness that such acts should occur only in cases of serious need" and therefore a high quorum for approval is needed.

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7 The initial (historical) text of the Satversme was 2265 words long, whereas now (on 1 November 2020) it has reached the length of 3415 words. The major part of it is constituted by amendments No. 5 to the *Satversme* of 1998, which added to the *Satversme* a new chapter – Chapter VIII with 28 articles, and amendments No. 13 to the *Satversme* of 2014, which replaced the original (initial) Preamble to the *Satversme* with a new one.

8 See more *Balodis, R., Kuzņecovs, A.* Satversmes 76. panta komentārs [Comment of Article 76 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Comments of *Satversme* [Constitution]. Section V. Legislation]. Collective of authors, scientific ed. Prof. *Balodis, R.* Rīga: Latvijas Vēstnesis, 2019, pp. 201–203.

9 The Constitutional Assembly consisted of one hundred and fifty members, whereas the German faction had only five members.

10 See Article 74, 75 and 76 of the Constitution of the German Reich August 11, 1919. Available: http://hydrastg.library.cornell.edu/fedora/objects/nur:01840/datastreams/pdf/content [last viewed 10.09.2020].

11 Latvijas Republikas IV Saeimas V sesijas 4. sēdes (1933. gada 10. februārī) stenogramma [Transcript of the 4th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 10.02.1933]. In: Latvijas Republikas IV Saeimas V sesija. 1933. gads. [Session of the Latvian IV *Saeima V sitting*. Rīga: Latvijas Republikas Saeimas izdevums, 1933, p. 149.

12 Ibid.

Most probably, in fear of confrontational legislative initiatives of the voters[13], Purgailis dismisses doubts regarding the exaggerated size of the quorum, stating that, if the issue to be examined in a referendum were important for the people then the required "number of participants would arise and the referendum will be able to take place"[14], and the same is stated also by Cielēns, who is one of the true architects of the *Satversme*, adopted on 15 February 1922, because he heads the first sub-committee of the Committee for Drafting the *Satversme*. [15]

At the sub-committee of the Committee for Drafting the *Satversme* of the Constitutional Assembly (1921), the initial proposal by Paul Schiemann is split into several norms of *Satversme*, until finally the current numbering is established (76, 77, 78 and 79).[16] In this interconnected set of articles, Article 76 defines the general (ordinary) procedure for amending the *Satversme*, Article 78 sets out the procedure, in which the people (totality of citizens) can initiate amendment to the *Satversme*, whereas the first part of Article 79 defines the quorum for approving the amendments to the *Satversme* put for a national referendum. To add, in the wording of the *Satversme* adopted by the Constitutional Assembly, Article 79 did not have the second part, it was amended by the amendments to the *Satversme* of 1933 and again – in 2003. Currently, the second part of Article 79 defines the quorum of voters and the simple majority vote required to adopt a law or a decision with respect the membership of the State of Latvia in the European Union.

> *76. The* Saeima *may amend the Constitution in sittings at which at least two-thirds of the members of the* Saeima *participate. The amendments shall be passed in three readings by a majority of not less than two-thirds of the members present.*
> *77. If the* Saeima *has amended the first, second, third, fourth, sixth or seventy-seventh Article of the Constitution, such amendments, in order to come into force as law, shall be submitted to a national referendum.*
> *78. Electors, in number comprising not less than one tenth of the electorate, have the right to submit a fully elaborated draft of an amendment to the Constitution or of a law to the President, who shall present it to the* Saeima. *If the* Saeima *does not adopt it without change as to its content, it shall then be submitted to national referendum.*
> *79. An amendment to the Constitution submitted for national referendum shall be deemed adopted if at least half of the electorate has voted in favour. A draft law, decision regarding membership of Latvia in the European Union or substantial changes in the terms regarding such membership submitted for national referendum shall be deemed adopted if the number of voters is at least*

[13] *Rodiņa, A.* Valstiskuma pamatu aizsardzības mehānismi [Mechanisms for Protecting the Foundations of Statehood]. In: Latvijas Universitātes 71. zinātniskās konferences rakstu krājums. Tiesību interpretācija un tiesību jaunrade – kā rast pareizo līdzsvaru [The 71st Scientific Conference of the University of Latvia. The interpretation of rights and the creation of rights – how to find the right balance]. Rīga: Latvijas Universitāte, 2013, p. 222.

[14] *Rainis, J.* Vispārējās debates par Satversmes I daļu. IV sesijas 5. sēdes (1921. gada 28. septembrī) stenogramma. [Transcript of the 5th sitting of the IV Session of the Constitutional Assembly 28.09.1921]. In: Latvijas Satversmes sapulces stenogrammu izvilkums (1920–1922). Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana [Discussion and approval of the draft Constitution of the Republic of Latvia]. Rīga: Tiesu namu aģentūra, 2006, p. 129.

[15] Ibid.

[16] Latvijas Satversmes sapulces Satversmes komisijas 1. apakškomisijas 1921. gada 17. janvāra sēdes protokols Nr. 8 [Minutes of the Constitutional Assembly Constitutional Commission 1st subcommission meeting 17.01.1921], unpublished material.

> *half of the number of electors as participated in the previous* Saeima *election and if the majority has voted in favour of the draft law, membership of Latvia in the European Union or substantial changes in the terms regarding such membership.*

Prior to commencing more detailed examination of the regulation, it must be noted that the Latvian basic law should be counted as one of the flexible[17] constitutions[18] of the group of "strict" constitutions, because a number of states in this group have embedded more substantial restrictions to amending the constitution in their constitutions (e.g., the US, Australia, Japan, etc.)

1. General Procedure for Amending the *Satversme*

More than a hundred years ago, Professor Kārlis Dišlers, examining the procedure for amending the *Satversme*, arrives at the conclusion that a sufficiently clear borderline between the ordinary and the constitutional legislation had not been drawn,[19] at the same time, as mentioned in the previous section, some elements of amendments are defined in some articles of the *Satversme*. Article 76 of the *Satversme* includes the basic restrictions to amending the *Satversme*. Let us examine these elements from the vantage point of comparative constitutional law, choosing as the basis the typical restrictions pertaining to constitutions of unitary, unicameral republics, defined in constitutions for republics with unicameral parliament. For this purpose, they are divided by the (1) range of subjects who initiate amendments to the constitution; (2) quorums that are required in parliaments for the approval of the constitutions; (3) the procedure for reading the draft amendments to the constitution; (4) other provisions.[20]

1.1. Circle of Subjects with the Right to Initiate Amendments to the *Satversme*

Amendments to the *Satversme* may be proposed by the same subjects,[21] who have the right to do it in the legislative process.

> *65. Draft laws may be submitted to the* Saeima *by the President, the Cabinet or committees of the* Saeima*, by not less than five members of the* Saeima*, or, in accordance with the procedures and in the cases provided for in this Constitution, by one-tenth of the electorate.*

As mentioned above, disregarding the states with bicameral parliaments or/ and federal system because initiation of constitutional amendments and the very process of amending is much more complicated, it must be noted that proposing amendments to the *Satversme* in Latvia is rather simple. There are countries where amendments to the constitutions may be initiated by a much more limited number of subjects compared to amendments to ordinary laws (for instance, in

[17] *Endziņš, A.* Preambulas projekts var destabilizēt sabiedrību [The draft preamble could destabilize society.] *Jurista Vārds*, No. 44, 29.10.2013, pp. 6–7.

[18] *Balodis, R.* Latvia. In: *Encyclopedia of World Constitutions.* Vol. II. Ed. *Robbers, G.* U.S. Facts on File, 2007, p. 514.

[19] *Dišlers, K.* Latvijas Republikas Satversmes grozīšanas kārtība [Procedures for amending the *Satversme* [Constitution] of the Republic of Latvia]. *Tieslietu Ministrijas Vēstnesis*, No. 7/8, 1929, pp. 227–228.

[20] See more *Balodis, R., Kuzņecovs, A.* Satversmes 76. panta komentārs [Comment of Article 76 of the Satversme], pp. 201–203.

[21] *Balodis, R.* The Constitution of Latvia. In: Rechtspolitisches Forum Legal Policy Forum Institut für Rechtspolitik an der Universität Trier, No. 26, 2004, p. 23.

Estonia,[22] it is only one-tenth of the members of the parliament and the president), in some countries a larger number of the members of the parliament is required (for instance, three-fourths in Bulgaria[23] or one-fifth in Croatia[24]).

In Latvia, all draft laws reach the Presidium of the *Saeima*, which puts the on the agenda of the *Saeima*'s sitting for examination. The *Saeima* decides on transferring the draft law to a committee or dismissing it. The *Saeima's* vote on transferring it to the committee is not to be regarded as a reading in the meaning of Article 76 of the *Satversme*, therefore, at the sitting the decisions is adopted by "*klātesošo deputātu absolūto balsu vairākumu*" ("an absolute majority of votes of the members present at the sitting") according to the Article 24 of the *Satversme*. If the majority of the members of the *Saeima* has decided on dismissing the draft law, it is no longer proceeded with, if it is supported, it goes to the respective committee[25] (usually, the Legal Committee), which is obliged to prepare an opinion, annotation[26] and advance it for the reading at the *Saeima*. During this "zero reading", only two members may speak, each of them is given five minutes to present their opinion, and one has to be "in favour of", while the other – "against" the draft law.

1.2. Number of Qualified Members of the *Saeima* at the Sitting Examining Draft Amendments to the *Satversme*

In amending the *Satversme* of the Republic of Latvia, the quorums of the members present and of approval must be complied with. Article 76 of the *Satversme* defines the same proportion for both quorums – two-thirds. Namely, for the sitting for amending the *Satversme* to be legitimate, at least 67 members must participate in it, which is two-thirds or the absolute majority of the members of the *Saeima*. The quorum for approving amendments to the *Satversme*, as opposed to the participation quorum, is a variable because it depends on the number of members who attend the sitting and have registered. With increasing number of members present, the quorum of approval also increases in arithmetic progression (for instance, with 67 members present, the approval quorum will be 45 members, with 87 members present, the approval quorum will be 58 members, with 91 members present, the approval quorum will be 61 members, etc.). The Latvian *Saeima*, just like many other parliaments in the world, uses the electronic voting system; therefore, to verify the qualified majority, the Presidium of the *Saeima* holds registration to establish the presence of members. Pursuant to Article 15 (2) of the Rules of Procedure of the *Saeima*, the member's presence in the sitting is established by his or her last registration for a quorum.

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[22] See, for example, Article 103 and 161 of the Estonian Constitution. Available: https://www.constituteproject.org/constitution/Estonia_2015.pdf?lang=en [last viewed 04.09.2020].

[23] See Article 154 of the Bulgarian Constitution. Available: https://www.constituteproject.org/constitution/Bulgaria_2015?lang=en [last viewed 04.09.2020].

[24] See Article 136 Croatia's Constitution. Available: https://www.constituteproject.org/constitution/Croatia_2013?lang=en [last viewed 04.09.2020].

[25] See Article 82, part one. Saeimas kārtības rullis: LR likums [The Rules of Procedure of the *Saeima*: Law of the Republic of Latvia], Article 81. *Latvijas Vēstnesis*, No. 96(227), 18.08.1994.

[26] Ibid., Article 86, part 2.

1.3. Procedure of Readings for a Draft Amendment to the *Satversme*

Abiding by the procedure set for the adoption of a legal norm is the precondition for the validity of a legal norm,[27] which the legislator always must comply with. In amending constitutions, particularly strict adherence to this procedure is required because the national basic law constitutes the legal foundations of the whole legal system and contesting the legitimacy of a norm of the basic law may seriously undermine the citizens' trust in democracy.

"The provision of three readings" is included in Article 76 of the Latvian *Satversme*, which is linked to "the impossibility of urgency principle".[28] It is included in the *Satversme* to prevent rushing the procedure of amendments by using the institute of urgency, when, pursuant to Article 75 of the *Satversme*, draft laws are adopted with two-thirds of the votes of members present in two readings. It is generally considered that the discussion of a draft law in three readings allows adopting a better-considered constitutional norm, whereas two readings entail a greater probability of flawed legislation. At the same time, a definite interval of time between the reading has not been determined in Latvia, as in the Estonian Constitution[29], referred to above, where, similarly to Latvia, draft constitutional amendments are discussed by the Parliament (*Riigikogu*); however, the interval between the first and the second reading is at least three months and the interval between the second and the third reading is at least one month. Thus, the shortest possible interval between the first and the third reading is at least four months.[30] It must be added that the Estonian Constitution, which was adopted in 1992, has been amended only five times.[31] In countries with bicameral parliament, for instance, in Italy,[32] amendments to the Constitution must be discussed by both chambers and the periods between the readings must be at least three months, etc. A procedure like this has not been established in Latvia, and sometimes amendments to the *Satversme* have been adopted even within a month and a half. For instance, in the spring of 2009, the fourteenth amendments to the *Satversme* recast Article 14 of the *Satversme* within a month a half. The *Saeima* decided to transfer the draft law to the committee at the sitting of 15 March 2009, the first reading was held at the sitting of 4 April, the second – at the sitting of 19 April, but the third – at the sitting of 3 May. The last, fifteenth amendments to the *Satversme* (2018) are even a more striking example, amending the procedure for electing the President of the State, established in Article 36 of the *Satversme* (from secret to open), two days before the parliamentary election. The *Saeima* decided to transfer the draft law to the committee at the sitting of 17 May 2018, the first reading was held at the sitting of 6 September 2018, the second – in the next month, at the sitting of 20 September, but the third – at the sitting of 4 October, whereas the election of the 13th convocation of the *Saeima* was held on 6 October. Constitutional barriers are established in constitutions to minimise hasty amendments based on emotions or populism. Amendments to the *Satversme*, which are adopted demonstratively on

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27 Judgment of 24 October 2019 by the Constitutional Court in case No. 2018-23-03, para. 14.

28 *Balodis, R., Kuzņecovs, A.* Satversmes 76. panta komentārs [Comment of Article 76 of the *Satversme*], p. 214.

29 See, for example, Article 163 Estonia Constitution. Available: https://www.constituteproject.org/constitution/Estonia_2015.pdf?lang=en [last viewed 04.09.2020].

30 *Narits, R., Merusk, K.* Constitutional Law. Estonia. The Hague, London, Boston: Kluwer, 1998, p. 58.

31 http://www.baltic-course.com/eng/analytics/?doc=105865 [last viewed 04.09.2020].

32 See Article 154 of the Italian Constitution. Available: https://www.constituteproject.org/constitution/Italy_2012?lang=en [last viewed 04.09.2020].

the eve of the parliamentary election, when all kinds of political canvassing are prohibited, provide grounds for reflections that it is not sufficient to have only the provision of three readings, setting a time interval between the readings should also be considered. The use of amendments to the *Satversme* in the pre-election passions should be reduced to the minimum.

1.4. Other Provisions

Among other provisions, it should be noted that, in the course of examining ordinary draft laws, proposals for new amendments can be advanced also for the second and the third reading, whereas with respect to amendments to the *Satversme* this procedure is not allowed. This prohibition has been established to prevent a situation where the proposals are poorly discussed and analysed. This has been recognised by the Constitutional Court[33], pointing out that proposals may be submitted only with respect to those articles (regarding amending or deleting these articles), which had been included in the draft law when it was adopted in the first reading. There are countries (for instance, Lithuania), where the constitution cannot be amended[34] if martial law has been proclaimed in the country, the situation is similar in France, where the procedure for amending the constitution is not initiated or it is stayed if an emergency state is announced, which is linked to a threat to the integrity of the national territory.[35] In the Latvian procedure for amending the *Satversme,* nothing is said about the procedure in states of emergency and exceptional situations, why it would be possible in practice. I believe that the statement made by Arvīds Dravnieks that "self-evident practice of contemporary Western democracy is that the parliament of one conscription does not introduce substantial constitutional amendments"[36] merits a more detailed analysis. Restrictions of this type are practiced by Portugal and Sweden, and I believe that it could be a good tool for slowing down the advancement of amendments to the *Satversme* to reconsider them, possibly, after emotions have settled.

2. Mandatory Constitutional Referendum – the People's Right to Express Their Assessment of the *Satversme*

2.1. The People's Safeguard of the Amendments to the Norms Enumerated in Article 77 of the *Satversme*

In Latvia, amendments to the *Satversme* may be adopted by both constitutional legislators – the *Saeima*, in the procedure established in Article 76 of the *Satversme*, and the totality of citizens, in the procedure established in Article 78 of the *Satversme*. If the *Saeima,* as the constitutional legislator, has amended the articles enumerated in Article 77 of the *Satversme*, i.e., Articles 1, 2, 3, 4, 6 or 77,[37] for

[33] Judgment of 16 December 2008 by the Constitutional Court in case No. 2008-09-0106, para. 16.5.

[34] See Article 147 of the Lithuanian Constitution. Available: https://www.constituteproject.org/constitution/Lithuania_2006?lang=en [last viewed 04.09.2020].

[35] See Article 89 of the French Constitution. Available: https://www.constituteproject.org/constitution/France_2008?lang=en [last viewed 04.09.2020].

[36] Priekšlikumi Latvijas publiskās varas pilnveidošanai Ekspertu grupas pārvaldības pilnveidei materiāli [Proposals for improving the public governance of Latvia. Materials for improving the management of the expert group]. Rīga: Latvijas Vēstnesis, 2015, p. 215.

[37] It must be added that, initially, Article 4 and also Article 7 itself were not included in the enumeration of the basic articles of the *Satversme.* With the intention of reinforcing the official language, in 1998, the 6th convocation of the *Saeima* amended Article 4, including in it the official language, and included this recast article in the enumeration of Article 77. The amendment made by the 6th convocation of

the amendment to enter into force it must be approved by the other constitutional legislator – the people, doing this in a referendum. Professor Kārlis Dišlers named this procedure "*tautas apsardzību*" ("the people's safeguard"),[38] because the parliament itself does not have an independent possibility to amend these basic articles of the *Satversme* – the people must have the final say. The next section of the article will examine the practical implementation of the law on the people's referendum, which applies to safeguarding the basic articles of the *Satversme*.[39] It envisages the possibility, in special cases[40], to turn to the nation's collective reason to receive the final conclusion. This constitutional regulation must be examined in interconnection with the Constitutional Court's finding that provides that the national referendums in the procedure set out in Article 77 of the *Satversme* must be held also if the parliament, amending a legal act "substantially", also affects legal norms that are protected by the said article of the *Satversme*, for instance, adopting a law on the ratification of an international agreement, which infringes on the provisions of Article 1 and Article 2 of the *Satversme*.[41] Also in such a case, a referendum must be held, as in the case if the *Saeima* had amended the very norms enumerated in Article 77 of the *Satversme*. Likewise, the Constitutional Court has recognised that, in amending laws or the *Satversme*, the *Saeima's* discretion is limited to a certain extent because the parliament, in making decisions, must take into account several factors that it may not ignore. These factors are, for instance, the European Union Law, general principles of law and other norms of the *Satversme*.[42] In this context, the issue arises regarding the "concept of the *Satversme's* core", which was extensively discussed in the circles of lawyers and politicians following publication of the opinion by the Constitutional Law Committee under the President's Auspices[43] (2012).[44]

Professor, Senator of the Supreme Court Jautrīte Briede, in explaining the *Satversme,* notes that none of the legislators may annex Latvia to another state or wish to review the basic decision included in the proclamation act of 18 November

the *Saeima* included Article 77 itself in Article 77, its becoming a basic article of the *Saeima*, substantially, closed their recasting in the future because the requirements with respect to the mandatory constitutional referendum are applied also to Article 77 itself.

38 *Dišlers, K.* Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian State Law]. Rīga: Tiesu namu aģentūra, 2017, p. 143.

39 Such substantial restriction is envisaged to preclude the possibility for the *Saeima* to decide unilaterally on the most important articles of the *Satversme*. I.e., if such political forces were to be in the parliament, who could ensure the quorums defined in Article 76, the amendments to the *Satversme* adopted by them that would change the political system or would otherwise undermine the foundations of the statehood would not enter into effect because they would have to be put for national referendum.

40 Clearly, amending the basic articles, enumerated in Article 77 of the *Satversme*, is a special case.

41 Judgment of 7 April 2009 by the Constitutional Court in case No. 2008-35-01, para. 15.1, 15.2.

42 Judgment of 18 April 2019 by the Constitutional Court in case No. 2018-16-03, para. 15.1.1.

43 The Constitutional Law Committee was established in 2007 by Preisdent Valdis Zatlers. Several well-known lawyers were included in the Committee. Incumbent President Egils Levits was appointed its head, incumbent President of the Constitutional Court prof. Ineta Ziemele, current Justices of the Constitutional Court prof. Sanita Osipova, prof. Daiga Rezevska, Gunārs Kusiņš, current Judge of the European Court of Human Rights Mārtiņš Mits and current Vice-Speaker of the *Saeima* Inese Lībiņa-Egnere served on the Committee.

44 As became clear later, the actual "push" to draft a modern argumentative basis to substantiate the State, was the fact Chairperson of the Committee Egils Levits, invisible to the general society, personally turned to several important public officials. See *Levits, E.* Valstsgriba. Idejas un domas Latvijai 1985–2018 [National will. Ideas and thoughts for Latvia 1985–2018]. Rīga: Latvijas Vēstnesis, 2019, p. 560.

1918 – Latvia is a sovereign and democratic state that respects human rights.[45] Egils Levits explains this approach[46] by the principle of "defensive democracy", otherwise a situation in Germany in 1933 could be repeated, when, by successive law-based actions, democratic structure was dismantled and replaced by the fascist regime.[47] Such "legal revolution" would be inadmissible[48] because an instantaneous democratic majority has neither the moral nor, since the adoption of the Preamble to the *Satversme*, legal right to deprive Latvians of the possibility to self-determine its statehood, which would be impossible to regain, once lost.[49] I.e., the concept of the inviolable core of the *Satversme* does not permit "the State's suicide", so that one, separate amendment to the *Satversme* would not destroy the values, on which the *Satversme* is founded.[50] An opinion has been voiced that the concept should be exercised only in the case of "extremely substantial" threat for the constitutional structure to defend the democratic order and prevent liquidation of a democratic state in seemingly correct procedural way.[51] The concept of the core immediately acquired its supporters and opponents, [52] just as the proposal to add to the *Satversme* a new Preamble, the wording of which "*latviešu nācijas negrozāmā valstsgriba*" ("the unwavering will of the Latvian nation to have its own State") reflects the concept of the inviolable core of the *Satversme*.[53] Passions were aroused by the Preamble to the *Satversme* also during scientific conferences[54] and articles[55], and died down only after the sizeable Preamble, with the expanded core of the *Satversme*[56], was included into the basic law. Clearly, it was great achievement by the Committee[57] and also Egils Levits, proven by the fact that its recommendations were gradually approbated in practice.[58] The Supreme Court has included the Committee's opinion in its judgements of 30 April 2013, 12 February 2014 and 28 March 2014. In its judgement of 30 April 2013, the Supreme Court expresses its support to the proposal, referred

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45 *Briede, J.* Satversmes 78. panta komentārs [Comment of Article 78 of the *Satversme*], p. 286.

46 See *Levits, E.* Eiropas Savienība kā vērtību savienība [The European Union as a union of values]. *Jurista Vārds*, No. 19, 08.05.2018.

47 *Levits, E.* Valstsgriba … [National will …], pp. 565, 619, 638.

48 Ibid., p. 592.

49 Ibid., p. 835.

50 *Pleps, J., Pastars, E., Plakane, I.* Konstitucionālās tiesības [Constitutional law]. Supplemented and revised edition. Rīga: Latvijas Vēstnesis, 2014, p. 56.

51 Ibid.

52 Viedokļu diskusija. Valsts pamati – vai visiem pašsaprotami [Discussion of views Discussion of views: State bases – or self-evident to all]. *Jurista Vārds*, No. 45, 06.11.2012, pp. 12–13, 15, 17, 19.

53 *Meistere, D.* Saeimas Juridiskā biroja atzinums par Satversmes ievada pieņemšanas procedūru [Opinion of the Saeima Legal Office on the procedure for the adoption of the Constitution Preamble]. *Jurista Vārds*, No. 26, 08.07.2014, pp. 12–13.

54 Aizritējusi konference par Satversmes preambulas paplašināšanas projektu [A conference on the draft extension of the preamble to the Constitution has elapsed]. *Jurista Vārds*, No. 45, 05.11.2013, pp. 7–10.

55 See for example *Endziņš, A.* Preambulas projekts … [The draft preamble …], pp. 6–7.

56 Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Comments of *Satversme*. Section I. General rules]. Collective of authors, scientific ed. Prof. *Balodis, R.* Rīga: Latvijas Vēstnesis, 2014, pp. 120–132.

57 *Krūma, K., Plepa, D.* Constitutional Law in Latvia. The Netherlands: Wolters Kluwer, 2016, p. 6.

58 It must be noted that not all proposals by the Committee have been implemented. One of the recommendations given by the Committee was to integrate into laws the right of the President, within a certain term before the promulgation of a law or an amendment to the *Satversme*, to turn to the Constitutional Court to establish, whether a law that had been adopted but had not been promulgated yet complied with the *Satversme*.

to in the Committee's opinion[59], regarding greater involvement of the Central Election Commission and the court (in assessing the elaborateness of the draft laws submitted for a referendum) and notes that the state institutions have incontestable right to prevent a threat to democracy already at an early stage.[60] In view of the fact that the text of the draft law, submitted by the initiative groups, cannot be changed in the further process, the Supreme Court notes in its judgement of 12 February 2014 that the Central Election Commission must ensure that a draft law that is contrary to the basic values of a democratic state governed by the rule of law should not be advanced for a referendum,[61] whereas in its judgement of 28 March 2014, the Constitutional Court notes that for a draft amendment to the *Satversme*, initiated by the totality of citizens, to be considered as "*pilnīgi izstrādātu*" ("fully elaborated") as to its content, it may be incompatible either with those provisions of the *Satversme* that it does not propose to amend or with the core of the *Satversme*.[62] The Supreme Court also explains in this judgement that part of the unwritten legal principles and basic values, on which the *Satversme* is founded, constitute the core of the *Satversme*. It includes all elements that form the identity of the State of Latvia and the identity of Latvia's order of a democratic state.[63]

It must be noted that even prior to the judgements referred to above, the Enterprise Register took the stand to safeguard the core of the *Satversme,* referring in its decisions to the Committee's findings as substantiation. The institution refused to register the party "*Par dzimto valodu*" ("For Native Language") because it identified in the party's programme, submitted for registration, turning against the foundations of the State – the Latvian language as the official language, as well as the territorial integrity of Latvia.[64] Although there is no normative regulation with respect to the core, the Legal Bureau of the *Saeima* holds that the *Saeima* as the legislator recognises the inviolable core of the *Satversme* as a general legal principle in Latvia's constitutional system, which is said to be reflected by the declaration, adopted at the *Saeima's* sitting of 2 February 2012, "On the national importance of the Latvian language" and the position adopted by the *Saeima* in the legal proceedings before the Constitutional Court in case No. 2012-03-01.[65] It must be noted that elsewhere in the European Union the protection of "inviolable articles", "unchangeable articles" or "*Ewigkeitsklausel*" ("eternity clauses") is resolved in the most diverse ways[66]; however, defining them in the constitution with

[59] In its opinion, the Committee expressed the view that the Central Election Commission could prevent the possibility that an amendment to the *Satversme*, directed against the core of the *Satversme*, would be put for national referendum.

[60] Augstākās tiesas Senāta Administratīvo lietu departamenta 30.04.2013. sprieduma lietā SKA-172/2013 motīvu daļas 20. punkts [Decision of 30 March 2013 by the Senate of the Supreme Court of the Republic of Latvia in case No. SKA-172/2013]. Available: at.gov.lv/files/files/ [last viewed 13.09.2020].

[61] Augstākās tiesas Administratīvo lietu departamenta 12.02.2014. sprieduma lietā Nr. A420577912 SA-1/2014 motīvu daļas 8. punkts [Decision of 12 February 2014 by the Supreme Court of the Republic of Latvia in case No. A420577912 SA-1/2014]. Available: at.gov.lv/files/files/ [last viewed 13.09.2020].

[62] Augstākās tiesas Administratīvo lietu departamenta 28.03.2014. sprieduma lietā SA-3/2014 motīvu daļas 12. punkts [Decision of 28 March 2014 by the Supreme Court of the Republic of Latvia in case No. SA-3/2014]. Available: at.gov.lv/files/files/ [last viewed 13.09.2020].

[63] Ibid.

[64] Ekspertu komentāri Uzņēmumu reģistra valsts notāres Lilitas Strodes 2013. gada 14. marta lēmumam Nr. 10-11/1850 [Expert Commentary to the Decision of the State Notary of the Enterprise Register Lilita Strode of 14 March 2013 No. 10-11/1850]. *Jurista Vārds*, No. 28, 23.04.2013, p. 28.

[65] *Meistere, D.* Saeimas Juridiskā biroja atzinums … [Opinion of the Saeima Legal Office …], pp. 12–13.

[66] Unconstitutional Constitutional Amendments. The Limits of Amendment Powers. *Edited by Loughlin, M., McCormick, J. P., Walker, N*. United Kingdom: Oxford University Press, 2017, pp. 23–26.

more complicated procedure of amending them is characteristic.[67] For example, in Italy[68] and France,[69] which also have complicated experience with changes and transformations in the constitutional status, this issue has been resolved in a rather simple way – by establishing in the constitution a prohibition to change the republican democratic form of government. Assessing the Latvian situation, one can say that for us the year of 2012 turned out to be fatal, when the decision had to be made in a referendum on the second official language in the so-called "language referendum.[70] The political elite was noticeably bewildered: President Andris Bērziņš boycotted the referendum demonstratively, thus indicating that ignoring the referendum ("disrupt the quorum") was the best civil solution, whereas the position parties of the *Saeima*, which also were Latvian parties, made a joint announcement, urging citizens to participate in the referendum[71] and vote against Russian as the second official language… It seems that the ability of colleagues-lawyers to create an authoritative "concept of the core of the *Satversme*" deserves commendation.

Furthermore, it must be noted with respect to the protection of the basic articles of the *Satversme*, established in Article 77 of the *Satversme*, and the concept of the core of the *Satversme*, that an opinion exists that the primary aim of Article 77 of the *Satversme* is, nevertheless, "to remove" certain issues from the competence of the *Saeima* but not from that of the people, because the people have the right to decide on the foundations of their State[72] and proposing some elements of the *Satversme's* core for the referendum should not be rejected.[73] This suggests that, in the absence of clear normative regulation, the inviolability of the core of the *Satversme* strongly depends on the personal conviction of the responsible officials, judges. Practice is still in the stage of development, and the test of the protective elements for the concept of the *Satversme's* core (including the Preamble to the *Satversme*) is yet to come.

Concluding this insight into the core of the *Satversme* and the basic articles of the *Satversme*, it needs to be noted that, as stated above, they are only partially identical because twenty-eight articles of Chapter VIII of the *Satversme*

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[67] Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Comments of *Satversme*. Section V. Legislation], pp. 205, 262–265.

[68] See Article 138 of the Italian Constitution. Available: https://www.constituteproject.org/constitution/Italy_2012?lang=en [last viewed 04.09.2020].

[69] See Article 89 of the French Constitution. Available: https://www.constituteproject.org/constitution/France_2008?lang=en [last viewed 04.09.2020].

[70] On 18 February 2012, national referendum was held in Latvia regarding adoption of the law "Amendments to the *Satversme* of the Republic of Latvia". The draft law envisaged amending Articles 4, 18, 21, 101 and 104 of the *Satversme*, including therein also provisions on the Russian language as the second official language, providing that the working languages of local governments were Latvian and Russian and that everyone had the right to receive information in Latvian and in Russian. The ballot paper of the referendum comprised the question "Are you for the adoption of the draft law "Amendments to the *Satversme* of the Republic of Latvia, which envisages grating the status of the second official language to the Russian language?"". The possible answers were "In favour" and "Against". Available: https://www.cvk.lv/lv/tautas-nobalsosanas/par-grozijumiem-latvijas-republikas-satversme-2012 [last viewed 04.09.2020].

[71] Prezidents: referendums par valodu nebūs gada svarīgākais notikums [President: language referendum will not be the most important event of the year]. Available: https://www.tvnet.lv/4739059/prezidents-referendums-par-valodu-nebus-gada-svarigakais-notikums [last viewed 04.09.2020].

[72] *Ņikuļceva, I.* Satversmes 77. panta komentārs [Comment of Article 77 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Comments of *Satversme*. Section V. Legislation], p. 271.

[73] *Paparinskis, M.* Piezīmes par Satversmes preambulas projektu [Notes on the draft preamble to the Constitution]. *Jurista Vārds*, No. 43, 22.10.2013, p. 36.

"Fundamental Rights", as well as seven paragraphs of the Preamble and the principle of the nation state revealed therein, are left outside the enumeration of Article 77. We can read in the opinion of the Constitutional Law Committee that "the scope of the inviolable part of the constitutional identity can be outlined only approximately",[74] which resonates with the opinion of Juris Jelāgins, Justice of the Constitutional Court", that "not each amendment to the content of the core articles of the *Satversme* is such that demands approval thereof in a referendum."[75] The principle of proportionality, which is an institutional principle and has joined the circle of the basic articles of the *Satversme*, in particular, points to this.[76] In contrast to other fundamental principles of the aforementioned article, which belong to the *Satversme's* core and are, in Dišlers' words, "under the people's safeguard" (general, equal, direct and secret election), the principle of proportionality is a constitutional principle, which should not claim to be part of "the eternity clause". In this respect, to my mind, the Lithuanian constitution is worth mentioning, – its basic articles (Chapter 1 of the Lithuanian Constitution) also must be approved in a referendum; however, it does not comprise the model or the principles of election, as it is in Latvia[77]. At the same time, as in an expanded constitution, a number of various symbols, institutions and regulations is listed in the basic articles, thus making their replacement difficult (for instance, flag, anthem, coat-of-arms, language, territorial integrity, the principles that "state institutions should serve the people", "the nation realises it supreme sovereign power either directly or via their democratically elected representatives"[78], etc.). In the context of this article, it must be particularly highlighted that the basic articles or rather the basic principles of the Lithuanian constitution comprise also the referendum as the main way for deciding on the most important national issues – "the most significant issues concerning the life of the State and Nation shall be decided by referendum".[79]

2.2. The Right of the Totality of Citizens to Decide on Amendments to the *Satversme* and Its Exercise in Practice

Assuming that the basic law of any state is, essentially, the agreement by the people themselves on the form of the State power, principles of governance and institutions, the people should have the right to amend such an agreement – the right to the constitutional power. This right should be genuine rather than such that cannot be exercised. The Latvian Constitutional Court has stated: the *Satversme* guarantees the exclusive right of the Latvian people to act on the fundamental

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74 Konstitucionālās tiesību komisijas 17.09.2012. viedoklis par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu [Opinion by the Commission of Constitutional Law from 17.09.2012 on the Constitutional Foundations of the State of Latvia and Inviolable Core of the *Satversme*]. Available: http://blogi.lu.lv/tzpi/files/2017/03/17092012_Viedoklis_2.pdf [last viewed 04.09.2020], p. 129.

75 Satversmes tiesas tiesneša Jura Jelāgina 2009. gada 21. aprīļa atsevišķās domas lietā Nr. 2008-35-01 [Separate thoughts of the Constitutional Court Judge Juris Jelāgins in case No. 2008-35-01 of 21 April 2009]. Available: https://juristavards.lv/doc/194927-satversmes-tiesas-tiesnesa-jura-jelagina-atseviskas-domas/ [last viewed 04.09.2020].

76 *Supe, V.* Satversmes 6. panta komentārs [Comment of Article 6 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima [Comments of *Satversme*. Section II. Parliament]. Collective of authors, scientific ed. Prof. *Balodis, R*. Rīga: Latvijas Vēstnesis, 2020, p. 114.

77 See Article 148 of Lithuanian Constitution.

78 Ibid., Article 4.

79 Ibid., Article 9.

norms of the *Satversme*, whereas the *Saeima* has only the power to review, which differs from the constitutional power of the Latvian people.[80]

As stated above, the *Saeima* has the right to amend the *Satversme* in the legislative procedure and the people (totality of citizens) – in the procedure of referendums.

Poet and member of the Constitutional Assembly Jānis Rainis has said that the referendum is one of fundamental rights of the people.[81] In Latvia, the majority of referendums have not been successful.[82] The total number of referendums in Latvia to date is eleven, of which four have been organised during the first period of independence (1923, 1927, 1931 and 1934), but the rest – in the second period of independence (1998, 1999, 2003, 2007, two in 2008 and in 2011). In two of these referendums (2008 and 2012), electors voted for amendments to the *Satversme*, and on both occasions, viewing it from the legal perspective, these referendums were unsuccessful because one half of those with the right to vote did not vote in support of the amendments, as required by Article 79 of the *Satversme*. Only 42% of electors participated in the referendum of 2008, which meant that the amendments were not approved, whereas in 2012, although 71.13% of voters participated in the referendum, the majority voted against the amendments. It is important to note that only in two referendums out of the eleven in total (in 2003 and 2011), the people approved of the issue proposed for the referendum. Both these referendums were sufficiently exclusive cases: the referendum of 2003 on membership in the European Union had a massive, comprehensive state-supported campaign, nothing resembling it, in terms of financial support and extensiveness of scope, has happened in Latvia. To have a positive outcome, *Satversme* was amended, adding a new article to the *Satversme*, which significantly decreased the quorum of participation, whereas in the referendum of 2011, in which only 44.73% of electors participated, the people protested against the power, proven by the fact that a convincing majority of voters (94.3%) supported the dissolution of the *Saeima*.[83] It needs to be added that if the two aforementioned referendums had been referendums for amending the *Satversme*, they would have failed because the successful outcome was based on significantly lower algorithms for quorums compared to the case of amendments to the *Satversme*.[84]

Thus, if anyone now would want to organise a referendum in Latvia, in which the totality of citizens could exercise their constitutional rights and amend the *Satversme*, this organiser should be aware that 774 337 electors should vote in

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[80] Judgment of 29 November 2007 by the Constitutional Court in case No. 2007-10-0102, para. 31.1.

[81] *Rainis, J.* Vispārējās debates par Satversmes I daļu IV sesijas 5. sēdē, 1921. gada 28. septembrī stenogramma [Transcript of the 5th sitting of the IV Session of the Constitutional Assembly 28.09.1921], p. 111.

[82] *Taube, C.* Constitutionalism in Estonia, Latvia and Lithuania. A study in comparative constitutional law. [S. l.]: Iustus Förlag AB, 2001, pp. 116–117.

[83] *Balodis, R., Kārkliņa, A., Danovskis, E.* The Development of Constitutional and Administrative Law in Latvia after the Restoration of Independence. *Journal of the University of Latvia. Law*, No. 5, 2013, pp. 75–82.

[84] For Latvia to join the European Union, at least a half of the number of electors who had participated in the previous *Saeima* election had to turn out, and the majority had to vote for the adoption of the draft law. This meant that if nearly 72% of all electors had participated in the election of the 7th convocation of the *Saeima*, then the election would be legitimate if only 36% of all electors were to participate and only 18% vote in support of the proposition, whereas the *Saeima* may be dissolved in national referendum if more than a half of those electors, who participated in the referendum, were to vote for its dissolution.

favour of the amendments to the *Satversme*. We arrive at this number by dividing 1 548 673, which is the number of electors at the last election of the 13th *Saeima*.[85] If we take into account that 54.6% of electors participated in the last *Saeima* election, which is, accordingly, 844 925 persons, it becomes clear why experts deem the possibility of amending the *Satversme* in a referendum as being only theoretical.[86] As generally known, considerably more persons participate in the parliamentary election than in a referendum. Exactly because of this, despite the opinion of many[87], the Preamble to the *Satversme* was not proposed for a referendum but was adopted by the *Saeima*. Most probably, it would not have been adopted in a referendum because, despite the group of enthusiasts, there was no lack of sceptics also among Latvians [88], and to exceed the quorum set in Article 79 of the *Satversme*, the totality of citizens should be really interested in the issue, which, as known, was not so even in the language referendum, in which less than 50% of the electors participated. Therefore, it is natural that none of the referendums aimed at amending any of the norms enumerated in Article 77 of the *Satversme* has legally occurred due to quorum. None of the norms of the *Satversme* has been adopted in a referendum. Perhaps it is pertinent to quote the prophetic words by Kārlis Dzelzītis, a member of the Constitutional Assembly, said at the Assembly's siting on 15 February 1922 directly before the final reading for the adoption of the *Satversme*: "[…] scholars and, likewise, voters, reading this *Satversme*, will just smirk at that legislative institution, which, as it were, had wanted to grant some democratic rights to the people but actually stretched out an empty hand to them [..] because the practice will prove that the right to referendum actually cannot be exercised." [89] Dzelzītis did not utter these words with respect to amending the *Satversme* in a referendum; however, this statement is uncontestably applicable both to the exercise of the people's right to a referendum and the people's right to amend the constitution of their State.

2.3. On the Constitutional Quorum Set for Amending the *Satversme* in a Referendum

With respect to a referendum, in which the *Satversme* could be amended, the Constitutional Assembly from the very beginning set the highest of the constitutional quorums, which, accordingly, is defined in the first part of Article 79. This quorum, just like other constitutional quorums, has a two-fold aim because it serves (1) as a restriction (barrier, obstacle) to ill-considered amendments to the *Satversme*;

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[85] Moreover, it should be taken into account that 134 806 of the electors have registered their place of residence abroad, and the practice shows that their link with Latvia is not too strong because only nearly 24 % voted at the election of the 13th convocation of the *Saeima* (Latvijas Republikas Centrālās vēlēšanu komisijas oficiāls izdevums "13. Saeimas vēlēšanas 2018. gada 6. oktobrī. Vēlēšanu rezultāti" [The Official Publication by the Central Election Commission of the Republic of Latvia. Election of the 13th Convocation of the *Saeima* on 6 October 2018. Election Results]. Rīga: Latvijas Republikas Centrālā vēlēšanu komisija, 2018, p. 4. Available: https://www.cvk.lv/upload_file/2018/13%20Saeimas%20velesanu%20rezultati%20A4%20_ML.pdf [last viewed 04.09.2020]).

[86] *Ņikuļceva, I.* Satversmes 77. panta komentārs [Comment of Article 77 of the *Satversme*], p. 269.

[87] *Jurista Vārda* lasītāju aptaujas rezultāti [The results of a survey of readers]. *Jurista Vārds*, No. 43, 22.10.2013, p. 7.

[88] Ibid., pp. 13–18.

[89] Satversmes sapulces sēžu stenogrammas, for example, Satversmes I daļas lasīšana pa pantiem. V sesijas 14. sēdes (1922. gada 15. februārī) stenogramma [Transcript of the 14th sitting of the V Session of the Constitutional Assembly 15.02.1922]. In: Latvijas Satversmes sapulces stenogrammu izvilkums (1920–1922) [Transcript of the Latvian Constitution Asambley Meeting (1920–1922)], p. 850.

(2) to establish the "correct expression"[90] and "unmistakable will"[91] of the people, moreover, the requirement follows from the rational basis of the public law institutions.[92] It must be proven by "full quorum".[93] Thus, the quorum plays an important role and its expedience is rooted in the very substance of the people's government because it does not allow a small part of the people to impose upon the majority an order, which, possibly, is dangerous and may possibly jeopardise the constitutional stability of the State. At the same time, if the quorum has been set too high and is unattainable, it may turn into a barrier for any collective decision, mothballing the constitutional development. The Latvian *Saeima*, at the very last stage of the first period of parliamentarianism, reached the conclusion that one of its constitutional quorums was excessively high. In 1933, the first amendments to the *Satversme* were proposed and adopted by the *Saeima*, which was done after four referendums had failed because of the high required quorum. The *Saeima*, the Central Election Commission and several presidents[94] were involved in the discussion, which lasted for years. The discussion had placed the political elite of the first independence period in a very awkward situation, so that the *Saeima* had to liberalise the procedure of referendum.

When examining amendments to Article 74 and Article 79 of the *Satversme,* members of the parliament engaged in long discussions, speakers were numerous, the usefulness and scope of quorums were extensively discussed. In view of the fact that the discussions focused on Article 74 of the *Satversme*, which, prior to the *Satversme* amendments of 1933, defined the participation quorum for a referendum – "a half of all electors", which is still found in Article 79 with respect to amendments to the *Satversme*, this discussion is still relevant today. I shall quote the most vivid statements made by the speakers:

> *[..] the quorum is needed not to make a referendum ridiculous [..]"; the quorum "may influence or adjust the parliament's legislative practice and erroneous is the illusion if one wants to perceive this matter as if the referendum could stand side by side or replace the legislation by the house of the people's representatives [..]";*[95] *"[..] While our* Saeima *has isolated and reinforced itself so much that the sovereign people do not reach it anywhere. [..] This is why you, gentlemen, are afraid of the law on referendum in such a form as demanded by the majority of our people. [..]";*[96] *"[..] if we look at the referendums that have taken place, we see that the people have never had the sovereign power in the State of Latvia. The sovereign power has had the right*

[90] *Dišlers, K.* Ievads Latvijas valststiesību zinātnē [Introduction to Latvian State Law Science], p. 148.

[91] Latvijas Republikas IV Saeimas V sesijas 4. sēde 1933. gada 10. februārī [Transcript of the 4th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 10.02.1933], pp. 149–150.

[92] *Pleps, J.* Satversmes iztulkošana [Translating the Constitution]. Rīga: Latvijas Vēstnesis, 2012, p. 197.

[93] Latvijas Republikas IV Saeimas V sesijas 4. sēde 1933. gada 10. februārī [Transcript of the 4th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 10.02.1933], pp. 149–150.

[94] See more in Latvijas Republikas Satversmes grozījumi. Latvijas Republikas Satversmes grozījums Nr. 1 [Amendments to the Constitution of the Republic of Latvia. Amendment 1 to the Constitution of the Republic of Latvia]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Comments of *Satversme* [Constitution]. Section V. Legislation], pp. 220–221.

[95] Latvijas Republikas IV Saeimas V sesijas 3. sēdes (1933. gada 7. februārī) stenogramma [Transcript of the 3th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 07.02.1933]. In: Latvijas Republikas IV Saeimas V sesija [V Session of the Latvian IV *Saeima* [Parliament], p. 110.

[96] Ibid., p. 113.

but has never had the possibility to express its opinion on those draft laws that had been put for the people's vote [..].

Fēlikss Cielēns, who reported on the draft law of the *Satversme,* noted that it could well be a case in Latvia that "[..] a rather small group could propose a draft law that it deemed important but the largest part of the people could consider it irrelevant, and therefore they would not participate in the referendum at all [..]"[97]

Cielēns, as the rapporteur on the draft law, expressed the concern that if the quorum would be even lower [he spoke about the quorum for a draft law, which was supported, – "the number of electors is at least half of the number of electors who participated in the previous *Saeima* election"][98] it might happen that a small number of people started issuing laws and this would be contrary to the laws issued by the parliament.[99] Cielēns expressed the conviction that only an adjustment of the parliament's will could be obtained in a referendum.[100] The politician saw any further reduction of the quorum as a genuine threat to the party of social democrats because the rightists could achieve, via a referendum, a president elected by the people, with greater powers.[101] It must be added regarding these debates that also that the *Saeima* was urged to not stop at what had been achieved but review also the quorum for amending the *Satversme*. Member of the *Saeima* Andrejs Zaķis proposed both at the sitting of the Public Law Committee and the *Saeima* that the algorithm of a decreased quorum should also be applied to amendments to the *Satversme*, offering the following wording of Article 79*:* "Amendments to the *Satversme*, put for the national referendum, shall be adopted if more than a half of all voters approve of them". The *Saeima* dismissed this proposal without lengthy discussions. It was supported only by radical Pēteris Leikarts, who insisted that the quorum should be abolished altogether. In the decisive voting by the *Saeima*, the legislative initiatives by the deputies from both minor parties (New Famer's Union, Union of Peace, Order and Production) gained only few votes.[102] The *Saeima* lowered the quorum requirements for adopting laws[103] and revoking them in

[97] Latvijas Republikas IV Saeimas V sesijas 3. sēdes (1933. gada 7. februārī) stenogramma [Transcript of the 3th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 07.02.1933]. In: Latvijas Republikas IV Saeimas V sesija [V Session of the Latvian IV Saeima [Parliament], p. 126.

[98] The initial wording of Article 74 of the *Satversme*, prior to the amendments of 1933: "A law adoped in the *Saeima* and suspended in the procedure of Article seventy-two may be revoked in national referendum if al least half of the electorate has participated in the referendum." The wording of Article 74 of the *Satversme* following the amendments: "A law adoped in the *Saeima* and suspended in the procedure of Article seventy-two shall be revoked in national referendum of the number of electors is at least half of the number electors who participated in the previous *Saeima* election and the majority voted for revoking of the law." Initial wording of Article 79 of the *Satversme* prior to the amendments of 1933: "Amendments to the *Satversme* put for national referendum shall be adopted if at least half of electors approve of them." (The current effective wording of Article 79 of the *Satversme* can be found in the introductory part of this article).

[99] Ibid.

[100] *Briede, J.* Satversmes 79. panta komentārs [Comment of Article 79 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Comments of *Satversme* [Constitution]. Section V. Legislation], pp. 295–296.

[101] Latvijas Republikas IV Saeimas V sesijas 4. sēde 1933. gada 10. februārī [Transcript of the 4th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 10.02.1933], pp. 113, 116, 159–162, 187–168.

[102] Ibid., pp. 113, 116, 159–162, 187–188.

[103] The Public Law Committee (the Committee responsible for the advancement of amendments) decidied, by majority vote, to decrease the quorum and, as the result, the *Saeima* amended the *Satversme* in 1933, envisaging that in the national referendums on draft laws "the number of electors

a referendum,[104] but the people did not manage to use these easements in the pre-war parliamentarianism. Only a year after these amendments to the *Satversme*, on 15 May 1934, members of the *Saeima* were dispersed, the *Saeima* was liquidated but the *Satversme* itself, including the amended provisions, was suspended[105] "until implementing a new reform of the *Satversme*".[106] The fact that a referendum on amendments to the *Satversme* has never happened in the forty years of the *Satversme*'s existence suggests that, in Latvia, the people's right to amend the *Satversme* was formal by nature from the very moment of its adoption, not intended for practical use. Quoting Dzelzītis, "an empty hand" hand been stretched out to the people. Looking into the transcripts of the Constitutional Assembly, one has to conclude that already in developing the procedure for amending the *Satversme*, including into it the quorum of "absolute majority of vote", the constitutional legislator had clearly intended to significantly reinforce the foundations of the State and make the change of the political system very difficult. This mentality is revealed in Kārlis Dišlers' reflections on amending the *Satversme* in the Herald of the Ministry of Justice in 1921, thus, a year before the *Satversme* was approved.[107] In examining the mandatory constitutional referendum, established in Article 77 of the *Satversme*, Dišlers writes that, in his opinion, any amendment to the *Satversme* should be put for a referendum. Any?! The total lack of discussions at the Constitutional Assembly[108] and the Committee for Drafting the *Satversme*,[109] as well as the joint sittings[110] testifies to admirable consensus of various political forces with respect to the procedure for amending the constitution and the elements thereof – the restrictions. Members of the Constitutional Assembly discussed the model for electing the President[111] intensely and at length, while, actually, the political forces covering the whole spectrum, both rightist and centrist and also leftist had no wish to experiment with the manifestations of the people's will taking

shall be at least half of the number of electors who participated in the last *Saeima* election, with the majority of electors voting in favour".

[104] *Kusiņš, G.* Satversme un Latvijas konstitucionālo institūciju izveidošana [Constitution and Establishment of the consitutional institutions]. In: Pamattiesības. Pilsonība. Latvijas Valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri [Fundamental rights. Nationality. Sources of Latvian State law. Establishment of the State – renewal of independence. Documents and commentary]. Rīga: Tiesu namu aģentūra, 2015, p. 62.

[105] Valdības deklarācijas [Government declaration]. *Valdības Vēstnesis*, No. 10, 19.05.1934.

[106] The people lost even the formal possibility to go to the ballot-boxes to express their opinion – the people only had "the right" to cheer for the leader Kārlis Ulmanis and create floral "arcs of honour" for him. Ulmanis' authoritarianism did not allow any plebiscite. Professor Kārlis Dišlers, apparently, to keep is position and salary during authoritarianism, attempted to legally justify it and interpreted the non-resistance to the coup of 15 May 1934 as "approval and support", which had not been put into "a legal form" but should be deemed to be sufficient (*Dišlers, K. Negotiorium gestio* publisko tiesību novadā [*Negotiorium gestio* in the Area of Public Law]. *Tieslietu Ministrijas Vēstnesis*, 1935. gads, p. 42).

[107] *Dišlers, K.* Dažas piezīmes pie Latvijas Republikas Satversmes projekta (tieša likumdošana un Valsts prezidents) [Some remarks on the draft Constitution of the Republic of Latvia (direct legislation and President of Latvia)]. *Tieslietu Ministrijas Vēstnesis*, 1921, No 4/6, pp. 142–143.

[108] *Briede, J.* Satversmes 79. panta komentārs [Comment of Article 79 of the *Satversme*], p. 295.

[109] See Satversmes izstrādes komisijas 1921. gada 6. aprīļa sēdes protokols [Minutes of the Constitutional Assembly Constitutional Commision Meeting 06.04.1921]. Unpublished material.

[110] See, IV sesijas 20. sēdes (1922. gada 9. novembrī) stenogramma [Transcript of the 20th sitting of the IV Session of the Constitutional Assembly 9.11.1922]. In: Latvijas Satversmes sapulces stenogrammu izvilkums (1920–1922) Transcripts of Latvian Constitution Asambley Meeting], pp. 466, 850.

[111] *Lazdiņš, J.* Clashes of Opinion at the Time of Drafting the Satversme of the Republic of Latvia. *Journal of the University of Latvia. Law*, No. 10, 2017, pp. 95–98.

the form of amendments to the *Satversme.* Neither have serious discussions about the high quorum in the first part of Article 79 occurred today, although nobody doubts that the high quorum is "not suitable for the needs of life". The best proof of it are the amendments to the *Satversme* of 2003,[112] when especially for joining the European Union[113] the high quorum was lowered for referendums with respect to the European Union. This leads to the conclusion that the high quorum for amendments to the *Satversme*, in tandem with the outdated institution of the people's vote of the reinstated *Satversme* of 15 February 1922[114], staunchly protects the *Satversme* from any impact by the people.

3. Improving the Procedure for Amending the *Satversme*

3.1. Reflecting on the Statements Made by Jānis Rainis, the Member of the Constitutional Assembly, About Burgeois Fear of the National Referendums

On 20 July 2012, the Central Election Commission organised the conference "The Arithmetic of the People's Will: Elections and Referendums in Latvia", in which the organisers expressed the most correct opinion that a referendum was a good way for the people to express their opinion and participate in the political process.[115] This conclusion, expressed in the distant year of 2012, is referred to for a good reason, because this was the decisive year both for referendums and the drafting of the concept of the *Satversme's* core. It was the referendum of 2012 on the second official language – the Russian language – that made the *Saeima* decide on such amendments to the Law on National Referendums, Initiation of Laws and European Citizen's Initiative,[116] which, at the end of the day, entirely suspended national referendums. The statements made by politicians that the concerns that the amendments would make the organisation of referendums impossible was only scaring the people[117] turned out to have been only excuses. The procedure became so unwieldy[118] that it stopped functioning altogether. Aivars Ozoliņš, the well-known publicist, assessed it as follows in the magazine "Ir":

[112] *Nikuļceva, I.* Tiešā demokrātija Eiropā [Direct democracy in Europe]. *Jurista Vārds*, No. 169, 26.10.2010.

[113] Saeima lems par Satversmes grozīšanu sakarā ar Eiropas Savienību [*Saeima* will decide on amending the Constitution in connection with the European Union]. *Jurista Vārds*, No. 7, 18.02.2003.

[114] *Ņikuļceva, I.* Fakultatīvā tautas nobalsošana Latvijā un Eiropā [Optional National Referendums in Latvia and Europe]. Juridiskās zinātnes aktuālās problēmas [Current challenges of legal science]. Rīga: Zvaigzne ABC, 2012, p. 411.

[115] *Platace, L.* Vēlētāju tiesības ierosināt referendumus pārmaiņu priekšā [Voters' right to propose referendums to face changes]. Available: https://lvportals.lv/norises/250193-veletaju-tiesibas-ierosinat-referendumus-parmainu-prieksa-2012 [last viewed 10.09.2020].

[116] Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu: LR likums [Law on National Referendums, Initiation of Laws and European Citizens' Initiative: Law of the Republic of Latvia]. *Latvijas Vēstnesis*, No. 47(178), 20.04.1994.

[117] *Čepāne, I.* Latvija ir referendumu paradīze [Latvia is a Paradise for Referendums]. *Jurista Vārds*, No. 34, 21.08.2012.

[118] The draft law, as described by Gunārs Kūtris, introduced revolutionary changes, brought by the amendments of 8 November 2012, pursuant to the new procedure the draft law, first of all, must be registered with CEC. Secondly, the initiators of the draft law must ensure themselves that the signatures of at least one-tenth of electors are collected. This means that the State supports neither the organising of the process of collecting signatures nor finances it. Likewise, Kūtris expresses suspicion that the problem is vested not only in the major restrictions established for the national referendums but also in the possibility to manipulate. I.e., if the state power genuinely does not want a national referendum, it can set an inconvenient date of the referendum and fail it, for example, setting a date

> *Politicians' presumption to protect the State from its citizens by restricting their rights is a bad style of behaviour. [..] The authors of the draft law are dealing with a non-existent problem and attempting to prevent the possibility to hold the referendums altogether rather than preclude some undesirable consequences of them.*[119]

Not only publicists[120] but also scholars of law who have studied the regulation on referendums have concluded that it is almost impossible for the people to initiate referendums. Thus, for instance, Annija Kārkliņa recognises[121] that the procedure of a national referendum in Latvia more or less functioned until the moment when it was prohibited by the amendments of 2012[122] to the law on National Referendums, Initiation of Laws and European Citizen's Initiative. Gunārs Kūtris, the former President of the Constitutional Court, has also sounded alarm, stating that the legal procedure should be real not only declarative, giving the possibility to the people to express their will in a national referendum.[123] Inese Ņikuļceva is of a similar opinion, believing that the collection of electors' signatures electronically should be made easier and notarial certification of the electors' signatures should not be required.[124]

Examining the approach of the current political elite towards referendums, one has to return to the origins of the establishment of the State, when there were different opinions on creating the Constitutional Assembly. The People's Council in the Platform of 17 November 1918[125] primarily advanced convening the Constitutional Assembly in the form of general election, whereas Andrievs Niedra, the creator of an alternative order of the State, had no intentions to organise election whatsoever because he planned the constitution of the Constitutional Assembly from curias or classes.[126] Niedra was afraid that general election might result in communists coming into power. It is ridiculous but also the Latvian Bolsheviks were afraid of the people, therefore instead of general election were planning class election, where the right to vote would be granted only to the class of proletariat.[127] Finally, the election is held on 17–18 April 1920, and the State takes the form of a democratic republic; however, the initial fear from the people's voice never

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when people have no time or wish to go to the electoral districts (see *Kūtris, G.* Referendumi jeb tautas nobalsošanas: cik tas ir reāli [Referendums or the people's vote: How real is it]. *Jurista Vārds*, No. 42, 28.10.2014, p. 22.

119 *Ozoliņš, A. Vienotības* piga [*Vienotība* cocking a snook]. *Ir*, 26.07.–01.08.2012, p. 6.

120 Ibid.

121 *Kārkliņa, A.* Requirements to be Set for Voters' Legislative Initiatives in the Republic of Latvia: Legal Regulation, Practice, and Recent Findings of Judicature. *Journal of the University of Latvia. Law*, No. 10, 2017, pp. 154–155.

122 Grozījumi likumā "Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu": LR likums [Amendments to "Law on National Referendums, Initiation of Laws and European Citizens' Initiative": Law of the Republic of Latvia] (08.11.2012). *Latvijas Vēstnesis*, No. 186(4789), 27.11.2012.

123 *Kūtris, G.* Referendumi … [Referendums …].

124 *Ņikuļceva, I.* Tautas nobalsošana un vēlētāju likumdošanas iniciatīva. Promocijas darbs [Doctoral thesis "National Referendum and Voters' Legislative Initiative"]. Rīga: Latvijas Universitāte, 2012, p. 206. Available: https://dspace.lu.lv/dspace/bitstream/handle/7/5120/22881-Inese_Nikulceva_2013.pdf?sequence=1 [last viewed 04.09.2020].

125 Latvijas Tautas padomes politiskā platforma [Political platform of the People's Council]. *Pagaidu Valdības Vēstnesis*, No. 1, 14.12.1918.

126 *Balodis, R., Lazdiņš, J.* Satversmes vēsturiskā attīstība [Historical development of the Latvian Constitution]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Comments of *Satversme* [Constitution]. Preamble. Section I. General rules], pp. 54–55.

127 *Šiliņš, J.* Padomju Latvija 1918–1919 [Soviet Latvia 1918–1919]. Rīga: Vēstures izpētes un popularizēšanas biedrība, 2013, p. 93.

disappeared but, on the contrary, became characteristic of the Latvian political system. Latvian poet Jānis Rainis has pointed to it at the Constitutional Assembly, stating, in one of his rare addresses, the following:

> *[..] It is, however, in the interests of the people to upkeep this State, and by its vote the people will upkeep this State and make it stronger. When they have this right, they will feel even a stronger bond with the State than now [..]. I regard this right to vote as harmless, even from the bourgeois standpoint. [..] the introduction of referendums [..] is a step towards educating the people politically [..].* [128]

In Rainis' opinion, the procedure established in the *Satversme* restricts the national referendum to the extent that a referendum is no longer possible, there is no vote by the people,

> *[..] because such might happen with us only on the rarest occasions of happiness. But this is not a matter of happiness but of law. The bourgeois is afraid of national referendums. This fear seems to be unfounded.*[129]

Rainis pointed out to the Constitutional Assembly that the consequences of placing such restrictions on holding of referendums would be the lack of political education among the people, which, in turn, would lead to the lack democratism.[130] The forecasts made by the outstanding poet are proven by the people's attitude towards the authoritarian coup of 15 May 1934. The people did not rush to defend the constitutional order but perceived authoritarianism with hope and, even, understanding. Rainis' statements come to mind also when examining the discussions among the members of the last pre-war convocation of the *Saeima* on the respective issues. The reciprocal hatred and lack of trust among the political groups are obvious, only fear from the changing opinion of the people unites all groups.[131] Following the restoration of Latvia's independence, the dislike towards national referendums was inherited and turned into a typical element of the Latvian parliamentary system. Although the institution of national referendums is called a strong instrument of the political fight[132], the experience of using it in Latvia is very poor, the complex organisational procedures and high quorum are validly blamed for it.

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[128] *Rainis, J.* Vispārējās debates par Satversmes I daļu IV sesijas 5. sēdē 1921. gada 28. septembrī stenogramma [Transcript of the 5th sitting of the IV Session of the Constitutional Assembly 28.09.1921], p. 112.

[129] Ibid., p. 111.

[130] Ibid., p. 112.

[131] The speeches made by the deputies reveal not only the reciprocal hatred of the various political branches but also fear that if it were easier to hold national referendums the elector could significantly amend the *Satversme*, thus destroying the State. All were afraid of the communists, but social democrats – of the rightist forces. In the sitting on the quorums, when active debates evolved, Fricis Bergs openly expressed the dislike of the communists, represented in the parliament, for the parliamentary system, saying that it was beyond remedy, openly praised the proletarian dictatorship of Moscow, which was said to be the genuine dictatorship of workers. In atmosphere like this, the cautious approach taken by the people's representatives towards liberalisation of referendums is quite understandable (see Latvijas Republikas IV Saeimas V sesijas 3. sēde 1933. gada 7. februārī [Transcript of the 3th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 07.02.1933], pp. 130–132; Latvijas Republikas IV Saeimas V sesijas 10. sēdes (1933. gada 10. martā) stenogramma [Transcript of the 10th sitting of the V Session of the Latvian IV *Saeima* [Parliament] 10.03.1933]. In: Latvijas Republikas IV Saeimas V sesija. 1933. gads, pp. 374–382).

[132] *Pastars, E.* Referendumu nedienas [Troubles with Referendums]. *Diena*, 03.08.2002.

3.2. Proposals for Improving the Procedure for Amending the *Satversme*

Author of the first commentaries to the *Satversme* Kārlis Vanags[133] wrote that the *Satversme* was something more than just a statute on the organisation of the State, it was the manifestations of the will of the people's majority regarding the type and form of its political expression. If these are not just mere beautiful words than the nation should be given a genuine and not solely a declarative opportunity to amend its *Satversme*. Without forgetting the national security and constitutional stability, the procedure for amending the basic articles of the *Satversme* should be separated from the procedure for amending other articles of the *Satversme*, which requires two types of quorums. The first one would be the existing "half of all electors" (the first part of Article 79 of the *Satversme*), it would apply to amending the basic articles of the *Satversme*, whereas the second quorum, which currently applies only to membership in the European Union, i.e., "the number of electors is half of the number of electors who participated in the last *Saeima* election" (the first part of Article 79 of the *Satversme*), could apply to the norms not enumerated in Article 77 of the *Satversme*. The possible wording:[134]

> *79. An amendment to the* Satversme *put for national referendum in the cases provided for in Article 77 shall be adopted if at least half of electorate approves of it. An amendment to the* Satversme *as well as a draft law, decision on Latvia's membership in the European Union or substantial changes in the terms regarding such membership shall be adopted if the number of electors is at least half of the electors who participated in the last* Saeima *election and if the majority voted for the adoption of the draft law, Latvia's membership in the European Union or significant changes in terms regarding such membership.*

New second part could be added to Article 65 of the *Satversme*, providing that "amendments to the Satversme may be submitted to the *Saeima* by the President, the Committees of the *Saeima*, not ten members of the *Saeima*." This step would, however, separate the ordinary legislation from the *Satversme*, providing that a small faction of the *Saeima* would have to cooperate with the other factions in order to initiate amendments to the *Satversme*, and would not be a matter for the government. I also believe that an interval should be defined (at least three months) for the three readings established in Article 76, likewise, perhaps prohibition to amend the *Satversme* six months prior to the election should be established. It could be discussed whether this provision should be included in the *Satversme* or the Rules of Procedure of the *Saeima*.

In my opinion, the *Saeima* should consider *pro et contra* and either conclude that the referendum for adopting a decision has exhausted its possibilities and give up this expensive, archaic tradition[135] or make the right to referendum operational. Why should the *Saeima* do it? The reason is the need for greater involvement of the people in the national politics. Approximately two-thirds (66%) of the surveyed inhabitants do not trust the Latvian parliament, whereas the absolute majority (82%)

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[133] *Vanags, K.* Latvijas valsts Satversme [The Constitution of the State of Latvia]. Valka: L. Rumaka apgāds, 1948, pp. 4–5.

[134] Of course, amendments to Article 77 of the *Satversme* could be as logical, including in them the first sentence of the draft referred to above, leaving only the rest in the wording of Article 79; however, as stated in the article, it cannot be implemented in practice.

[135] *Timofejevs, P.* Referendumi un demokrātija [Referendums and democracy]. *Diena*, 13.09.2003.

does not trust the political parties[136], and these indicators have retained similar proportions throughout years.[137] Voters start losing interest also in the local government election, which is proven by the extraordinary election in the capital of Latvia Riga in 2020, when only 40.6% of the inhabitants turned out to vote.[138] This means that the Latvian citizens have a very limited belief in their own ability to change anything by means of election. It is not surprising that inhabitants are not satisfied with the election system.[139] One of the main problems of the Latvian democracy is the distrust of the Latvian people in their own elected representatives or a divide between the people and the ruling elite.[140] This divide can be decreased only by greater involvement of the people in decisions of national importance. That would only reinforce our democracy and, quoting Rainis, would educate the people politically (it is worth noting here that historians link the failure of parliamentary democracy of 1934 with the absence of responsible political culture and the inability of the Latvian political elite to communicate with the people).[141] The right to referendum would increase the people's self-confidence. The first post-war President of Latvia Guntis Ulmanis has put this very aptly – referendums, apart from everything bad, have their positive moment: the people get a chance to draw a second breath and regain the sense of affiliation with the State.[142] It must be added that this politician, although already in retirement, sadly concluded that the parliament continued to have the lowest rating for a long period and that this mechanism needed

[136] 2018. Autumn. Public opinion in the European Union Standard Eurobarometer 90. Available: file:///C:/Users/User/AppData/Local/Temp/eb_90_data_annex_en.pdf https://ec.europa.eu/malta/sites/default/files/st90-report.pdf [last viewed 04.09.2020].

[137] Latvia's inhabitants elect directly only the members of two institutions of public administration – members of the *Saeima* and of the local governments. Participation in elections is not only the citizens' constitutional duty but also the main indicator of their political activity, just as the election results reveal the people's political sentiment and maturity. Election results, depending on the political perspective, may be satisfactory or not; however, the constantly decreasing citizens' activity in elections proves that a significant part of the people distance themselves from the public administration. The political elite gets more distant from the people with each election. A vivid example is the last election held in the summer of 2020 in the capital of Latvia Riga, when the majority of electors chose to stay at home. The same analogy is seen in the *Saeima* election, where in the last election of the 13th convocation of the *Saeima* only 54.6% (844 925) of electors participated, which is significantly less than in the previous elections (e.g., election of the 8th convocation of the *Saeima*, with the participation of 71.51% (997 754) of electors, but the last pre-war election of the 4th convocation of the *Saeima* saw the participation of 80% of electors (974 822). Of course, also sociological surveys (for example, Eurobarometer survey held in 2018) show that only 19% trust the Latvian *Saeima*, i.e., less than one-fifth of the society…

[138] Only 40.6% of electors participated in the Riga City Council election, which is the lowest electors'activity at least since 1997. No data can be found on the homepage of the Central Election Commission regarding the electors' activity in the local government election in Riga of 1994.

[139] Sabiedrības apmierinātība ar pašreizējo vēlēšanu sistēmu varētu būt samazinājusies [Public satisfaction with the current electoral system could have decreased]. LETA. Available: https://www.apollo.lv/5299562/sabiedribas-apmierinatiba-ar-pasreizejo-velesanu-sistemu-varetu-but-samazinajusies [last viewed 04.09.2020].

[140] *Levits, E.* Demokrātiskā valsts iekārta, brīvas vēlēšanas un parlamentārā demokrātija [Democratic State Administration, free elections and parliamentary democracy]. In: Parlamentārā izmeklēšana Latvijas Republikā. 1. parlaments. Parlamentārā kontrole [Parliamentary investigations in the Republic of Latvia 1. Parliament]. Scientific editor Prof. *Balodis, R.* Rīga: Latvijas Vēstnesis, 2016, p. 21.

[141] *Bleiere, D., Butulis, I., Feldmanis, I., Stranga, A., Zunda, A.* Latvijas vēsture. 20. gadsimts [History of Latvia. 20th century]. Rīga: Jumava, 2005, p. 250.

[142] *Ūdris, J.* Gunta Ulmaņa vertikāle [Guntis Ulmanis' Vertical]. Rīga: Jumava, 2009, p. 206.

some improvements.[143] Although this is an entirely different topic, there is one correlation – the people's trust in democratic institutions, which is disastrously decreasing in Latvia.

Summary

1. Providing an answer to the objective set in the beginning in the article, it can be concluded that the basic restrictions to amending the *Satversme*, which are included in Article 76 of the *Satversme*, are well elaborated and tested in practice, as opposed to the procedure for the mandatory constitutional referendum. The people's right to express their assessment of the *Satversme* is limited and practically impossible to exercise in Latvia.
2. The procedure for amending the Latvian constitution should be separated from the general legislation, restricting the circle of applicants and establishing a time interval between readings. A restriction on the approval of amendments to the *Satversme* by the *Saeima* during the last months of its term should be considered.
3. The participation quorum, defined in the first part of Article 79 of the *Satversme,* for amending the *Satversme* in national referendum ("half of the electorate"') should be applied to the basic articles of the *Satversme*, which are enumerated in Article 77 of the *Satversme,* i.e., Articles 1, 2, 3, 4, 6 and 77, but with respect to amendments to other articles of the *Satversme*, a lower participation quorum should be introduced, which would be "the number of electors is the half of the electors in the last *Saeima* election", which could be achieved by amending Article 79 of the *Satversme*.
4. The Central Election Commission together with the Analytical Service of the *Saeima* should review the experience with national referendums thus far and, following consultations with legal experts, should submit to the *Saeima* an opinion on the required improvements with respect to liberalisation of the regulation on national referendums.

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[143] *Ūdris, J.* Gunta Ulmaņa vertikāle [Guntis Ulmanis' Vertical]. Rīga: Jumava, 2009, p. 207.

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"The Rule of Law Mechanism" and the Hungarian and Polish Resistance: European Law Against National Identity?

Professor Dr. iur. **Christoph J. Schewe,** M.E.S.
Fachhochschule für Verwaltung und Dienstleistung, Kiel-Altenholz/Reinfeld
E-mail: *schewe@fhvd-sh.de*

Dr. **Thomas Blome**
Hochschule des Bundes für öffentliche Verwaltung, Brühl
E-mail: *thomas.blome@hsbund.de*

Similarly to the rest of the world, the COVID-19 pandemic has also hit the European Union (EU) severely. In order to foster the process of the economic recovery of EU Member States, the EU Member States agreed on a financial aid package combined with a regulation – the conditionality mechanism – that provided for financial sanctions in the event of a breach of the rule of law. Given that the positions of Poland and Hungary in the adoption process of this regulation caused a controversy, this article examines general questions on the rule of law, the regulation and the background to the controversy.

Keywords: rule of law, conditionality mechanism, regulation on general conditional rules for the protection of the budget of the Union, national identity, democracy.

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Introduction

The new conditionality mechanism aims at enhancing the rule of law in the EU Member States by sanctioning breaches of the rule of law. It establishes respective standards, which may be considered at fundamental elements of this principle and which are comparable to internationally accepted standards for the rule of law. These standards, however, are not that far reaching that they would affect the cultural and national identity of the Member States, as the Polish and Hungarian governments had claimed they would. While the new instrument may be considered as an overall positive development for securing the EU at least to certain extent against authoritarian developments in its Member States, the instrument should not be overrated. The link of breaches to the EU budget weakens the mechanism's proposed in its effect to secure the rule of law and, in the cumbersome adoption process, the procedure of the mechanism was completed with elements that prolong the process leading to potential sanctions.

1. "The Rule of Law Mechanism" and Hungarian and Polish Concerns

Why would you refuse to accept a precious, generous, and beautifully wrapped present? This is a question that could have been asked by anyone, not only Polish and Hungarian citizens, when learning about the intention of their respective governments to opt against the new financial package aiming at the recovery of the COVID-19-afflicted EU. Especially Italians and Spaniards reacted furiously, given that these states, particularly plagued by the pandemic, desperately needed these funds. Finally, the German Presidency to the EU Council found a compromise that led to the consent of all Member States to the Multiannual Financial Framework (MFF)[1] and the "Next Generation EU" (NGEU).

Only Poland and Hungary had initially announced the intention to block these instruments, as they were linked to the consent to the "conditionality mechanism", also named "rule of law mechanism".[2] Eventually – depending on the perspective – Poland and Hungary gave in[3], however, only after the other 25 Member States had indicated that they might facilitate these funds without the two states and

[1] *Official Journal of the European Union*, L 433I, 2020, p. 11.

[2] *Official Journal of the European Union*, L 433I, 2020, p. 1. While most publications in press, media and political statements name the regulation "the rule of law mechanism", it might not be an entirely precise denotation. In some instances, the dialogue between the Commission and the Member State concerned from 11.03.2014 is also called rule of law mechanism (https://eur-lex.europa.eu/resource.html?uri=cellar:caa88841-aa1e-11e3-86f9-01aa75ed71a1.0017.01/DOC_1&format=PDF [last viewed 01.10.2021]); in the same line, *Schorkopf, F.* Article 7 EUV. In: *Grabitz, E., Hilf, M., Nettesheim, M.* (Hrsg.). Das Recht der Europäischen Union. 69 Aufl. München, 2020, S. 60 ff. The scholarly legal debate in English language uses the term "conditionality mechanism".

[3] In contrast to this interpretation, the two Member States in question declared the outcome as their victory, *Hillion, C.* Compromising (On) the General Conditionality Mechanism and the Rule of Law

after considerable concessions had been made to Polish and Hungarian claims.[4] Furthermore, the adoption process caused a vivid debate on its legality, given that the European Council seemed to have assumed competences[5] that are not assigned to it by the Treaties.[6] Despite their political agreement to the deal, on 11 March 2021, both governments brought a claim against this mechanism to the Court of Justice of the European Union (CJEU).[7] Even though it is highly contested that this is in line with EU law, the European Council concluded that the regulation will not be applied until the ECJ will have decided on the matter.

Apart from this set of problems – which will not be addressed in detail in this article – the matter brings up a more general aspect: the Polish and Hungarian positions are bewildering, given that the two governments opposed something presumably positive, which in the EU and its Member States seemed to be self-evident and which formed one of the fundamental principles, – the rule of law. Hence, this raises a further set of questions: what does the rule of law mechanism imply? Do the two states have to sacrifice their core values such as family and religion to "neoliberal internationalists" under this new mechanism? Does this mechanism have a negative impact on the cultural and national identity of Member States? Does the EU have the competence to regulate this matter? Furthermore, given that other Member States do not see this danger – are they ignorant or is the mechanism specifically directed against the two Member States?

Accordingly, this contribution will explore what is to be understood under the rule of law (2.1.) and the new corresponding mechanism (2.2.), which motivates the governments of the two Member States to appear "to fight against the rule of law". In the light of this provoking image, the analysis will need to address the question, whether this mechanism really erodes (the two states') national identities and core values of Member States as the Polish and Hungarian governments had claimed (II. 3.).

2. The Rule of Law Mechanism and the Hungarian and Polish Resistance: European Law Against National Identity and Values?

2.1. A Rapprochement to 'Rechtsstaatlichkeit' and 'the Rule of Law' in the Context of European Values

The terminology regarding "the rule of law" in the various European languages is inconsistent, as the German *Rechtsstaatsprinzip* or the French *état de droit* refer to the *state*, and thus seem to concentrate on the state. The Latvian legal terminology

(April 6, 2021). *Common Market Law Review*, No. 58, 2021, pp. 267–284. Available: https://ssrn.com/abstract=3820897 [last viewed 01.10.2021].

4 More in depth on the background and development *Hillion, C.* Compromising (On) the General Conditionality Mechanism and the Rule of Law (April 6, 2021), pp. 267–284.

5 European Council conclusions, EUCO 22/20 CO EUR 17 CONCL 8, 11 December 2020.

6 *Alemanno, A., Chamon, M.* To Save the Rule of Law you Must Apparently Break It. VerfBlog. 11.12.2020. Available: https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/ [last viewed 01.10.2021]. DOI: 10.17176/20201212-060201-0; *Scheppele, K. L., Pech, L., Kelemen, R. D. Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism. VerfBlog.* 12.11.2018. Available: https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/ [last viewed 01.10.2021]. DOI: 10.17176/20181115-215538-0.

7 The main points of the claims are accessible on the Court's website: Hungary: C-156/21; Poland: C-157/21.

appears to be either more precise or more mediative, given that it distinguishes between *tiesiska valsts* and *likuma vara*. Notwithstanding these linguistic differences, also the efforts to define the concept of the rule of law have been undertaken for decades, if not centuries[8] and seem to be countless. This essay thus does not aim at further developing this broader concept, but intends to identify problematic aspects and to determine what might be commonly agreed upon to be denoted by this term, at least in the European Union (EU). The presumably first problem regarding the wording which focusses on the state can be relatively easily resolved, as today the German legal terminology allows a broad interpretation of *Rechtsstaatlichkeit*, thus enabling the use of this term for the EU (see Article 2, Treaty on European Union – TEU in the German language) and other international organisations.[9] In addition, the ECJ chooses the term "community based on the rule of law"[10].

In short, *Rechtsstaatlichkeit* describes "a state that is governed by law", i.e., by previously existing rules and norms.[11] This short definition indicates the aim of the principle, which is to achieve a certain order, providing predictable relations and thus maintain a stable, plannable environment. Those addressed by the law may arrange their behaviour according to existing norms and adjust their respective relations. In the ideal case of the rule of "good (i.e.: just and fair) law" leads to a society that accepts the governing rules and norms, lives in accordance with them and the entity of rules hence provides the framework for peace and stability of a state.

The same may be said about the "rule of law". This term describes a situation which is governed by law, i.e., previously existing rules and norms, though, linguistically, it is not limited to states but may also apply to international organisations.

Central to both definitions seems to be the equation of *Recht* resp. *law* with "rules and norms". In reality, however, the situation is more complex, as it raises the fundamental philosophical question, what is *Recht* [in German language simultaneously meaning a right and law, but also implying something *just* or *fair*]? The relevance of this question becomes clearer in the light of a more differentiated approach on the essence of the term *Rechtsstaat*. German legal science distinguishes between *substantive [materielle]* and *formal [formelle] Rechtsstaatlichkeit*. In essence, this distinction signifies that the latter refers to compliance with the – mostly written – law, whereas *materielle (substantive) Rechtsstaatlichkeit* particularly addresses the aspect of *Gerechtigkeit* (lit. translated as *justice*, however, the German term is rather expressed by the concepts of *fairness* and *equity*). Accordingly, the German constitution in Article 20(3) GG distinguishes between law and justice ("The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice"). The difference between these aspects and the interest of a distinction has frequently been highlighted and the debate identified a problem

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[8] In detail *Trentmann, C.* Die Grundlagen des Rechtsstaatsbegriffs – Zugleich eine Einführung in die Rechtslehre Immanuel Kants und Robert von Mohls. *Juristische Schulung*, Nr. 10, 2017, S. 982; *Grzeszick, B.* Article 20. Bundesstaatliche Verfassung; Widerstandsrecht. In: *Maunz, T., Dürig, G.* Grundgesetz-Kommentar, VII, p. 3 f.

[9] *Hilf, M., Schorkopf, F.* Article 2 EUV. In: *Grabitz, E., Hilf, M., Nettesheim, M.* Das Recht der Europäischen Union, S. 37.

[10] Judgement of ECJ of 23 April 1986 in case No. 294/83, p. 23. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61983CJ0294 [last viewed 01.10.2021].

[11] *Voßkuhle, A., Kaufhold, A.-K.* Grundwissen – Öffentliches Recht: Das Rechtsstaatsprinzip. *Juristische Schulung*, Bd. 50, H. 2, 2010, S. 116.

which may be formulated in the form of a question: Can written law, which obviously leads to manifest injustice still be regarded as law, only because it has been enacted in accordance with the constitutional requirements? Formally, we may perfectly speak of *Recht* (the German *Recht* seems to comprise the two notions, *law* and *justice* and thus seems to indicate that law is just in the sense of fair), in reality, however, the *Recht* (law) appears to be *Unrecht* (literally meaning "unlawful", although in this sense rather meaning: "unjust").[12] Or, as the controversial legal scholar Carl Schmitt put it in 1935, the concept of the *Rechtsstaat* itself is void of any specific content.[13] *Rechtsstaat*, according to this formal concept, thus merely amounts to a state, governed by [any kind of] laws. This aspect has also been raised in the context of the German reunification in more popular language: "Wir wollten Gerechtigkeit und bekamen den Rechtsstaat!" [The translation: "We wanted justice and finally got the rule of law!" probably comes closest to the original meaning].[14] The concept of *materielle Rechtsstaatlichkeit* addressed this problem, as it, in addition to the formal rule by law, strives to providing substance in the sense of justice and fairness. This aspect, i.e., the question, what is supposed to be fair, also comprises philosophical, ethical and political dimensions that lead to views which may, furthermore, vary geographically and over time. In addition, the respective answer to the question, what is to be understood as fair, differs according to the perspective of the subject concerned. Accordingly, the same situation might be considered differently, e.g., whether a scheme of progressive taxation or a flat tax of 25 % is fair for the taxation of millionaires and poor people.[15] Moreover, the definition of legal terms which require the interpretation of their meaning may lead to quite different outcomes in legal practice. One of the most relevant examples in the context of this article concerns the meaning of "common values" in Article 2 TEU.

At first glance, the term of "common values" may insinuate an identical meaning in the various Member States. Nevertheless, the notion is broad and needs to be further elaborated and interpreted, which thus renders it susceptible to manipulation. However, the positioning in Article 2 TEU illustrates the uttermost importance of these values for the EU and its legal system.[16] Literally overarching

[12] Unfortunately, present political developments provide various examples, where this aspect might be discussed. Relevant references may be found everywhere in the free press worldwide. For reasons of simplicity, we merely refer to one issue of *The Economist*, April 17th–23 2021, describing, for instance, the situation in Myanmar (pp. 13, 40), where the military pretends to act in accordance with national law; in Hongkong, where the PRC argues that imprisonment of activists was in line with the rule of law (more or less on p. 44) or Russia, which claims to act in line with the existing law when imprisoning Aleksei Nawalny or regarding the activities of Russian military in the Ukraine / at the Ukrainian border (p. 20). Beyond these dramatic examples, it is also possible to identify situations in liberal countries of a more a limited and minor impact, which, however, may also illustrate a discrepancy between law and what is conceived as fair (or just), for instance, the example of "Containering" in Germany, shows, see Judgement of the Constitutional Court of the Federal Republic of Germany of 5 August 2020 in case No. 2 BvR 1985/19, 2 BvR 1986/19. Available: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/08/rk20200805_2bvr198519.html [last viewed 14.05.2021].

[13] *Schmitt*, C. Was bedeutet der Streit um den „Rechtsstaat"? *Zeitschrift für die gesamte Staatswissenschaft*, Bd. 95, H. 2, 1935, S. 196).

[14] To that *Bahners, P.* Bärbel Bohley: Gerechtigkeit und Rechtsstaat. *Frankfurter Allgemeine Zeitung*, 14.10.2020. Available: https://www.faz.net/aktuell/feuilleton/debatten/baerbel-bohleys-zitat-von-gerechtigkeit-und-rechtsstaat-16996571.html [last viewed 01.10.2021].

[15] *Braun, J.* Einführung in die Rechtswissenschaft, Mohr Siebeck, 4. Aufl, Tübingen, 2011.

[16] *Bogdandy, A. von.* Tyrannei der Werte? Herausforderungen und Grundlagen einer europäischen Dogmatik systemischer Defizite. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Bd. 79, H. 3, 2019, S. 512 ff.

the EU legal and political system, the common values comprise the essence of the philosophic and humanistic European heritage[17] which guide the subordinated polity objectives stipulated in Article 3 TEU. Accordingly, they are supposed to express the essence of the EU fundamentals, a function which simultaneously burdens them with an extensive field of application. This makes values appear differently, according to the context in which they stand, resembling "shimmering in different colours according to the incidence of light". This somewhat poetic comparison illustrates the problem that values may vary according to the position of the observer, given that values are subject to the perspective and position of those referring to them.[18] Notwithstanding their importance, the complexity of their nature thus makes the term open to diverging interpretations. Subsequently, one may observe that the description of values may vary according to those who direct the rule of interpretation (*Definitionsherrschaft*). Furthermore, nuances of interpretation may considerably affect the subordinated law and thus have repercussions on the (European and national) political debate. Eventually, the process of interpretation may become the subject of debates and disputes which frequently are of a political nature.

Moreover, it is important to take note of a considerable diversity among the different political systems of Member States. They may be republics or monarchies with parliamentary and semi-presidential systems with powerful und powerless parliaments, democracies with powerful parties, organised in centralistic and federal systems, powerful, powerless and missing constitutional courts, as well as differences in fundamental rights.[19]

In the light of these aspects, it is problematic to assume that all 27 EU Member States with their singular national histories adhere to identical values – and apply an identical concept of the *materielle Rechtsstaatlichkeit* (rule of law in its substantive sense) – which would suggest one single approach in the EU. On the contrary, the openness and lack of precision of the term "values" – including the value "rule of law" – is subject to different understandings in the Member States.

The potential diversity, reflected in different approaches to values and the concept of the rule of law, may lead to practical problems which are particularly manifest in the aspects of the *materielle Rechtsstatlichkeit*. These considerations illustrate that this very concept, which aims at providing fairness and equity, may potentially contradict one of the main aspects of *Rechtsstaatlichkeit*, namely, its aim to provide legal security, clarity, and predictability.

The concept of the *substantive* rule of law thus potentially bears an inherent conflict of the aims, legal security and fairness, which, in some instances, may stand detrimentally to another. This dilemma had famously been discussed by the legal philosopher Gustav Radbruch some 70 years ago (1946), after the reign of terror by the National Socialists which is also known as the *Radbruchsche Formel*:

> *The resolution of the [possible] conflict between justice and legal certainty may well be found in a formula such as this: Preference is given to the positive law, duly enacted and secured by state power as it is, even when it is unjust and fails to benefit the people, unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, 'false law' and must therefore yield to*

[17] Recital 2 of the Preamble TEU.

[18] Von Bogdandy illustrated this aspect when referring an important Germany Commentary (Dreier) on the term "Rechtsstaat" which spans 200 pages. *Bogdandy, A. von.* Tyrannei der Werte?, S. 542.

[19] *Bogdandy, A. von.* Tyrannei der Werte?, S. 543.

> *justice. [..] One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'false law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.*[20]

This conclusion seems to indicate a certain degree of impuissance and to suggest surrendering to the factuality of reality. However, even though there is no simple comprehensive theory to this problem, there seems to be a broad consensus that there are core principles that have been identified as elements of an internationally accepted notion of the rule of law. In fact, for measuring the rule of law and for implementing respective standards in countries of transition, scholars and practitioners from different continents and legal systems have undertaken various approaches for contributing to the rule of law.[21] Most of these initiatives have established catalogues of elements that may be seen as constitutive for the rule of law. Some of these elements may still be contested or be less applicable to some states or societies than others; however, the following aspects may be identified and regrouped. The Venice Commission[22] counts five core elements of the Rule of Law:[23]

Firstly, *legal certainty* concerns the accessibility of the law. The law must be certain, foreseeable and easy to understand. Secondly, the principle of legality implies that administration and courts are bound by the law and that decisions and acts are based on a (sufficiently precise) legal basis for the action of the executive, at least in central areas, as well as the demand for measurability of state behaviour with the specifics of sufficient clarity, proportionality and legal certainty, i.e., limited retroactive effect and protection of legitimate expectations – the legal reservation (Article 52 (1) 1 CFR). This also implies a functioning private legal system including a judicial infrastructure.

A third task aims at preventing the abuses of powers which ensures that the legal system provides safeguards against arbitrariness and that the discretionary power of the officials is not unlimited, and it is regulated by law.

A fourth element requires control and review, i.e., the separation or a balance of power in order to ensure a system of "checks and balances", as well as an independent judiciary (Article 19(2) subpar. 3 sentence 1 TEU). Furthermore, it comprises the protection of fundamental rights, including effective legal protection[24] with the principle of proportionality[25], the fundamental right to good administration and *Equality before the law and non-discrimination.* According to this principle, similar situations must be treated equally and different situations

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[20] *Radbruch*, *G.* Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristenzeitung*, Nr. 1, 1946, S. 107; translation copied from: *Leawoods, H., Radbruch, G.* An Extraordinary Legal Philosopher. *WASH. U. J. L. & POL'Y. Vol. 2. Re-Engineering Patent Law: The Challenge of New Technologies*, January 2000, p. 500. Available: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1516&context=law_journal_law_policy [last viewed 01.10.2021].

[21] United Nations. Available: https://www.un.org/ruleoflaw/thematic-areas/justice-2/; World Bank. Available: https://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety.

[22] Venice Commission of the Council of Europe, Rule of Law Checklist. Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e [last viewed 14.05.2021].

[23] These elements are copied from: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN [last viewed 12.05.2021].

[24] Article 51(1) CFR, Article 47 CFR, Article 19(1) subpar. 2 TEU.

[25] cf. Article 5(1)2 and (3)1 and (4) TEU; Article 52(1)2 CFR.

differently. Positive measures could be allowed as long as they are proportionate and necessary.

Finally, the fifth aspect concerns *access to justice*, which implicates the presence of an independent and impartial judiciary and the right to have a fair trial. The independence and the impartiality of the judiciary are central to the public perception of the justice and thus to the achievement of the classical formula: "justice must not only be done, it must also be seen to be done". These aspects comprise accountability and state liability.

While it is too much to assume that all 27 EU Member States with their independent national histories adhere to identical values and standards which would suggest one single approach – as for instance the rule of law – for all, the constitutional traditions of the Member States nonetheless have a common nucleus that leads to a community of values. These traditional values are incorporated in the European Treaties (Article 2, 7 und 49 TEU) in which all Member States committed themselves to promoting them. Accordingly, the legislative branch of the European Union depends on Member States that execute law based on European values.

2.2. Safeguarding the Rule of Law Under the Treaties and Article 7 TEU

When concluding the Treaties, Member States had agreed to ensure the rule of law in the European Union. This may be observed in the different procedures, such as the preliminary ruling procedure (Article 267 TFEU), infringement proceedings (Article 258 und 259 TFEU) and also in the procedure stipulated in Article 7 TEU regarding the breach of values. In addition to these "hard-law" instruments, the European Parliament and the Council agreed on a general regime of conditionality for the protection of the Union budget in December 2020. In contrast to the above-mentioned procedures, these new instruments aim at preventing a breach of the rule of law, respectively, its continuation, leaving it to the Member States to restore the rule of law.

The sanction procedure according to Article 7 TEU serves – regardless of context – to enforce the canon of values according to Article 2 TEU. Article 7(1) TEU requires a clear risk of a serious breach of the values specified in Article 2 TEU by a Member State. A breach of an aspect of the rule of law (or a corresponding danger[26]) is generally not sufficient. Rather, Article 7(1) TEU speaks of a "serious" breach, Article 7(2) TEU of a "serious and persistent breach". These aspects are comprised by the term *systemic deficit* which requires an overall assessment of all measures, taking due account of the political and social conditions in the Member States reviewed. This may, for instance, be assumed in the case of repetitive illegal acts, if these are rooted deeply in state structures or if they were ordered by the highest authorities, expressing a political line. The provision requires a certain intensity, however, already a single incident, such as breaking a taboo – as a single case of torture – may indicate a systemic deficit if there is no adequate institutional response. Furthermore, there is a strong presumption of a systemic deficit if widespread corruption calls the implementation of Union law into question. This is, for instance, the case, if it is not ensured that the law will be applied (correctly) or if the courts can no longer be expected to independently review governmental acts.[27]

As to the legal consequences, Article 7(3) TEU allows the Council to suspend certain rights deriving from the application of the treaties to the EU Member State

[26] *Bogdandy, A. von.* Tyrannei der Werte?, S. 523.
[27] Ibid., S. 525 ff.

in question, including its voting rights in the Council. In that case, however, the "serious breach" must have persisted for some time and it is to highlight that the provision does not foresee financial sanctions. Moreover, this procedure is regarded as the last resort in order to preserve the very core of European values.

The procedure firstly foresees a Council hearing of the Member State concerned, which may lead to respective recommendations. The procedure, however, requires *unanimity* the European Council on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament.

Given that the procedural requirements are exceptionally high, the provision has only been used in a few cases. First of all, it is difficult to achieve unanimity among 26 Member States in a sanction procedure against a single and – in this case, isolated – Member State. Furthermore, as to the substantive law, it is difficult to establish the corresponding breach or the clear risk in a sovereign Member State. Finally, the sanctions tend to have an effect which is contrary to the EU´s aim of integrating Member States. Consequently, the Article 7 TEU procedure has been described as the "nuclear option"[28] (José Manuel Barroso) with a "symbolic function" [29].

2.3. The Conditionality Mechanism Under Regulation 2020/2092

The regulation enacting the so-called "Conditionality / Rule of Law Mechanism"[30] or, officially, the "Regulation on general conditional rules for the protection of the budget of the Union" entered into force on 11 January 2021.[31] It consists of ten articles which deal with three thematic aspects: Firstly, defining the scope of the regulation, secondly, dealing with definitions and a third thematic aspect concerns breaches. Finally, the regulation lays down the conditions and measures to be adopted, the relevant procedure, as well as the requirements for their lifting.

2.3.1. The Substantive Elements of the Regulation – Breaches of the Rule of Law

Article 4 of the regulation specifies the substantive requirements for the rule of law mechanism. Legal consequences may be triggered, if the principles of the rule of law in a Member State (2.3.1.1) are breached (2.3.1.2.), which impairs or seriously jeopardizes the proper financial management of the Union or jeopardizes the protection of the Union's financial interests in a sufficiently direct manner (2.3.1.2.).

2.3.1.1. Rule of law principles

Article 2a[32] seeks to define the rule of law, as follows:

> *[..] 'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including*

[28] Quoted after *Schorkopf, F.* Wertesicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise? *Europarecht*, Nr. 2, 2016, S. 150.

[29] Ibid.

[30] European Commission, Rule of law mechanism. Available: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en [last viewed 01.10.2021].

[31] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. *OJ*, L 433I, 22.12.2020, pp. 1–10.

[32] If not otherwise indicated, the following articles quoted refer to regulation 2020/2092.

access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU;

The norm thus provides a list of non-exclusive aspects, which indicate imperative requirements of the rule of law. However, this implies that further aspects may be required for establishing the rule of law.

2.3.1.2. Breaches

The mechanism aiming to ensure the rule of law is stipulated in Article 3 of Regulation 2020/2092, as it may be triggered by breaches of the principles of the rule of law. The following may be indicative of breaches:

[..]

(a) endangering the independence of the judiciary;

(b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;

(c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

The wording "the following may be indicative of breaches" implies that the norm either requires a breach of the explicitly pronounced rule of law principles or of aspects that are considered as equivalent breaches of this principle.[33] Given that the wording of Articles 3 and 4 is formulated in the plural, it leads to conclusion that a single breach is not sufficient to constituting a breach. The breach of one of these aspects automatically triggers legal consequences, as the provision does not foresee any further requirements. However, the Member State under review may undertake refuting the suggestion that the act breaches the rule of law. Even though the list of rule-of-law elements is not exclusive, there is a (refutable) assumption that state measures, which do not constitute a breach of these explicit elements of Article 3, comply with the rule of law. Accordingly, the hurdles are considerably higher, when it is attempted to prove a breach of the rule of law in case of the non-written elements.

2.3.1.3. Damage or Serious Threat to the Proper Financial Management of the Union or the Protection of the Union's Financial Interests

For assuming a breach, the regulation further requires that the sound financial management of the Union or the protection of the Union's financial interests is impaired or seriously jeopardized. In this respect, the regulation rather appears to protect the EU budget than the rule of law. To a certain extent, this formulation also expresses the importance of the rule of law for the EU, as financial aid by the

[33] Contrary to this reading, the European Council stated in point f): "The triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature. The Regulation does not relate to generalised deficiencies". EUCO 22/20 CO EUR 17 CONCL 8, 11 December 2020.

EU is only granted under a lawful procedure in the sense of this regulation. As the regulation requires a prejudice to the Union's financial interests, the term "rule of law mechanism" falls short, given that breaches of the rule of law in Member States without the respective prejudice cannot be sanctioned under this regulation.[34] However, one may take note of the CJEU case law on this element of similar secondary law acts, which is usually interpreted in an extensive manner and that "[..] a demonstration of the existence of a specific financial impact is not required. It is sufficient that the possibility of an impact on the budget of the funds concerned is not excluded."[35]

2.3.2. Legal Consequences

If the aforementioned requirements are met, Article 5 provides for various legal consequences. Article 5(1) differentiates between the legal consequences according to whether the Commission implements the Union budget in accordance with Article 62(1) points (a) and (c) of the financial regulation. Unlike the procedure under Article 7 TEU, the regulation provides for financial sanctions. In particular, the following sanctions are envisaged: the suspension of payments in whole or in part; the prohibition on entering into new legal commitments; the suspension of commitments and payments; the reduction of commitments, including through financial corrections or transfers to other spending programmes; the reduction of pre-financing or the interruption of payment deadlines.

Ultimately, Article 5(3) of the regulation stipulates that the measures must be proportionate, thus prescribing that the procedure itself is based on the rule of law. This requirement is specified in more detail in Article 6(1) and (5), Article 5(3) sentence 3 specifies that measures must be suitable, i.e., the nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures cannot therefore be used to sanction purely domestic breaches of the rule of law. Furthermore, the measures must also be necessary. Article 6(1) expressively provides that a dialogue may be regarded as a milder measure of equal effectiveness.

Finally, the nature, duration, severity, and scope of the breaches of the rule of law must be duly taken into account when considering whether a measure is appropriate (Article 5(3), sentence 2).

2.3.3. Procedure

Article 6 to Article 8 provide for additional requirements regarding the procedure, not least in order to preserve its legitimacy. While the mechanism has been criticised for being a "toothless tiger"[36], this statement fails to recognize that this procedure, in turn, also has to comply with the principles of the rule of law.[37]

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[34] This passage of the regulation has therefore been heavily criticised, see *supra* note 4.

[35] See for instance CJEU, C-408/16 para. 60 u. 61 (Compania Națională de Administrare a Infrastructurii Rutiere) ECLI:EU:C:2017:940 and C-743/18 (LSEZ SIA/Latvijas Investīciju un attīstības aģentūra) with further references in para. 66.

[36] *Mader, O*. Rechtsstaatlichkeit und Haushalt: Der Stand des Werteschutzes in der EU nach dem Streit über die Rechtsstaatsverordnung. *Europäische Zeitschrift für Wirtschaftsrecht*, Bd. 32, H. 4, 2021, S. 133.

[37] See CJEU, C-743/18 (LSEZ SIA/Latvijas Investīciju un attīstības aģentūra) and comments by *Schewe, C*. EuGH: Investitionen: Verstoß gegen eine Unionsbestimmung als Folge einer Handlung eines Wirtschaftsteilnehmers. *Europäische Zeitschrift für Wirtschaftsrecht*, Bd. 32, H. 3, 2021, S. 119.

Article 6 deals with the procedure and stipulates that the Commission investigates the matter and, if applicable, submits a proposal for an implementation of decision on the appropriate measures to the Council.

According to Article 6(5), the Member State must be heard beforehand on the findings that form the objective basis for the measures proposed by the Commission. At a later point in time, according to Article 6(7), there is also the possibility of expressing a view on proportionality. In particular, the Member State has the option of proposing remedial measures in accordance with Article 7. Objections raised to this, that it would be appropriate to give the concerned Member States time and further blocking possibilities,[38] are not convincing for reasons of the rule of law (cf. Article 41(2) lit. a CFR). Hereafter, the Commission submits a draft implementing decision with appropriate measures to the Council which may adopt it or change it by qualified majority.

Article 7 regulates the procedure for the lifting of measures. Thereafter, one year after the adoption of measures at the latest, the Commission will examine the situation in the Member State concerned.

According to Article 8, the Commission informs the European Parliament immediately of all the measures proposed, adopted or repealed under Articles 5, 6 and 7 and reports to the European Parliament and the Council on the application of this regulation, in particular on the effectiveness of the measures taken.

2.3.4. The Essentials of the Regulation – Positive Elements and Shortcomings

Overall, the regulation establishes the very essentials of the internationally accepted core elements of the rule of law. Furthermore, the regulation itself expressively foresees that its procedure respects these standards, i.e., *in sum*, one may regard Article 2 TEU as as a written minimum of the essence of the rule of law. With regard to the inherent problems that this principle brings along, it was improbable to expect more of the definition. This concerns e.g. the initial proposal by the Commission, to also incorporate the term "generalised deficiencies", which would have been problematic under this very principle, due to a lack of precision. However, when it comes to the Article 3, one needs to take note of the massive criticism this provision has encountered, not only concerning the necessary link to the budget, but particularly regarding the watering down of the legal mechanism through additional steps implying the European Council that, eventually delay the process. Regarding the overall outcome, one may thus quote the catchy conclusion by Dimitrovs and Droste that "[..] Brussels apparently obtained what it is best at: it reached a compromise that makes everyone equally unhappy."[39] However, these clarifications have not yet explained, whether the substantive content of regulation in fact collides with national identity as has been voiced by the Polish and Hungarian governments.

3. Polish and Hungarian Concerns: EU Law v. National Identity?

At first glance, the regulation does not seem to introduce anything surprising or new: overall, the definition of the term is not really novel and widely resembles the earlier definitions. Furthermore, all Member States are bound by the principles

[38] *Mader, O.* Rechtsstaatlichkeit und Haushalt, S. 133 (139).

[39] *Dimitrovs, A., Droste, H.* Conditionality Mechanism: What's In It? VerfBlog, 30.12.2020. Available: https://verfassungsblog.de/conditionality-mechanism-whats-in-it/ [last viewed 01.10.2021]. DOI: 10.17176/20201230-201659-0.

stipulated in Article 2 TEU, which explicitly addresses the rule of law.[40] This raises the question, why two governments so strongly opposed against this conditionality mechanism and whether their concerns are well-founded.

3.1. Polish and Hungarian Concerns

The Polish and the Hungarian governments uttered their concerns[41] against this new mechanism. Their arguments are partially political and partially legal and may be regrouped in three categories.[42] First of all, the two states argue that the regulation interferes with the competence of the Member States, i.e., breaches the principle of conferral, and that the provisions of the Treaty, namely, Article 7 TEU procedure, were exclusive. Secondly, that the broad criticism towards the two states was unfounded, given that other Member States (too) show rule of law-deficiencies. Thirdly, particularly Hungary counters the allegations regarding corruption and financial abuse of funds with a statement that all subsidies had been legally obtained and spent in accordance with EU rules.

3.1.1. The Various Arguments Against the Regulation Regarding a Lack of EU Competence

The first set of arguments concerns various political aspects that imply a legal reasoning, as the two governments refer to lack of EU competence. Both claim that the states acceded to the EU without the intention to become members of a federalist union. Furthermore, it was under the discretion of the Member State to independently regulate family and matrimonial matters, – the Member State was free to decide on questions of immigration and asylum and national security remained the sole responsibility of each Member State.[43] Moreover, the Polish Minister for European Affairs emphasized the right of each Member State to organize its judicial system autonomously. Finally, they argue that the respective national legal acts reflect the due exercise of democracy and national identity or values.

3.1.2. Pointing the Finger at Other Member States

In the second line of argumentation, the two states claim that other Member States (also) breach the rule of law. This contention is probably directed against Germany (and others), where prosecutors are under the direction of the Ministry of Justice and judges are appointed by politicians, secondly, that some Member State were not able to protect Christians or Jews from (Islamist/Muslim) acts of aggression.

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[40] *Gutscher, T.* Polen und Ungarn klagen gegen EU-Rechtsstaatsmechanismus. 11.03.2021. Available: https://www.faz.net/aktuell/politik/ausland/polen-und-ungarn-klagen-gegen-eu-rechtsstaatsmechanismus-17238896.html [last viewed 01.10.2021].

[41] *Löwenstein, S.* Es geht um Erpressung. FAZ. 17.11.2020. Available: https://www.faz.net/aktuell/politik/ausland/ungarns-justizministerin-varga-es-geht-um-erpressung-17056871.html [last viewed 01.10.2021].

[42] The argumentation of the two states is not identical, however, in order to systematically illustrate the various aspects playing a role in the debate, they are presented jointly.

[43] https://www.cicero.de/aussenpolitik/interview-mit-dem-ungarischen-parlamentsprasidenten-laszlo-kover-ungarn-bleibt-solange-mitglied-der-union-bis-diese-zusammenbricht. *Varga, J.* „Sind wir das schwarze Schaf, weil wir keine Migration wollen?". Die Welt. 13.11.2020. Available: https://www.welt.de/politik/ausland/plus220037090/Ungarn-Wir-wollen-keine-multikulturelle-Gesellschaft.html [last viewed 01.10.2021].

3.1.3. Correct Spending of EU Funds

This aspect particularly concerns the allegations against Hungary that its government misuses EU funds, especially in order to build up an illiberal media landscape. The government, however, denies doing so.

3.2. The Legal Foundation of the Polish and Hungarian Concerns

It has previously been indicated that these political arguments to a certain extent have a legal basis in the treaties. The first set of argumentation refers to the aspects of competence, namely, the principles of conferral and subsidiarity (see Article 4 and 5(1) and (3), 13 TEU), which is also reflected in the two Member States' claims.[44]

However, the argument concerning democracy and national identity contains a debatable reasoning in that, according to the concept of Article 2 TEU, these values are not supposed to conflict with the rule of law, but are mutually dependent: the rule of law serves to implement democratic politics. Resolutions of the (Polish) parliament can only be implemented in accordance with the aforementioned core principles of the rule of law. Lack of transparency, corruption and arbitrariness would run counter to the democratic decisions of the (Polish) parliament. In this respect, the rule of law safeguards "the core of the core" of European values. Apart from Article 2 TEU, it is important to note that this principle also forms an outstanding value of the constitutions of all Member States, including the Polish Constitution (Article 2, Constitution of the Republic of Poland). Furthermore, the rule of law in the independent Member States is a *conditio sine qua non* for becoming a member in a supranational organization like the EU and to jointly exercise the pooled sovereignty of Member States. This means that the EU, in the areas of the competences conferred, exercises supranational power, which necessarily implies that the Member States agree not to exercise state power in these areas. This aspect of supranationality, however, does not mean that the EU will become a federal state but that the EU may legislate according to the treaties. In this regard, it is vital that the EU and its Member States can be certain that the enacted law will be applied and that this application will be monitored by independent courts. If this were not ensured, the legal order would lack efficiency and jeopardise the whole existence of the supranational organization and reduce the EU to an international agreement.

These considerations imply a high level of mutual loyalty among the Member States, which therefore is enshrined in Article 4(3) TEU. Furthermore, the EU is based on the principle of mutual recognition of administrative and judicial decisions. The acts of foreign sovereignty, however, may only be recognized and enforced by a Member State against its own citizens if they essentially meet comparable requirements. Accordingly, Member States are bound by the values of Article 2 TEU when designing their internal structures. This implies that the design – or concept – of national identity, which is based on national "building laws", must yet heed a few "red lines"[45] respecting the values of Article 2 TEU. While this is not to be confused with levelling national or cultural identities, successful integration nevertheless requires a certain degree of homogeneity of constitutional values.[46] Subsequently, the regulation is limited to reviewing whether

[44] C-156/21, see *supra* note 7.
[45] *Bogdandy, A. von.* Tyrannei der Werte?, S. 503 (543).
[46] *Schorkopf, F.* Wertesicherung in der Europäischen Union, S. 148.

administration and jurisprudence are based on the rule of law. The regulation does not deal with family and matrimonial matters or questions of immigration and asylum, thus respecting the principle of subsidiarity.

The second line of political arguments, however, seems to be irrelevant from a legal perspective, even if the claims are well founded. The defense along the lines "we only do what others are doing" is frequently employed by these two Member States.[47] According to a principle of international law, already known in Roman law as *ex iniuria ius non oritur*, there is no right to equal treatment in the case of illegality (literally, "law (or right) does not arise from injustice"). This principle must necessarily apply for the EU, since, otherwise, unsanctioned breaches of the various EU Member States would accumulate and continuously lead to a decrease of the rule of law. Notwithstanding, blaming other Member States might have consequences, as the rule of law and the application of the regulation would make it necessary to also initiate infringement procedures against those Member States, that are encroaching with the corresponding rules. In the case of Germany[48] and Portugal[49], this has already been the case.

In the supranational interest, only those breaches are to be sanctioned that affect the economic management of the Union's budget or the protection of its financial interests in a sufficiently direct manner, or threaten to seriously affect it. If these requirements are met, no Member State is immune to a corresponding procedure,[50] which illustrates that the regulation cannot be considered as "lex Hungary and Poland".

The third set of arguments implies a complex analysis of the corresponding law, which thus defers any preliminary comment or quick answer.[51] The wider field of the funds and subsidies is relatively technical and, over the decades, has been regulated in detail. For that reason, problematic cases need to be reviewed independently on the grounds of the specific governing law by independent, specialized institutions and agencies. Their findings are subject to independent legal review and finally, the CJEU in constant practice has further developed the corresponding law on the correct administration of EU funds in neighbouring fields, such as government procurement.

Accordingly, particularly the first set of questions may require a legal review of the corresponding legal acts by the CJEU. However, it must yet be examined how far these aspects concern the validity of the regulation.

Summary

As the result of a compromise between the 27 Member States, the new rule of law mechanism or the conditionality mechanism aims at protecting the core elements

[47] See the Polish White Paper on the reform of the judiciary. Available: https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chanceller-white-paper-3-18.pdf; Supreme Court opinion on the White Paper on the reform of the judiciary. Available: https://archiwumosiatynskiego.pl/images/2018/04/Supreme-Court-Opinion-on-the-white-paper-on-the-Reform-of-the-Polish-Judiciary.pdf; https://verfassungsblog.de/solving-the-copenhagen-dilemma/.

[48] CJEU, C-508/18, 27.05.2019.

[49] CJEU, C-64/16, Associação Sindical dos Juízes Portugueses, Judgment of the Court of Justice, 27 February 2018, EU:C:2018:117.

[50] See the Rule of law report in *every* Member State. Available: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

[51] *Győry, C.* Ein Freund, ein guter Freund. VerfBlog. 22.12.2020. Available: https://verfassungsblog.de/ein-freund-ein-guter-freund/ [last viewed 01.10.2021]. DOI: 10.17176/20201222-172713-0.

of the rule of law. In its substance, it transcends the concept of a merely *formal rule of law* (*formelle Rechtsstaatlichkeit*), given that it provides certain set standards. Insofar as it aims at ensuring legality, legal certainty, prohibition of arbitrariness, judicial protection by independent impartial courts, also as regards fundamental rights, separation of powers and non-discrimination before the law (see Article 2 lit. a), it is comparable to other standards applied internationally. Comprising only these aspects of the rule of law, it, however, does not aim at providing *justice or fairness*, in the sense of a *substantive* understanding of the *rule of law*. While for some this aspect will be considered as a deficiency, others may be relieved, given that the mechanism does not aim at regulating aspects that might be considered as cultural or national identity. Be it as it may, the respective concerns uttered by the Polish and Hungarian governments against the substance of the mechanism thus appear to be unfounded.

With regard to increasing tensions, where a number of states deplored the decrease of the rule of law in a few Member States and the lack of instruments that may safeguard the values of the EU enshrined in Article 2 TEU, the mechanism may at least be seen as a positive step. In the sense of "better than nothing", it can generally be regarded as a good and novel tool. Moreover, the Regulation enriches the variety of instruments under EU law with a milder and more flexible alternative for sanctioning the Member States disrespecting the rule of law.[52] This again needs to be seen as an advancement compared to using "the nuclear weapon", i.e., Article 7 TEU, which has proved to be too rigid and severe.

This said, it should be remembered that this codification securing the rule of law only clarifies what probably most have taken for granted: that upon joining EU, all the Member States have agreed to respect the values of Article 2 TEU.[53] In this regard, it is a clear negative signal of the political development in the EU, that it has become necessary to establish these more rigorous legal instruments. Furthermore, it might be said that strict instruments do not create trust, which is important for deeper integration. Apart from this general aspect of criticism, there is a number of problematic issues[54] that have been addressed, and that will not be repeated here in detail. However, this overview has shown that the rule of law comprises a variety of aspects that bring together different legal principles which require careful balancing, simultaneously underscoring the need for mutual trust and loyalty among the actors. For the EU, this means that the principle of the rule of law needs to be taken seriously and respected by all, – Member States and the EU alike. While this essay has particularly pointed at deficiencies in legal and political practice in Hungary and Poland, this does not mean that all other Member States comply with this principle immaculately. Also, Germany, where politicians frequently reminded other states of the necessity to "do their homework"[55], was found to disrespect the principle of independent prosecutors.[56] Even more dramatically, the title of *Alemannos* and *Chamons* article, "To Save the Rule of Law You Must Apparently

[52] *Nguyen, T*. The EU's new rule of law mechanism How it works and why the 'deal' did not weaken it. Available: https://www.delorscentre.eu/en/publications/detail/publication/the-eus-new-rule-of-law-mechanism [last viewed 01.10.2021].

[53] Regarding this aspect, see most recently, CJEU, C-896/19, Repubblika v Il-Prim Ministru.

[54] See *Hillion, C*. Compromising (On) the General Conditionality Mechanism …

[55] *Séville, A*. Der Sound der Macht, Eine Kritik der dissonanten Herrschaft. Verlag C. H. Beck, 2018, S. 49 ff.

[56] CJEU, C-508/18, C-82/19.

Break It"[57] illustrates that, ironically, in the process for enacting the conditionality mechanism at various instances, EU institutions seemed to fail respecting the EU law. Accordingly, this shows that the concerned legal acts need to be carefully reviewed by the CJEU, yet also by the public and scholars. Notwithstanding these aspects, it should be underlined that critics devoted to the deterioration of the rule of law concentrate on Poland and Hungary.[58] In this context, one may take positive notice that the EU efforts to countering these authoritarian tendencies are sided by the ECHR, which, in a case concerning irregularities in the personal composition of the Polish Constitutional Tribunal (*Xero Flor w Polsce sp. z o.o. v. Poland*) found a violation of "the right to a tribunal established by law".[59]

Finally, the analysis has shown that one of the mechanisms' main elements seems to be the fight against the (systemic) misuse of funds, fraud and corruption in Member States. The implementation in practice is problematic given that the EU depends on the institutions of the Member States. Here it is improbable that the beneficiaries of fraudulent activities will engage in procedures to their very detriment and the system thus depends on the independence of national authorities and a functioning sanctioning mechanism, should authorities be too lenient. However, clear and transparent guidelines decrease the (potential) leniency of national institutions when reviewing the administration and use of EU funds. Ultimately, the CJEU has been an important player in this process, when interpreting the legal provisions in this complex legal field. And, again somewhat ironically, also in this very field of funds,[60] the CJEU has been reminded by Member States, political actors and legal scholars to enhance predictability and transparency in its adjudication and the interpretation of EU law.[61] Though in a different field, it however, is not a sign of praise for the rule of law in the CJEUs judicial practice, if the German *Bundesverfassungsgericht* finds that [..] the judgment is simply not comprehensible so that, to this extent, the judgment was rendered *ultra vires* [..]."[62]

In sum, this new mechanism is a novel and additional tool that promises to contribute to fostering the rule of law in Member States and the institutions. One should, however, be cautions not to overestimate the impact of this mechanism. The rule of law mechanism does not address the substantive (political) standards or specific values but rather sets the frame for the conditions of law – without them, a supranational organization cannot work. While the regulation does not conduct

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[57] *Alemanno, A., Chamon, M.* To Save the Rule …

[58] See particularly *Koncewicz, T. T.* How the EU is Becoming a Rule-of-Law-Less Union of States: From POLEXIT to E(U)EXIT? VerfBlog. 28.04.2021. Available: https://verfassungsblog.de/how-the-eu-is-becoming-a-rule-of-law-less-union-of-states/ [last viewed 01.10.2021].

[59] *Leloup, M.* The ECtHR Steps into the Ring: The Xero Flor ruling as the ECtHR's first step in fighting rule of law backsliding. VerfBlog. 10.05.2021. Available: https://verfassungsblog.de/the-ecthr-steps-into-the-ring/ [last viewed 01.10.2021]. DOI: 10.17176/20210510-181420-0; *Szwed, M.* What Should and What Will Happen After Xero Flor: The judgement of the ECtHR on the composition of the Polish Constitutional Tribunal. VerfBlog. 09.05.2021. Available: https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/ [last viewed 01.10.2021]. DOI: 10.17176/20210509-210914-0.

[60] See CJEU, C-743/18 (LSEZ SIA/Latvijas Investīciju un attīstības aģentūra) and comments by *Schewe, C.* EuGH: Investitionen, S. 119.

[61] *Klenk, L.* Die Grenzen der Grundfreiheiten: Studien zum europäischen und deutschen Öffentlichen Recht 28.
Mohr Siebeck, 2019.

[62] BVerfG, Urteil des Zweiten Senats vom 05. Mai 2020 –2 BvR 859/15, Rn. 116. Available: http://www.bverfg.de/e/rs20200505_2bvr085915.html; https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.

the matter regarding the allegations that the rule of law menaces national or cultural identity, it is predictable that similar aspects will arise in future disputes. The main problem will resemble a delicate evergreen of constitutional and international law: the distinction whether a dispute is to be considered political or judicial. However, beyond this mechanism in the EU these issues are frequently dealt with by other legal principles or secondary law and thus may become relevant to disputes and be adjudicated.

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The Place of Contract for Digital Thing in Latvian Contract Law Within the Context of the Consumer Sale Directives 2019

Dr. iur. **Jānis Kārkliņš**
Faculty of Law, University of Latvia
Professor of Civil Law at the Department of Civil Law Sciences
E-mail: *janis.karklins@lu.lv*

Dr. iur. **Vadim Mantrov**
Faculty of Law, University of Latvia
Docent of Civil Law at the Department of Civil Law Sciences
E-mail: *vadims.mantrovs@lu.lv*

The article aims to explore the place of contract for digital thing (i.e., a good with digital elements; digital content; and digital service) from the point of view of Latvian contract law considering the recently adopted Consumer Sale Directives 2019 (Directives 2019/770 and 2019/771). The topicality of the article's theme is rooted in transposition of these directives into Latvian national law. On the one hand, it is necessary to find a proper place for classification of contract for a digital good considering approaches and contents of Latvian contract law for the appropriate understanding of this contract within Latvian contract law and, speaking broadly, Latvian civil law. On the other, the transposition of these directives would mean that digital goods for non-consumers will remain without explicit regulation because these directives are intended to be transposed into consumer rights protection law being as *lex specialis* without introducing any amendments into general contract law. At the beginning, the present article provides an overview of the place of contract for a digital thing before transposition of the Consumer Sale Directives 2019 into Latvian consumer rights protection law, i.e., in the current regulation of Latvian contract law. The article continues with analysis of the expected place of contract for a digital thing after the currently intended transposition of these directives. Afterwards the article addresses the consequences of that transposition. The article concludes with summary following the discussion contained therein.

Keywords: digital thing (digital good), supply of digital service, digital content, consumer sale, contract law, Latvia, Directive 2019/770, Directive 2019/771.

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Introduction

The contracts whose object is a digital thing[1] are considered as a type of modern contracts increasingly gaining importance in recent years due to rapid technological progress and evolving digital environment. These contracts are usually considered as *sui generis* contracts and, therefore, they are traditionally subject to the need for a special regulation in contract law. However, as it is admitted in European consumer rights protection literature, "rules on the supply of digital content [and digital services – the authors' remark] are generally absent in European private law systems"[2] with a few exceptions.[3] The situation in Latvia is not an exception. The Latvian situation for regulation of contracts whose object is a digital thing is, therefore, difficult due to several significant aspects.

One the one hand, the Civil Law[4] (a Latvian civil law codification which, *inter alia*, deals with general contract law) does not explicitly recognise digital content as a contract object. This is true both regarding sale (purchase) and supply – contracts traditionally distinguished by the Civil Law[5] which in this situation continues the approach of its predecessor, Part III of BLVK[6]. Likewise, the Civil Law does not recognise a contract for supply of service but instead regulates a contract for work-performance following the Roman tradition. As it is explicitly indicated in Latvian legal literature, Latvian law does not recognize services as a separate subject matter of contracts.[7] Therefore, the contract for supply of service cannot be considered as a typical (nominate) contract and is, therefore, left without any special regulation in the Civil Law.[8] It means that the regulation of contract for work-performance

[1] This concept is understood within the meaning of the new consumer sale directives adopted in 2019 dealt further and covers three different consumer sale objects: a good with digital elements; digital content; and digital service.

[2] *Giliker, P.* Adopting a Smart Approach to EU Legislation: Why Has it Proven so Difficult to Introduce a Directive on Contracts for the Supply of Digital Content? In: *Synodinou, T., Jougleux, P., Markou, C., Prastitou-Merdi, T.* (eds.). EU Internet Law in the Digital Era: Regulation and Enforcement. Cham: Springer, 2020, p. 300.

[3] Ibid., pp. 300–301.

[4] Civil Law of the Republic of Latvia (1937). Official translation into English available on the webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/The%20Civil%20Law.doc [last viewed: 06.09.2021].

[5] This distinction is based on different regulation (though similar) for both types of contracts: contract of sale is regulated in Articles 2002–2090 of the Civil Law, while supply contract – in Articles 2107–2111 of the Civil Law. Consequently, Latvian legal literature traditionally treats both these types of contracts as different contracts.

[6] Part III of the Baltic Local Laws Collection 'Civil Laws' (*Baltijas vietējo likumu kopojuma III daļa 'Civillikumi'* in Latvian). For its brief overview from the perspective of contract law, see *Torgāns, K., Kārkliņš, J., Mantrov, V., Rasnačs, L.* Contract Law in Latvia. Alphen aan den Rijn: Kluwer Law International, 2020, pp. 25–26.

[7] *Torgāns, K., Kārkliņš, J., Mantrov, V., Rasnačs, L.* Contract Law in Latvia, p. 215.

[8] Except the amendments to the Civil Law introduced in recent years such as a special set of rules included in the Civil Law by transposing the Late Payment Directive (Directive 2011/7/EU of

included in the Civil Law cannot be applied to the contract for supply of digital service.

On the other hand, the contract whose object is a digital thing is explicitly regulated within the Consumer Rights Protection Law[9] already since the transposition of the Consumer Rights Directive 2011[10], as discussed further in this article. This regulation included in the Consumer Rights Protection Law is considered as *sui generis* and, therefore, treats this contract as an independent contract in the same meaning which is attributed to this contract by the above Directive.

In this situation, the Latvian legislator is concerned with the transposition of the recent Consumer Sale Directives adopted in 2019, which specifically deal with contracts for digital thing. In addition to requiring a systematic approach, this transposition process presents a systematic challenge of transposing these directives into Latvian national law considering the attitude of the Civil Law towards this type of a contract.

Therefore, the aim of the present article is to examine the issues arising in relation to the transposition of the recent Consumer Sale Directives adopted in 2019 into Latvian law. In order to achieve this aim, at the outset the article considers the situation before and after the transposition of the Consumer Sale Directives 2019 if the transposition would follow the currently considered approach. Afterwards, the expected transposition is critically considered from a systematic point of view of Latvian civil law concerning its consequences, if the intended transposition approach would be maintained. This leads to elaboration of legislative suggestions to the Latvian legislator for improvement of the transposition of the Consumer Sale Directives 2019 into Latvian law.

1. Situation Before the Transposition of Consumer Sale Directives 2019

1.1. Regulation of Contract for a Digital Thing Within the Civil Law Relationship B2C

Before the transposition of the Consumer Sale Directives of 2019, a contract between a seller and a consumer, whose object is digital thing was explicitly regulated in Latvian national legislation – only in the Consumer Rights Protection Law. Taking into account the necessity to transpose the obligations set out in the Consumer Rights Directive of 2011, the term 'digital' first appeared in the Consumer Rights Protection Law in 2014.[11] Thus, the Consumer Rights Protection Law began to recognise two types of digital things: 1) a good with digital content,

the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. *OJ*, L 48, 23.02.2011, pp. 1–10), i.e., Articles 1668^{1}–1668^{11} Civil Law in conjuncture with Article 1765(2) Civil Law in relation to the amount of interest.

[9] Consumer Rights Protection Law. Official translation into English available on the official webpage of the State Language Centre: https://vvc.gov.lv/image/catalog/dokumenti/Consumer%20Rights%20Protection%20Law.docx [last viewed: 06.09.2021].

[10] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. *OJ*, L 304, 22.11.2011, pp. 64–88.

[11] Law "Amendments to the Consumer Rights Protection Law" adopted on 24 April 2014, entered into force 28 May 2014. No official English translation is available.

which was included in the definition of 'goods' as 'digital content together with a material medium (CD, DVD or similar material medium)'[12]; 2) digital content, which was defined as 'data which are produced and supplied in digital form'.[13]

While digital content supplied on a tangible medium was considered as goods, and therefore could be an object of sales contract, the contracts for digital content which is not supplied on a tangible medium were classified neither as sales contracts nor as service contracts, nor any other specific type of contract following the approach of the Consumer Rights Directive 2011. In order to avoid uncertainties regarding the requirements applicable to such contracts[14], Article 4.[1](7) of the Consumer Rights Protection Law provided that rules of this law governing provision of services shall apply to digital content which is not supplied on a tangible medium unless otherwise provided by special norms regulating the protection of consumer rights. Therefore, contracts concerning such digital content were protected as a *sui generis* contract by the Consumer Rights Protection Law.[15]

It must be noted that the Consumer Rights Protection Law does not define any types of contracts, including contracts for digital things except references to either a purchase contract[16] or a supply contract[17] (and, frequently, confusing[18] both types of contracts[19]). Moreover, it does not generally regulate the rules on the formation, validity, nullity of contracts, the rules for the interpretation of the will of parties, or the legality of digital content as an object of an agreement or transfer of the author's economic rights.[20] Among other things, it merely indicates additional rules which the parties must comply with before[21] and after concluding contracts, the object of which is a digital thing, as well as lays down certain obligations as to the content of contracts. Thus, for such issues, general contract law as *lex generalis* law envisaged by the Civil Law still applies.[22]

Some of these *lex generalis* provisions can generally be applied to all types of contracts. For example, for a contract to be considered as concluded, the following obligatory elements are required to be established: complete agreement between the parties, particular form, intention to mutually bind (Article 1533 of the Civil Law).[23] However, it is important to understand that different types of contracts

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[12] Point 6 Article 1 Consumer Rights Protection Law.

[13] Point 8 Article 1 Consumer Rights Protection Law.

[14] See Likumprojekta "Grozījumi Patērētāju tiesību aizsardzības likumā" anotācija [Annotation of the draft law "Amendments to the Consumer Rights Protection Law"] (24.04.2014). Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/WEBRespDocumByNum?OpenView&restricttocategory=724/Lp11|2483 [last viewed: 06.09.2021].

[15] Certain provisions regarding digital content were also transposed in the regulations of the Cabinet of Ministers issued on the basis of the Consumer Rights Protection Law.

[16] For instance, Point 5, Article 3 Consumer Rights Protection Law.

[17] For instance, Paragraphs 6–7, Article 12 Consumer Rights Protection Law.

[18] For instance, obviously in Point 5, Paragraph 3, Article 6 or Article 30[1] Consumer Rights Protection Law.

[19] It should be noted that Latvia is one of rare jurisdictions where a purchase contract is differentiated from a supply contract (*Torgāns, K.* Saistību tiesības [Law of Obligations]. 2nd revised edition. Rīga: Tiesu namu aģentūra, 2018, pp. 286, 288). See Article 2002 *et seq* and Article 2107 *et seq* Civil Law.

[20] Article 2[1] (2) Consumer Rights Protection Law.

[21] For example, a requirement to provide information to the consumer.

[22] I.e., Chapters 2–8 of the Law of Obligations Part of the Civil Law. For a useful summary of this topic from the point of view of Latvian contract law in English, see *Torgāns, K., Kārkliņš, J.* Contract Law and Non-Contractual Obligations. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* (eds.). The Law of the Baltic States. Cham: Springer, 2017, pp. 291–298.

[23] *Torgāns, K.* Saistību tiesības [Law of Obligations], p. 42.

have their own essential elements, without which a contract cannot be considered as concluded (Articles 1470 and 1533 of the Civil Law), as well as their own specific rules. Therefore, it is important to indicate which contract type (types) also covers contracts for digital things.

1.2. Regulation of Contract for a Digital Thing Outside the Civil Law Relationship B2C

If a contract for a digital thing within the civil law relationship B2C is regulated by the Consumer Rights Protection Law, this contract outside this relationship, i.e., within B2B and C2C, is regulated on the basis of general and special contract law included in the Civil Law. According to the Civil Law, the type of contract depends on whether the object of the contract is digital content or a good with digital elements.

If a seller sells goods with digital elements to a consumer (the object of a contract is sale of goods with digital elements), the concluded contract will generally be a purchase (sales) contract of a movable. In such a situation, regulation on purchase (sales) contract envisaged in the Civil Law applies.[24]

However, if a seller sells digital content,[25] which is not supplied on a tangible medium, then a specific contract type cannot be identified as such on the basis of the Civil Law. Namely, no legal provision that currently regulates alienation contracts[26] could in the same way be applicable to contracts, the object of which is digital content. All alienation contracts share a common characteristic – their conclusion or execution results in the transfer of the right of property. As indicated in Article 927 of the Civil Law, the right of property can be exercised only over a thing (both tangible and intangible).[27] Given the fact that digital content is not a tangible thing (because it lacks spatial characteristic), nor it is an intangible thing (because intangible things in the legal system of Latvia are only rights), it has to be concluded, that one cannot execute right of property over digital content, and because of that one cannot pass these rights on to someone else. For this reason, no legal provisions applicable to alienation contracts may be directly applied to contracts, the object of which is digital content.

Similar conclusions can be found in other jurisdictions (including member states of the European Union). For example in the Comparative Study on cloud computing contracts prepared for the European Union Commission, it was stated that "In many jurisdictions (e.g. Belgium, England & Wales, France, Ireland, Lithuania, Luxembourg, Malta, Sweden, Slovenia, the Netherlands and also the United States), the application of the regulations on sales of goods are deemed inapplicable, as goods are likely defined as tangible movable items, which generally does not apply to a cloud computing context".[28] At the same time, as stated in the above comparative study, if specific rules exist in relation to services contracts, these rules will likely

[24] Articles 2002–2090 of Civil Law.

[25] Latvian law does not currently separate digital content from digital services.

[26] The Civil Law perceives purchase (sales), supply, exchange, and maintenance contracts as alienation contracts as they are regulated in a special chapter called 'Claims from alienation contracts' (Article 2002 Civil Law *et seq.*).

[27] For a useful discussion of this topic from the point of view of Latvian property law in English, see *Rozenfelds, J.* Property Law. In: *Kerikmäe, T., Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* The Law of the Baltic States, 2017, p. 280.

[28] DLA Piper UK LLP. Comparative Study on cloud computing contracts. Final Report. Luxembourg: Publications Office of the European Union, 2015, p. 28. Available: https://op.europa.eu/en/publication-detail/-/publication/40148ba1-1784-4d1a-bb64-334ac3df22c7 [last viewed: 06.09.2021].

apply to a cloud computing context which is the case of several EU Member States.[29] As noted above, this is not a case in Latvia, as the Civil Law does not recognise a contract of services.

However, this does not mean that contracts whose object is a digital thing cannot be concluded. It just means that these kinds of contracts in Latvian civil law are to be recognised as *sui generis* (i.e., ones which lack regulation by law). A legislator is entitled to stipulate that the provisions regulating other specific types of contracts are also applied to specific *sui generis* contracts. As mentioned above, Latvia has taken a cautious approach in this regard, stating that the Consumer Rights Protection Law rules governing provision of services generally apply to contracts object of which is digital content, at the same time indicating that these (*sui generis*) contracts cannot themselves be classified neither as sales contracts nor as service contracts within the civil law relationship B2C.

For the sake of truth, it should be mentioned that the contracts whose object is a digital thing may be subject to regulation of other sub-branches of law. Although this article is not aimed to view these other sub-branches of law in relation to a contract whose object is a digital thing, in this regard, it is sufficient to outline the perspective of intellectual property law. Depending on whether the subject-matter of the contract is either a right of use or an ownership right over a digital content, intellectual property law distinguishes two types of contracts, namely, licence contract and assignment contract. As indicated in Latvian legal literature, features of lease or rent contract may be established in the former situation, but in the latter situation – purchase (sales) contract.[30] However, regulation of these contracts within intellectual property law would be applicable as far as they concern intellectual property objects and their exploitation. As it is justly observed in this regard in the literature dedicated to European consumer rights protection law, "[i]n difference to normal sales contracts of movables, where the buyer acquires full rights of use and sale of the good, digital content contracts [as well as other types of contracts whose object is a digital thing – authors' remark] usually contain use restrictions on the consumer-buyer in general contract terms".[31]

1.3. Conclusion from the discussion in previous two sub-chapters

Consequently, the regulation of a contract whose object is goods with digital elements is provided in both the Civil Law and the Consumer Rights Protection Law: if the former regulation applies to civil law relationships such as C2C and B2B, the latter applies to B2C only; the former is based on general regulation of purchase contract, whereas the latter – on conformity of a thing to the contract which is generally more favourable to a consumer as a buyer (purchaser) than regulation of purchase (sales) contract included in the Civil Law to a buyer (purchaser). In such a way, it must be emphasized that the existing provisions regulating digital things

[29] DLA Piper UK LLP. Comparative Study on cloud computing contracts. Final Report. Luxembourg: Publications Office of the European Union, 2015, p. 28. Available: https://op.europa.eu/en/publication-detail/-/publication/40148ba1-1784-4d1a-bb64-334ac3df22c7 [last viewed: 06.09.2021].

[30] *Mantrovs, V.* Intelektuālā īpašuma līgumu regulējuma modernizācija Latvijas Republikas Civillikumā [Modernisation of Regulation for Intellectual Property Contracts in the Civil Law of the Republic of Latvia]. *Journal of the University of Latvia. Law*, No. 2, 2011, pp. 115–128. Available: https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No2/V_Mantrovs.pdf [last viewed: 06.09.2021].

[31] *Micklitz, H.-W., Reich, N.* Chapter 4. Sale of Consumer Goods. In: *Micklitz, H.-W., Reich, N., Rott, P.* EU Consumer Law. 2nd edition. Antwerpen, Portland, Oregon: Intersentia, 2014, p. 193.

on the basis of purchase regulation on the basis of Civil Law can by no means be called sufficient, as there still is no clear answer on many questions when it comes to delivery of digital thing. Until the transposition of the Consumer Sale Directives, there is no regulation on digital thing specific problems such as updates, compatibility, functionality, interoperability, integration, concept (definition) of "digital services". Transposition of the Consumer Sale Directives will also have notable changes on other, more general aspects regulating digital things, such as process of the delivery, conformity, etc.

2. Expected Situation After the Transposition of Consumer Sale Directives of 2019

Like other EU Member States, Latvia currently fulfils its obligations by taking steps in order to transpose the new consumer sale directives into national law. These steps are considered within the current chapter.

At the outset, it should be noted that the Consumer Digital Sale Directive[32] provides that classification of a contract for supply of digital content and digital service is considered as a non-harmonised issue and, therefore, falls within national competence of EU Member States. Indeed, the Consumer Digital Sale Directive itself provides that

> *[t]his Directive should also not determine the legal nature of contracts for the supply of digital content or a digital service, and the question of whether such contracts constitute, for instance, a sales, service, rental or sui generis contract, should be left to national law.*[33]

As one may observe from this quote from the Directive, national civil law of EU Member States, including Latvia, is free to determine the legal nature of a contract for supply of digital content and digital service.

At the same time, it should be considered that the Consumer Rights Directive of 2011 dealing also with digital content treats the supply for a digital content controversially. If digital content is supplied on a tangible medium, this Directive treated such goods as movables[34] similarly to the Consumer Sale Directive of 1999[35], noting that such objects should be considered as goods within the meaning of this Directive. However, if a digital content is not supplied on a tangible medium, this contract was considered by this Directive "neither as sales contracts nor as service contracts", and equalised to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating.[36] However, such approach, as it may be observed from these Directive's provisions, is limited to the Consumer Rights Directive of 2011 and, therefore, is not extended to other directives, including both Consumer Sale Directive of 2019, i.e. the Consumer Digital Sale Directive mentioned above and the Consumer Sale Directive of 2019.[37]

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[32] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. *OJ*, L 136, 22.05.2019, pp. 1–27.

[33] Consumer Digital Sale Directive, preamble, para. 12.

[34] Consumer Rights Directive 1999, preamble, para. 19.

[35] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. *OJ*, L 171, 07.07.1999, pp. 12–16.

[36] Consumer Rights Directive 1999, preamble, para. 19.

[37] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and

As it was concluded in the previous chapter, Latvian contract law treats a contract for a digital thing, i.e., supply of a digital content or digital service, depending on the civil law relationship. In the case of B2B and C2C, the Civil Law applies, regulating this contract based on general contract law as *lex generalis*. However, if B2C applies, Latvia has taken a cautious approach in this regard, stating that the Consumer Rights Protection Law rules governing provision of services generally apply to contracts, the object of which is digital content, at the same time indicating that these (*sui generis*) contracts cannot themselves be classified either as sales contracts or as service contracts within the civil law relationship B2C.

The **draft law**[38] is already prepared in order to introduce the amendments into the Consumer Rights Protection Law, which would allow to transpose the Consumer Sale Directives adopted in 2019 into Latvian national law. This draft law defines the understanding for a digital thing regulated by the new consumer sale directives.

The draft law is based on an assumption that the thing with digital elements (goods with digital elements in the terminology of the new consumer sale directives and the draft law) should be considered as a good.[39] Therefore, depending on the character of a contractual relationship, a contract for a good with digital elements would correspond to purchase contract or supply contract envisaged by the Civil Law and subject to special regulation included in the Consumer Rights Protection Law.

At the same time, digital content[40] and digital service[41] would be considered as *sui generis* contracts. This conclusion is based on the contents of the draft law. As one may observe from amendments to be introduced by the draft law to the legal definitions of the term 'consumer'[42] and liability of a seller and a service provider[43], these amendments aim to equalize obligations for digital content and digital service with those for good and service. Such approach was considered appropriate and desirable already in the relevant European Union Commission Staff Working Document in 2015, which in this regard provides, as follows:

> [..] *any rules on digital content should be as far as possible based on the rules on the sales of goods, deviations being justified only to take account of the specificity of digital content. Indeed this approach is appropriate and has been followed. To ensure such a consistent approach also during the legislative process, both sets of rules should be discussed as far as possible in parallel.*[44]

Directive 2009/22/EC, and repealing Directive 1999/44/EC. *OJ*, L 136, 22.05.2019, pp. 28–50.

38 Likumprojekts "Grozījumi Patērētāju tiesību aizsardzības likumā" [Draft Law "Amendments to the Consumer Rights Protection Law"]. Available: http://tap.mk.gov.lv/lv/mk/tap/?pid=40495464 [last viewed: 06.09.2021].

39 Article 1 draft Law introducing amendments to the Point 6 of Article 1 envisaging the legal definition of the term 'good'.

40 This term is defined in Point 8 of Article 1 of the Consumer Rights Protection Law which transposes a respective norm of the Consumer Rights Directive of 2011.

41 This term will be defined in Article 1 of that Law following amendments envisaged by the draft Law.

42 Article 1 draft Law introducing amendments to the Point 3 of Article 1 envisaging the legal definition of the term 'consumer'.

43 Article 17 draft Law introducing amendments to Article 33(4) of Consumer Rights Protection Law.

44 See European Union Commission Staff Working Document. Impact Assessment. Accompanying the document – Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods (SWD/2015/0274 final/2 – 2015/0287 (COD)). Brussels, 17 December 2015. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1450432347519&uri=SWD:2015:274:REV1 [last viewed: 06.09.2021].

3. Consequences of the Transposition of Consumer Sale Directives 2019

The transposition of the new consumer sale directives in the way intended by the current draft law would lead to several consequences examined separately in this chapter of the article by analysing weaknesses and providing respective suggestions.

Firstly, the understanding of the contract for a digital content and digital service would be regulated only on the basis of Consumer Rights Protection Law as a *sui generis* contract in conjuncture with general contract law included in the Civil Law. An obvious weakness of such approach is related to the fact that this regulation is fragmentary, as it focuses on conformity of a thing to the contract and remedies. Likewise, such an approach leaves regulation of a contract for a digital content and digital service within B2B and C2C solely to contractual parties (but general contract law still applies as explained above).

The negative outcome is related to the issue that this contract is left without appropriate regulation and, therefore, imbalances in bargaining power would allow one party to include contractual terms that are not in line with fair business practice (for detriment of the other contractual party). On the one hand, unlike consumers who are often in a structurally imbalanced position compared with the trader, in B2B relationships imbalances in bargaining power are due to the respective market situations (which will differ on a case-by-case basis). Therefore, the risk of a seller or a supplier exploiting its bargaining power in B2B relationships is significantly lower than in B2C relationships. On the other hand, extending the provisions of the Consumer Sale Directives (or a part of them) to contracts concluded within the B2B relationship would help solve the imbalances in contracts between large businesses and SMEs. Regarding specific types of digital content and digital services, it has been noted in the relevant European Union Commission Staff Working Document, that SMEs are often the weak part in cloud computing contracts and face contract law-related problems in B2B transactions (for example, issues regarding service providers' liability and accountability, conformity of the digital content, etc.).[45]

Secondly, the systematic problem leads to the artificial separation of regulation intended for a digital good depending on a civil law relationship. This approach is old-fashioned, as a modern European approach is different: it envisages general regulation for a contract of sale for all civil law relationships which is accompanied by a set of special rules mostly for the B2C, as it is governed by EU directives.[46]

However, even taking into account the aforementioned issues, the choice to extend the provisions of Consumer Sale Directives (or a part of them) to contracts between B2B and C2C is a legislative policy related decision which could be only adopted by the legislator, i.e., the Latvian parliament. This decision may be influenced by various socio-political factors. As it can be seen from the relevant European Union Commission Staff Working Document, by collecting stakeholder views in 2014 and 2015, business associations (with the exception of the main

[45] See European Union Commission Staff Working Document. Impact Assessment.

[46] This issue is already raised in Latvian legal literature (see Mantrovs, V. Jaunā patērētāja pirkuma Direktīva (Direktīva 2019/771): izaicinājumi un iespējas Latvijas likumdevējam [New Consumer Sales Directive (Directive 2019/771): Challenges and Possibilities for Latvian Legislator]. In: Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās: Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums [Application of the International and European Union law in the national courts. Collection of research papers of the 78th International Scientific Conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2020, pp. 319–329).

SMEs association) argued that the proposals for directives concerning contracts for the supply of digital content should only cover B2C contracts, while half of the respondents from legal professions suggested that the new contract rules could apply to SMEs as well, but at a lower level of protection than for consumers. Similar to business associations, the Member States (with the exception of one Member State) also preferred the inclusion of only B2C contracts. Regarding tangible goods (including goods with digital elements), businesses were practically unanimous in supporting the inclusion of only B2C contracts, while majority of legal professions' associations considered that the same regime could apply to both B2C and B2B, except some rules on standard terms in the latter case. Similar to business associations, most Member States (with the exception of a couple of Member States) supported the inclusion of only B2C contracts.[47] The main reason why business organizations are reluctant to apply the same measures from directives to both B2C to B2B contracts, is the significance of freedom of contract as an overarching principle in B2B contracts, be it in terms of the freedom to choose the law that will apply to the contract or the freedom to adapt B2B contract law default rules which would in many cases pre-empt potential problems regarding contractual issues.[48]

Therefore, one of the possible solutions to reduce fragmentation, and at the same time respect the principle of freedom of contract, would be for the Latvian legislator to apply the provisions (or part of the provisions) transposed from the Consumer Sale Directives to B2B contracts as natural elements of the contract[49], meaning that obligations transposed from the directives would be binding in B2B contracts. This suggestion does not require drafting a separate legal act. It would be sufficient to supplement Article 4^1 of the Consumer Rights Protection Law with a respective provision. This Article is an appropriate place for such a provision, because it already contains different adapting provisions including a provision which extends certain rules of this law to B2B contracts[50]. The Latvian legislator may also decide whether it is allowed for the parties to the B2B contract to agree otherwise than would be envisaged by this extended regulation. However, such a choice cannot be absolute, for instance, it is unlikely that a B2B contract for the supply of digital content may set a specific period of trader's liability different than the liability time periods envisaged in Article 11 of the Directive 770/2019.

Summary

The transposition process of the new Consumer Sales Directives adopted in 2019 has already commenced in Latvia by drafting a draft Law intended to amend the Consumer Rights Protection Law. However, these amendments would deal with regulation of contract whose object is a digital thing only within the civil law relationship B2C. An obvious challenge for this draft law relates to the characterisation of this contract as a *sui generis* contract which would mean that

[47] See European Union Commission Staff Working Document. Impact Assessment.

[48] Ibid.

[49] The Civil Law distinguishes natural elements of a contract in addition to essential and incidental elements of the contract. The Civil Law explains that the natural elements of a transaction are those which are its direct consequences by law if the transaction is entered into according to its essential principles. Therefore, these elements are self-evident, even without a special arrangement, but they may be removed or changed by special agreement, which shall be proved by the party referring to such (Article 1471 Civil Law).

[50] Para. 1 Article 4^1 of Consumer Rights Protection Law.

it will be regulated on the basis of special regulation to be included in that law in addition to general contract law provided by the Civil Law. However, an unclear and problematic issue relates to regulation of that contract outside the civil law relationship B2C. In this regard, the article proposes a solution for the Latvian legislator which could be obviously considered within or after the transposition process of both abovementioned Directives will take place, i.e., to supplement Article 4[1] of the Consumer Rights Protection Law with a provision which would extend the discussed regulation to the civil law relationship B2B.

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Legal and Practical Issues Related to Telework: The Example of Estonian Law

Gaabriel Tavits
University of Tartu, School of Law
Professor of Social Law
E-mail: *gaabriel.tavits@ut.ee*

Aleksei Kelli
University of Tartu, School of Law
Professor of Intellectual Property Law
E-mail: *aleksei.kelli@ut.ee*

Telework as a new form of employment has become particularly relevant with the advent of the COVID-19 restrictions. So far, telework has been used occasionally, and only a few employers and employees have resorted to this mode of work. Due to the COVID-19 situation, telework has become a reality, and at times it is the only possibility to work. Although telework is widely used, the legal regulation might not be apparent. The article explores the specific aspects of legal regulation regarding telework in Estonia.

Keywords: telework, employment conditions, working time, employee privacy.

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Introduction

Digitalisation and the sharing economy are considered essential topics at the EU level. Thus, the EU has endorsed the plan for digitalisation. The European Union also endorsed the principles of the sharing economy. Estonia pays attention to digital solutions aimed at the communication of the state with its citizens. The main goal is to offer the population faster ways to communicate with the state authorities and as much as possible to ensure paperless administration. These developments enable various tasks that no longer require a traditional job with a physical presence or a conventional employer. At the same time, it must be borne in mind that not all

types of work can be digitized at present. Therefore, also the significance of telework has increased.[1]

Teleworking entails many technical and legal issues. From a technical point of view, internet access is a *condition sine qua non*. The is acknowledged by the Estonian government as well. Estonia has adopted an information society development plan.[2] One of the goals set out in this document is to ensure the availability of high-speed internet and digital skills.

Regarding the information society plan, it is pointed out that almost 300 000 people in Estonia have not yet used the internet. Although the Estonian state takes numerous different steps to encourage people to learn to use various digital communication tools, attention has been paid primarily to those population groups in a somewhat weaker position in the Estonian labour market. Less attention has been given to the potential of the internet for the creation of high-quality jobs.

Teleworking also raises human rights issues. The key questions include how and whether an employer can compel an employee to work from home and whether such an obligation is not contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – Human Rights Convention).[3]

A range of data protection issues accompanies this mode of work. In addition to the customary questions – when and whether the employer can read the e-mails sent by the employee at all, data protection concerns related to the processing of different data and the transmission of such data to different employees and the co-operation partner are vital. Who is authorised to process the data, and who is the controller?[4]

The authors address the changes in employment relations and their legal regulations that have taken place in Estonia in connection with the introduction of new digital opportunities. In the first place, the legal regulation of telework and the problems arising in connection with telework are analysed. Estonian labour legislation does not define the concept of telework. The Employment Contracts Act (hereinafter – ECA)[5] merely states that an employee and an employer may agree that an employee performs duties outside his usual place of work. The duration of telework and the rights and obligations of the parties to the employment contract are not specified.

The current legal regulation has not responded to changes in employment relationships and working methods. It remains a private agreement between both the employer and the employee. The state does not directly prevent the conclusion of separate agreements, but such agreements must not worsen the employee's situation in comparison with the requirements established by law.

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1 Telework in the EU before and after the COVID-19: where we were, where we head to. Available: https://ec.europa.eu/jrc/sites/jrcsh/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf [last viewed 28.02.2021].

2 Eesti infoühiskonna arengukava kuni 2020 [Development plan for Estonian information society until 2020]. Available: https://www.mkm.ee/sites/default/files/eesti_infouhiskonna_arengukava.pdf [last viewed 27.02.2021].

3 European Human Rights Convention. Available: https://www.echr.coe.int/Documents/Convention_ENG.pdf [last viewed 27.02.2021].

4 This question is outside of the scope of the present article.

5 Employment Contracts Act. Available: https://www.riigiteataja.ee/en/eli/529122020003/consolide [last viewed 27.02.2021].

1. The Nature of Employment Relations in Estonia

In Estonia, individual employment relationships are regulated by the Employment Contracts Act. This law is based on the principle of flexicurity used in the European Union. According to the ECA, the employment contract does not necessarily have to be concluded in writing. The requirements for terminating the employment contract have been simplified. The number of significantly different formal requirements have been reduced. Although the ECA leaves sufficient space for the parties to the employment contract to enter into individual agreements, the ECA has been criticised for not providing sufficient flexibility in the situation where working conditions have changed. This also concerns teleworking. The issues related to working time are insufficiently regulated. Concerning working time, the parties to an employment contract do not have enough freedom to decide how many hours an employee still has to work.[6]

According to Section 28 of the Constitution,[7] everyone has the right to choose their field of activity and workplace freely. Section 19 of the Constitution states that everyone has the right to self-determination, also complies with this provision. The principle of freedom of contract is likewise derived from that provision. Consequently, everyone has the right to decide with whom to conclude an employment contract. This principle also guarantees the possibility to determine whether and with whom to terminate a contract. The employee and the employer can decide with whom and under what conditions the employment contract is concluded. The conditions of employment are under state control. Under this principle, the state can establish the necessary and required working conditions and, in addition, exercise control over the fulfilment of these conditions.

The ECA also regulates teleworking. The provisions of the ECA on the regulation of telework are general and leave the employee and the employer the opportunity to reach agreements to the extent necessary and appropriate for them. The Confederation of Estonian Trade Unions and the Confederation of Estonian Employers have also agreed on the principles of applying telework.[8] Although these principles are not mandatory (they are not generally a binding collective agreement), they constitute the principles that both employers and employees are expected to follow.

When regulating employment relations, Estonia must consider that public service employment is also relevant in addition to regular employment based on an employment contract. According to the Civil Service Act[9] in force in Estonia, employees in the public service are divided into two categories: officials and employees on the basis of an employment contract. Officials are appointed by administrative act and are generally not subject to labour law. According to the Civil Service Act Section 67 (3), the possibility of teleworking is also provided. However, the Civil Service Act does not specify which conditions should be applied in

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[6] Töötamisega seotud regulatsioone tuleb muuta paindlikumaks [Regulations concerning employment must be more flexible]. Available: https://www.koda.ee/et/uudised/tootamisega-seotud-regulatsioone-tuleb-muuta-paindlikumaks [last viewed 27.02.2021].

[7] The Constitution of the Republic of Estonia. Available: https://www.riigiteataja.ee/en/eli/530122020003/consolide [last viewed 26.02.2021].

[8] Kaugtöö kokkulepe [Agreement on telework]. 25.05.2017. Available: https://www.eakl.ee/kokkulepped/kaugtoo-kokkulepe [last viewed 26.02.2021].

[9] Civil Service Act. Available: https://www.riigiteataja.ee/en/eli/525032019003/consolide [last viewed 26.02.2021].

telework. The collective agreement between the two confederations referred to above is also applicable by analogy in the public service.

The provisions of the ECA on telework are general and leave the employee and the employer considerable freedom in determining their relations. Observing and ensuring compliance with occupational health and safety requirements is imperative concerning teleworking. This is one of the critical issues, the specific solution to which is being sought by many countries, not only in Estonia. Although telework in many countries is regulated by legislation at different levels, occupational health and safety requirements have mostly remained unchanged. The Estonian Occupational Health and Safety Act[10] does not alter the prescribed liability for occupational safety between an employee and an employer. The employer is fully responsible for compliance with occupational health and safety requirements in all work situations, including teleworking. This principle has not been changed, nor has it been altered in the context of COVID-19. When other working conditions in telework are a matter of agreement between the parties, then ensuring occupational health and safety requirements is ultimately the employer's responsibility. The employer is responsible for non-compliance with these requirements. One way to change this is to transfer responsibility for health and safety at work onto the teleworker. This could be possible when the employer has informed the employee about the risks of teleworking. If such information is provided, the employer is released from liability in the event of possible damage to employee's health.

One of the essential issues in implementing teleworking is the employee's right to his or her private life. The Estonian Constitution provides that everyone has the right to the protection of his or her privacy.[11] The right can only be restricted on a legal basis if there are good reasons for that. A similar right is also enshrined in Article 8 of the Human Rights Convention. Besides, under Article 8, it is possible to restrict this right by law if it is necessary and essential in a democratic state governed by the rule of law. When implementing teleworking (especially working from home), the question arises here, whether the employer can unilaterally oblige the employee to work from home (e.g., in the case of COVID-19). To answer the above question, it is necessary to analyse issues that an employer may unilaterally require to work from home. Such a unilateral requirement by the employer can only be relevant if provided for by law or necessary for protecting the health and safety of other workers. Under the Human Rights Convention, the requirement of legality obliges the legislator to pass a specific law. Yet, it is also sufficient if, for example, the national government is authorized to enact such legislation.[12]

The application of teleworking has become a new norm since the advent of COVID-19. Countries are left with choices about how and in what forms to do it. Occupational health and safety guidelines were adopted in Estonia even before the wave of the COVID-19 virus, and they should be followed in the performance of

[10] Occupational Health and Safety Act. Available: https://www.riigiteataja.ee/en/eli/522022021001/consolide [last viewed 26.02.2021].

[11] Section 33 of the Estonian Constitution.

[12] Guide on Article 8 of the European Convention on Human Rights. Available: https://www.echr.coe.int/documents/guide_art_8_eng.pdf [last viewed 26.02.2021].

telework.[13] These guidelines are not mandatory but set out clear requirements that both the employer and the employee must observe to prevent the employee's health from deteriorating. Still, some of the employers have adopted the internal rules on telework.

2. Teleworking as a Regular Form of Work

Typically, when talking about new ways of working, the possibilities and ways of remote working are also relevant. There is no single definition for telework. It is characterised by the fact that the employee does not have to be physically present in the regular place of work, but instead, the work is done remotely.[14] For such work to be possible, technical means of work are necessary. Typically, it means a situation where the employee does not have to leave home and can perform his duties at home using various information technology tools and options. From this point of view, there are also obligatory tools that allow performing tasks in the prescribed volume and under the prescribed conditions (computer with the necessary capacity, webcam, microphones, internet connection with sufficient speed to download and upload files).

Teleworking can take different forms to perform the tasks. On the one hand, there can be a case where the employee is not at work. An employee does not have a workplace with his employer, and the entire work is carried out from home or another place. On the other hand, teleworking can be a case where an employee works remotely a few days a week, for example, at home, whereas the rest of the time, an employee is present in his regular place of work. Moreover, teleworking, which involves creating office space and the presence of employees representing several employers, is not ruled out. The office space is equipped with the necessary resources, enabling employees to perform their duties on site. An employee may work at home or in other places. The employment contract can also stipulate that the employee is at the workplace provided by the employer two days a week. The rest of the time, the employee works in a place that suits him. The workplace, in case of the telework, does not necessarily have to be at employees' home.

In terms of employment law, telework differs from other ways of work because the employee may not be physically located at the employer's workplace, and the employer does not have the opportunity to control whether and how the employee performs his duties. Nevertheless, since work tasks are performed using modern information and communication means, the employer can still control the performance of work tasks if the necessary control mechanisms have been established.

Owing to the COVID-19 restrictions, teleworking has become a standard work option. Indeed, not all activities permit home-based work (e.g., construction or other spheres). In some situations, when the worker is not allowed to go to work, taking into account all potential restrictions on movement, work from home is the only way to continue working. Such changes in the situation have brought along

[13] Kaugtöötaja tööterviskoid ja – ohutus [Teleworker – occupational health and safety]. Available: https://www.tooelu.ee/UserFiles/Sisulehtede-failid/Teemad/Paindlikud%20t%C3%B6%C3%B6v%C3%B5imalused/Kaugtootaja%20tootervishoiu%20ja%20-ohutuse%20juhis.pdf [last viewed 26.02.2021].

[14] *Haddon, L., Brynin, M.* The Character of Telework and the Characteristics of Teleworkers. 2005. Available: http://eprints.lse.ac.uk/67001/1/Haddon_character_of_telework.pdf [last viewed 26.02.2021].

new issues, which so far in teleworking were either not regulated at all or lacked regulation of a sufficient extent and scope.

According to the ECA, if the tasks are performed remotely, the performance of the specified work must be agreed in the employment contract. The ECA does not specify what the working conditions are in the case of telework, nor does it stipulate what the rights and obligations are and what means of employment must be guaranteed by the employer to the employee. These obligations are left to the agreement of the parties.

As mentioned above, certain principles for organizing telework were agreed upon between the Confederation of Estonian Trade Unions and the Estonian Employers' Confederation for 2017. This agreement is of an indicative nature. Although the aforementioned agreement referred to teleworking on a voluntary basis and on the basis of an agreement between the parties, under the conditions that changed due to COVID-19, the transition to teleworking was compulsory rather than agreement-based. Especially in the spring of 2020, when the first wave of the COVID-19 and the restrictions stepped in unexpectedly. Employers had no choice but to arrange for employees to work remotely where it was feasible, and the nature of the work allowed to do so. There was relatively little time left to agree on which conditions would be applicable to telework.

Estonian labour legislation addresses the question of agreement of the parties as to whether and under what conditions organizing of telework is realizable. The law does not specify the rights and obligations of employees and employers.

A more significant aspect of teleworking is ensuring compliance with the working and rest time prescribed by law and agreeing expressly on the time from which the employee must be available to the employer to perform work-related tasks. There is also a need to agree on how and to what extent the costs related to the resources required for carrying out the work should be covered.

In the case of teleworking, compliance with occupational health and safety requirements remains of major importance. The current legal regulation of occupational health and safety is aimed at achieving that the employer is generally responsible for compliance with the requirements related to occupational health and safety. Although the employee is also obliged to comply with occupational health and safety requirements, the employer is ultimately responsible for meeting these requirements.

The Estonian Occupational Health and Safety Act stipulates the same principle – the employer is responsible for compliance with occupational health and safety requirements. The employer must instruct the employee and explain to them the risks associated with teleworking. Still, the employer will not be excused from liability should the employee's health deteriorate during teleworking. In this respect, the improvement of the relevant legal regulation in Estonia is impending, as the division of responsibility for compliance with occupational health and safety requirements in telework should be imperative.

In Estonia, the Chamber of Commerce and Industry proposed that the employee be responsible for safe working conditions if the employer has informed the employee about the risks of teleworking. It should therefore imply a division of responsibilities between the employee and the employer.[15]

[15] Töötamisega seotud regulatsioone tuleb muuta paindlikumaks [Regulations concerning employment must be more flexible].

3. Employee Privacy, Occupational Health and Safety and Telework

Teleworking does not necessarily entail the violation of the employee's privacy. The employee consents to telework and therefore accepts the necessary restrictions. It is compatible with the General Data Protection Regulation (hereinafter – GDPR).[16] Article 6 (1) of the GDPR allows the processing of the employee's personal data[17] for the performance of a contract (clause b) and the legitimate interests (clause f).

Privacy issues may ensue when telework is required unexpectedly, and neither the employee nor the employer can implement different measures. Considering COVID-19 outbreak in spring 2020, one can ask whether and to what extent the employer had an obligation and the right to unilaterally oblige the employee to transfer to the telework?

Article 8 of the Human Rights Convention, which states that everyone has the right to privacy, has a key role here. This situation also concerns a person's right to the dwelling. According to Article 8 of the Human Rights Convention, the right to interfering with privacy is not unlimited. Under Article 8, it is permissible to interfere with a person's privacy if it is necessary in a democratic society, and such a possibility is also provided by law. It does not matter whether it is a law adopted by the parliament. According to the European Court of Human Rights case law, the legal basis can be constituted by any legal act, whether enacted by law or set forth in accordance with the law.

Therefore, an employer's order to work at an employee's home office needs a legal basis. What the legal basis must be is not specified by the Human Rights Convention. An emergency situation was declared in Estonia on 12 March 2020. Based on the emergency situation, the Government of the Republic acquired the competence to establish various restrictions, including restrictions related to the movement of people. The establishment of such a state of emergency gives the employer the right to oblige an employee to work remotely if this is necessary in a democratic society and also protects the rights and freedoms of others.

There is one more aspect to be noted here. When Estonia declared a state of emergency, the Estonian government sent a notice to the Council of Europe to suspend the guarantee of the rights and freedoms provided for in the ECHR during the emergency.[18] Such an opportunity is provided for by Article 15 of the Human Rights Convention. Does such an exercise of the right automatically mean that the rights and freedoms provided for in the ECHR may be restricted? Even if it were held that the state had the possibility to impose restrictions on the suspension of the rights provided for in Article 8, this did not nullify the restriction of the right to privacy provided for in Sections 33 and 43 of the

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[16] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Available: https://eur-lex.europa.eu/eli/reg/2016/679/oj [last viewed 13.09.2021].

[17] Article 4 (1) of the GDPR defines personal data as information relating to an identified or identifiable natural person.

[18] Reinsalu: hädaolukorras võidakse piirata inimõiguste konventsioonis tagatud õigusi [Reinsalu: In case of emergency, human rights can be restricted]. Available: https://www.delfi.ee/news/paevauudised/eesti/reinsalu-hadaolukorras-voidakse-piirata-inimoiguste-konventsioonis-tagatud-oigusi?id=89384059 [last viewed 26.02.2021]; *Lõhmus, U.* Lisandusi inimõiguste konventsiooniga võetud kohustuste peatamisele [In addition to suspended obligations arising from the Human Rights Convention]. Available: https://www.err.ee/1070879/uno-lohmus-lisandusi-inimoiguste-konventsiooniga-voetud-kohustuste-peatamisele [last viewed 26.02.2021].

Estonian Constitution and the legal consequences thereof.[19] According to the Estonian Constitution, it is also possible to place restrictions on a person's private life if necessary to protect the rights of other persons. Restrictions on movement are imposed and needed to limit the spread of the virus. The measures taken to do so are necessary to protect the rights and freedoms of others. Therefore, it is in accordance with the Estonian Constitution that an employer orders an employee to work remotely if this is necessary to ensure the rights and freedoms of other persons. For the employer to issue such an order, the state must issue a general order imposing restrictions on movement. Based on general restrictions, the employer can also unilaterally reorganize work according to the changed overall situation.

However, one problem remains when there are no overall restrictions in the country, but the employer wants to impose such restrictions in his company to prevent, for example, the spread of the virus or other infectious diseases (to prevent a local outbreak). If the employer wishes to impose such restrictions itself, it can do so only if legislation provides a basis for such action.

Under the Occupational Health and Safety Act, the employer must ensure a safe working environment and healthy working conditions. These occupational health conditions must be ensured in such a way that the health, rights and freedoms of other workers are not adversely affected. The Occupational Health and Safety Act provides an opportunity to reorganize work. Still, it does not confer upon the employer the unilateral decision-making right to direct an employee to telework. The employer can send the employee to work at home on a condition that it provides the corresponding work equipment and a safe work environment (e.g., a suitable desk, office chair, etc.) needed for work.

If the employer gives an order to stay at home, this order is also justified, but the employee refuses to do so. It must be considered that the employee may commit a breach of work obligations. For example, according to the Estonian Employment Contracts Act, the law stipulates the employee's obligation to refrain from violating the rights of other employees, and the employee also has an obligation to do everything in his power to avoid harming the health of other employees. When an employee comes to his regular workplace despite the employer's instructions, thus he by his presence endangers the health of other employees. Such behaviour in the employment relationship entails the responsibility of the employer for ensuring safe working conditions. Still, at the same time, it may also lead to the employee's individual responsibility (e.g., due to breach of non-contractual obligations). Because of the above, the employer's decision to assign the employee to working remotely must be made in accordance with the law and the actual situation at the workplace. If the employee disregards the employer's order to perform telework even if the situation at the workplace requires this measure, the employee assumes responsibility for such behaviour. In addition to being liable to the employer, it is conceivable that an employee is personally liable to co-workers if his behaviour may lead to health problems of other employees.

[19] *Lõhmus, U*. Lisandusi inimõiguste konventsiooniga võetud kohustuste peatamisele [In addition to suspended obligations arising from the Human Rights Convention].

4. Calculation of Working Time and Rest Time

The issue of working and rest time is one of the critical topics in employment. The more flexible the working conditions, the more crucial the relationship between working time and rest time. The proper ratio of working and rest time ensures the employee's efficiency. Compliance with the working and rest time requirements ensures that the employee is provided with the necessary occupational health and safety conditions. The ECA complies with the Working and Rest Time Directive requirements established by the European Union,[20] related to the restrictions on maximum working hours and compliance with the requirements for minimum rest periods. Under Section 28 (2) 4) of the ECA, the employer is obliged to ensure the control of working and rest time and ensure that the necessary records are kept regarding the use of working and rest time. In its judgment, the ECJ has drawn attention to how the employer must keep working time records.[21] The European Working Time Directive does not explicitly provide a single measure on how the calculation of working and rest time should be ensured, leaving the choice to the Member States. The Employment Contracts Act does not describe how the employer must keep these records and whether and in what cases the representative of employees has access to these records.

The calculation of working time makes it possible to determine whether and to what extent employees have had to work overtime and whether the necessary rest requirements have been complied with. Although the Employment Contracts Act does not oblige the employer to introduce a specific accounting system or prescribe how the said accounting system for working and rest time should be introduced regarding employees, it is up to the employer to comply with this obligation.

The spread of digitalization means that the employee does not have to be always virtually reachable by the employer. The only aspect that matters is that his job should be fulfilled and, if necessary, the employee must be available to the employer for professional communication. Consequently, the employee may be independent in planning his working and rest time. Concerning rest time, the ECA allows the employer to divide the rest period into parts based on an agreement prescribed in the employment contract. According to Section 51 of the ECA, the rest period between working days must be at least 11 hours. This rest period can be divided into parts by an agreement in the employment contract. There are also restrictions on splitting rest time. The duration of one part of the rest period shall be at least six consecutive hours, and the work shall not endanger the health and safety of the worker. If such a rest period is agreed upon in the employment contract, the employer must comply with this requirement. It is not only compliance with the requirements prescribed by the ECA. Above all, the restrictions important from the point of view of occupational health and safety must be respected. This provision becomes significant in teleworking when uninterrupted rest may not be possible in all cases. Here, the employer's obligation to ensure that the employee complies with the requirements for the regulation of rest time is principal. From the legal regulation, the regulation of working and rest time and occupational health and

[20] Directive 2003/88/EC of the European Parliament and Council of 4 November 2003 concerning certain aspects of the organisation of working time. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0088&from=ET [last viewed 26.02.2021].

[21] Judgment of the Court (Grand Chamber) of 14 May 2019. *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE.* Case No. C-55/18. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0055 [last viewed 26.02.2021].

safety requirements remain the employer's responsibility. Here, a particular change in trend must be considered.

Concerning working and rest time, the employee and the employer must agree on the time intervals during which the employee must be available. An employee cannot be required to be available 24 hours a day. The regulation of working and rest time can be provided by law, but the possibility becomes sufficient if the employee and the employer reach a corresponding agreement.

Summary

The changed situation incurs new challenges to the regulation of labour relations. While in the near past we considered teleworking as one of the optional alternatives to working and earning income, today it may be said that in some cases, telework is the only way for people with different mobility restrictions to work and make a living.

Estonian labour legislation does not formally regulate telework and the conditions for its application. There is only one provision in ECA, according to which there is a possibility to apply telework by mutual agreement of the parties. The parties determine the conditions of the telework agreement to the employment contract.

Compliance with the rules of working and rest time and occupational health and safety requirements have remained the employer's responsibility, even if the employee works remotely. Although the employer must ensure occupational health and safety requirements, it is worth considering the division of responsibilities between the employer and the employee in telework. This is especially the case when the employer has informed the employee about the risks of teleworking.

A dominant legal issue is a possibility for the employer to oblige the employee to work remotely if there are no other opportunities to perform work duties. Although this may appear to be an unjustified interference with worker's privacy, at first sight, such interference can have a legitimate basis if it is provided for by law or if it is intended to ensure the health and safety of other workers.

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7. Reinsalu: hädaolukorras võidakse piirata inimõiguste konventsioonis tagatud õigusi [Reinsalu: In case of emergency human rights can be restricted]. Available: https://www.delfi.ee/news/paevauudised/eesti/reinsalu-hadaolukorras-voidakse-piirata-inimoiguste-konventsioonis-tagatud-oigusi?id=89384059 [last viewed 26.02.2021].
8. Telework in the EU before and after the COVID-19: Where we were, where do we head to. Available: https://ec.europa.eu/jrc/sites/jrcsh/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf [last viewed 28.02.2021].
9. Kaugtöötaja töötervishoid ja – ohutus [Teleworker – occupational health and safety]. Available: https://www.tooelu.ee/UserFiles/Sisulehtede-failid/Teemad/Paindlikud%20t%C3%B6%C3%B6v%C3%B5imalused/Kaugtootaja%20tootervishoiu%20ja%20-ohutuse%20juhis.pdf [last viewed 26.02.2021].

Normative Acts

1. European Human Rights Convention. Available: https://www.echr.coe.int/Documents/Convention_ENG.pdf [last viewed 27.02.2021].
2. Directive 2003/88/EC of the European Parliament and Council of 4 November 2003 concerning certain aspects of the organisation of working time. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0088&from=ET [last viewed 26.02.2021].
3. The Constitution of the Republic of Estonia. Available: https://www.riigiteataja.ee/en/eli/530122020003/consolide [last viewed 26.02.2021].
4. Civil Service Act. Available: https://www.riigiteataja.ee/en/eli/525032019003/consolide [last viewed 26.02.2021].
5. Employment Contracts Act. Available: https://www.riigiteataja.ee/en/eli/529122020003/consolide [last viewed 27.02.2021].
6. Occupational Health and Safety Act. Available: https://www.riigiteataja.ee/en/eli/522022021001/consolide [last viewed 26.02.2021].
7. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Available: https://eur-lex.europa.eu/eli/reg/2016/679/oj [last viewed 13.09.2021].

Case Law

1. Judgment of the Court (Grand Chamber) of 14 May 2019. *Federación de Servicios de Comisiones Obreras (CCOO) v. Deutsche Bank SAE*. Case C-55/18, 14 May 2019. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0055 [last viewed 26.02.2021].

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Doctrine of State Continuity. Latvia's Experience

Dr. iur. **Ineta Ziemele**
Professor of International Law at Riga Graduate School of Law
Judge at the Court of Justice of the European Union
former President of the Constitutional Court of the Republic of Latvia
former Judge and President of Section of the European Court of Human Rights
E-mail: *ineta.ziemele@curia.europa.eu*

Dr. hist. **Ainārs Lerhis**
Senior Researcher at the Institute of Latvian History, University of Latvia
Senior Researcher at the Centre for East European Policy Studies (Riga)
E-mail: *ainars_lerhis@yahoo.co.uk*

Dr. iur. **Jānis Pleps**
Faculty of Law, University of Latvia
Assistant Professor at the Department of Legal Theory and History
E-mail: *janis.pleps@lu.lv*

Dr. iur. **Jānis Lazdiņš**
Faculty of Law, University of Latvia
Professor at the Department of Legal Theory and History
E-mail: *Janis.Lazdins@lu.lv*

The article examines the scope and consequences the continuity of the Republic of Latvia in several domains and places them within a broader context of Latvia's history. Firstly, it describes and analyses some functions of the State of Latvia which continued to be performed during the years of occupation by the USSR and Nazi Germany (1940–1990) and, secondly, the significance of the *de iure* effect of the *Satversme* of the Republic of Latvia of 15 February 1922 during the years of occupation and following the restoration of the independence of the state. The authors advance the thesis that the occupation regimes of the communist USSR and Nazi Germany failed to extinguish the existence of the Republic of Latvia as an internationally recognised subject of international law, moreover, Latvia in practice did not discontinue performing some functions of the state. Of course, full restoration of the independence of the state on the basis of values enshrined in the Satversme occurred only after *coup d'état* in the Soviet Union.

Keywords: foreign (diplomatic and consular) service, Satversme (Constitution of Latvia), state continuity, restoration of independence, denationalisation, property.

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Introduction

On 18 November 1918, Latvia was promulgated as an independent, democratic republic. On 15–17 June 1940, the Republic of Latvia was occupied by the USSR. During the Second World War, the Soviet occupation was replaced by the occupation by Nazi Germany (1941–1945). The communist regime was restored after the war. The Soviet occupation power in Latvia, although unlawful, endured for almost half a century. The Republic of Latvia continued to exist *de iure* as an internationally recognised subject of international law for the entire period of occupation. *De facto* the independent State of Latvia was restored in 1990–1991. Following the restoration of Latvia's sovereign power on the territory of the state, the legal and practical questions stemming from state continuity emerged, and the doctrine or principle of state continuity gained prominence amongst the research themes in scholarly writings.

A group of researchers, consisting of historians, political scientists and lawyers, was established to study the doctrine of state continuity in the context of Latvian history. Noteworthy scientific material was collected in the framework of cooperation project of fundamental and applied research No. 653/2014 "Experience, lessons learned and international significance of restoring the independent statehood of Latvia (historical, political and legal aspects)". All the issues analysed in the project have not been addressed in this article.[1] The current article introduces the international research community (in particular, the lawyers belonging to it)

[1] The research results of the project have been published in a book: Nepārtrauktības doktrīna Latvijas vēstures kontekstā [The Continuity Doctrine in the Context of Latvia's History]. Collective of authors, research supervisor *Jundzis, T.* Rīga: Latvijas Zinātņu akadēmijas Baltijas stratēģisko pētījumu centrs, 2017. Another more extensive article stemming from this research and focusing on the findings in

with two aspects of the research, which until now have been little discussed on an international level.

The first aspect is related to the functioning of Latvia's foreign service during the years when the State of Latvia was occupied by the USSR and Germany, the second – to the significance of the *Satversme* of the Republic of Latvia during the years of communist and Nazi occupations. In relation to the second issue, it should be taken into account that an anti-constitutional *coup d'état* took place on 15 May 1934. The functioning of Kārlis Ulmanis' government until the additional contingent of the Red Army was moved into the territory of Latvia (16–17.06.1940) was incompatible with the values enshrined in the *Satversme*. However, the undemocratic government of the state did not undermine the existence of the State of Latvia either *de iure* or *de facto*.

The authors set the following aim for this article – to analyse the significance of the functioning of Latvia's foreign service and of the *Satversme* during the years of Latvia's occupation and during the period leading to the full restoration of the sovereign state power for the purposes of state continuity thesis of Latvia.

1. Implementing of Foreign Affairs Functions of Latvian State During Occupation

1.1. Changes in Latvian Foreign Service Stemming from Loss of Independence of the State

The fact that the foreign services of the three Baltic states – Latvia, Lithuania and Estonia – continued their operations in the Western countries in 1940–1991 attested *de iure* existence of these states. The Latvian foreign service (diplomatic and consular service) in the Western states after the Baltic states were occupied by the USSR in 1940 was an institution of the state power of the Republic of Latvia, which continued performing functions of the state power since the representations were located outside the territory of occupied Latvia. The service continued its work uninterruptedly throughout the whole period of Latvia's occupation until the restoration of the state's independence in 1991. This possibility was ensured by the non-recognition of the occupation of Latvia by many states.

A month prior to Latvia's occupation, on 17 May 1940, the government of Latvia granted Kārlis Zariņš (Charles Zarine), the Envoy to Great Britain, extraordinary powers to defend Latvia's interests in almost all countries. These powers would enter into effect also in case if the government were to be unable to maintain connections with Latvia's diplomatic and consular missions.[2] These powers were intended to enable continuing representation of the interests of the Latvian state abroad in an emergency, in conditions of war. Although the extraordinary powers had significant deficiencies and were limited, in the future they would play an important role in the

international law is included in volume 19, 2020, of the Baltic Yearbook of International Law published by the Riga Graduate School of Law and the Brill Publishers.

[2] Latvian National Archives, Latvian State Historical Archive (hereafter – LNA LSHA), 293. fonds [fund] (hereafter – f.), 1. apraksts [description] (hereafter – apr.)., 4388. lieta [file] (hereafter – l.), pp. 12, 16, 17, 28; Hoover Institution Archives, Vilis Sumans collection, box 1, folder "Increment April 1978"; Latvijas Republikas oficiālā nostāja Latvijas diplomātiskā dienesta dokumentos 1940.–1991. gadā. Dokumentu krājums [The Official Position of the Republic of Latvia in the Documents of the Latvian Diplomatic Service in 1940–1991. Collection of Documents]. Compiled by *Lerhis, A*. Rīga: Latvijas vēstures institūta apgāds, 2015, pp. 41–42.

fight for continuity of *de iure* existence of the Latvian state and ensuring the further operations of the Latvian diplomatic and consular service.

The Latvian government decided to accept the ultimatum advanced by the USSR on 16 June 1940 and did not resist the occupation of Latvia realized by the USSR (17 June) either through a diplomatic protest or in a military way,[3] it also did not forward any instructions for setting into motion the extraordinary powers.[4] In mid-July, before the declaration by the Latvian "People's" *Saeima* on the establishment of the Soviet power (21 July) and incorporation of Latvia into the Soviet Union (5 August), the diplomatic representatives of the last independent government of the Republic of Latvia, accredited in several Western states, commenced diplomatic fight against this aggression by the USSR. The employees of the Latvian diplomatic service abroad assessed this situation as a fact of occupation,[5] several envoys took a very strong stance against annihilation of Latvia's independence. In these diplomatic protests, they invited the governments of their countries of residence (the United States, Great Britain, etc.) to not recognise Latvia's occupation by the USSR.

The bearer of the extraordinary powers of the government of the Republic of Latvia, the head of the foreign services and Envoy to Great Britain K. Zariņš and the deputy of the bearer of the extraordinary powers, the Envoy to the United States Alfrēds Bīlmanis and other envoys prepared and expressed the official opinion of the Latvian state on matters of international policy pertaining to the interests of the State of Latvia and its citizens.[6] The basic principles of the state's position were elaborated (political and legal positions), which the foreign service followed throughout the next 50 years until the independence of the state was regained.

The Latvian foreign service continued to operate abroad on a significantly reduced scale without the support of an independent government and the Ministry of Foreign Affairs. The main objective of the service was to continue representing the State of Latvia, to preserve the state's international law status, to fight for the restoration of independence in the future, as well as to protect Latvia's citizens and their property abroad. Despite numerous restrictions in the international diplomatic environment in comparison to the diplomats representing the heads of independent states and the governments thereof, the Latvian diplomats via diplomatic channels strived to inform other states about Latvia's opinion. There are grounds for considering these activities as a continuation of the foreign policy of the State of Latvia at least in these matters, although in a very limited scope.

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[3] LNA LSHA, 1307. f., 1. apr., 317. l., p. 172; *Gore, I., Stranga, A.* Latvija: neatkarības mijkrēslis. Okupācija. 1939. gada septembris – 1940. gada jūlijs [Latvia: The Twilight of Independence. Occupation. September 1939 – July 1940]. Rīga: Izglītība, 1992, pp. 115–117.

[4] *Lūsis, J.* Latvijas diplomātu darbs [Work of Latvian Diplomats]. *Daugavas Vanagu Mēnešraksts*, No. 3, 1990, p. 11.

[5] *Feldmanis, I., Freimanis, A. A., Lerhis, A., Ziemele, I.* Latvijas valsts okupācijas gados [The Latvian State in the Years of Occupation]. In: Dokumenti par Latvijas valsts starptautisko atzīšanu, neatkarības atjaunošanu un diplomātiskajiem sakariem 1918–1998 [Documents on the International Recognition, Restoration of Independence and Diplomatic Relations of the State of Latvia in 1918–1998]. Rīga: Nordik, 1999, p. 132; *Lerhis, A.* Pārmaiņas Latvijas diplomātiskā dienesta darbībā (1940. g. jūnijs – 1942. g. augusts) [Changes in the Operations of the Latvian Diplomatic Service (June 1940 – August 1942)]. In: Vēsturnieks profesors Dr. phil., LZA ārzemju loceklis Andrievs Ezergailis: Biobibliogrāfija, darbabiedru veltījumi 70 gadu jubilejā [Historian Professor Dr. phil., LAS Foreign Member Andrievs Ezergailis: Biobibliography, Dedications of Colleagues on the 70th Anniversary], Rīga: Latvijas vēstures institūta apgāds, 2000, p. 169.

[6] *Feldmanis, I., Freimanis, A. A., Lerhis, A., Ziemele, I.* Latvijas valsts okupācijas gados [The Latvian State in the Years of Occupation], p. 132; *Lerhis, A.* Pārmaiņas ... [Changes ...], p. 180.

The Statement by the US Acting Secretary of State Sumner Welles on 23 July 1940 ensured that the diplomatic representations of the Baltic states continued their activities in the USA.[7] The stance taken by Latvia's diplomatic representatives also facilitated the fact that the USA and Great Britain in the summer of 1940, later followed by other Western states applied the principle of non-recognition of violent conquests also to the Baltic states and commenced *de iure* non-recognition of the occupation of the Baltic states.[8]

1.2. Main Activities During the Second World War and the Cold War (1940–1988)

The diplomatic and consular representations of the Republic of Latvia continued operations in several states: the entire period of Latvia's occupation – legations in Washington and London, for a shorter term – legations in Buenos Aires (1940–1946), in Geneva (1940–1946), in Rio de Janeiro (1944–1961), diplomatic representations in Madrid (1953–1959) as well as, in various periods, – numerous career consuls and honorary consuls.[9]

In 1940–1991, the work of Latvia's representations abroad was managed by the heads of the Latvian diplomatic and consular service: Kārlis Zariņš (1940–1963), Arnolds Spekke (1963–1970; thus, the service's centre of command moved from the legation in London to the legation in Washington) and Anatols Dinbergs (1971–1991). They set the guidelines on foreign policy matters and appointed the employees of the representations, consuls and personal representatives. In the future, the activities were determined by the head of the Latvian diplomatic and consular service and the head of the respective representations.

As recognised by the Constitutional Court of the Republic of Latvia in May 2010, during the period of occupation, the activities of Latvia's diplomatic representations were the sole manifestation of the capacity of the Latvian state, and, in the extraordinary situation caused by the occupation (absence of the government's support), this limited capacity of the state also determined the activities of the representations. For the further 50 years, the Latvian diplomats abroad maintained the claim regarding the State of Latvia, and this fact is significant in the context of the doctrine on the state's continuity.[10]

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7 Statement of Acting Secretary of State Sumner Welles, July 23, 1940. In: U.S. Department of State, Department of State Bulletin III. Washington, U.S. Government Printing Office, July 27, 1940. Vol. III, No. 57, p. 48; Rietumvalstu nostāja Baltijas valstu jautājumā 1940.–1991. gadā: Dokumentu krājums [Position of the Western Countries on the Issue of Baltic States in 1940–1991. Collection of Documents]. Compiled by *Lerhis, A*. Rīga: Latvijas vēstures institūta apgāds, 2018, pp. 66–67; Sūtniecība Vašingtonā [Legation in Washington]. In: Latvju Enciklopēdija [Latvian Encyclopaedia]. Ed. *Andersons, E*. Vol. 4. Rockville, 1990, p. 510.

8 *Feldmanis, I., Freimanis, A. A., Lerhis, A., Ziemele, I.* Latvijas valsts okupācijas gados [The Latvian State in the Years of Occupation], pp. 134–135.

9 [*Lerhis, A*.]. Ieskats Latvijas Republikas ārlietu dienesta vēsturē (1917–1997) [Insight into the History of the Foreign Service of the Republic of Latvia (1917–1997)]. In: Latvijas ārlietu dienesta rokasgrāmata [Handbook of Foreign Service of Latvia]. Rīga: Latvijas Republikas Ārlietu ministrija, 1997, p. 17.

10 Latvijas Republikas Satversmes tiesas 2010. gada 13. maija spriedums lietā Nr. 2009-94-01 [Judgement by the Constitutional Court of the Republic of Latvia of 13 May 2010 in Case] No. 2009-94-01. Available: http://www.satv.tiesa.gov.lv/upload/spriedums_2009_94_01.htm [last viewed 12.12.2015]; Address of President of Latvia, Egils Levits, at the reception marking 100 years of foreign service (09.09.2019). Available: https://www.president.lv/en/news/news/address-of-president-of-latvia-egils-levits-at-the-reception-marking-100-years-of-foreign-service-25901#gsc.tab=0 [last viewed 02.04.2021].

In Latvian legations, the political work mainly focused on activities of informative nature and fight for Latvia's existence and rights. The work with Latvia's citizens, vessels, etc. was mainly concentrated in the consular branch and was recognised as being very important.[11] The legation in Washington assumed the consular oversight over Latvian vessels and seamen, as well as the protection of the owners' interests. During the period of Latvia's occupation, the state's diplomatic and consular representations in the Western countries in their activities followed the legal acts of the pre-occupation period. They remained in force also after Latvia's occupation. Furthermore, during the following 50 years, the diplomats of Latvia's foreign service continued to declare their subordination to the last sovereign Latvian government of the pre-war period, which was internationally recognised.

The beginning of the Soviet–German war (on 22 June 1941) and replacement of the Soviet occupation by the German occupation did not interrupt *de iure* existence of the Republic of Latvia and its right to be a free, sovereign and independent state. Similarly to the envoys' actions in 1940, declaring the position against the Soviet occupation, in 1941 they also protested against the occupation of Latvia by Nazi Germany, appealing to the governments of their countries of residence.

The diplomats' duty was to speak on behalf of the citizens of Latvia who had gone abroad, and also of those living in the conditions of the Nazi and the Soviet regimes (in Latvia, Siberia, etc.). The employees of the Latvian foreign service developed cooperation with the representatives of the Estonian and Lithuanian foreign services. Slightly later, cooperation was established with the Latvian resistance movement, which stood against both foreign powers and fought for restoration of the independence of the Latvian state.

During the war years, the Latvian diplomats regularly reminded of the international law existence and status of the State of Latvia, of the conditions in Latvia and the violations of international law committed by Nazi Germany and the USSR, as well as the crimes against the State of Latvia and its inhabitants, called attention to its right to restoration of independence. K. Zariņš and A. Bīlmanis had to reject and refute both the Soviet and the Nazi propaganda statements.

The serving and former Latvian diplomats in the Western countries greatly contributed to informing the Western democratic states about the situation in Latvia.[12] Starting with 1942, the envoys drew up and disseminated memoranda on the situation in Latvia, the Nazi occupation, the second Soviet occupation, and the Latvian refugees in the Western countries. Envoy A. Bīlmanis was particularly active in this informative work against the Soviet and Nazi propaganda in the West and, during the war years, published several brochures on Latvia's situation – the legal status and the policies of the Nazi and Soviet regimes in Latvia.[13]

The diplomats of the Baltic states operated in the courts of the countries of residence together with attorneys, who defended the interests of the Baltic states.

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[11] A. Bīlmanis' letter of 07.09.1940 to K. Zariņš; file "1940. D. 125.63/ Latvian Consulate-General, New York". LNA LSHA, Latvian Legation London fund (the archival file has not yet been assigned a file number).

[12] File "Sarakste ar Foreign Office līdz 1945. g." [Correspondence with Foreign Office until 1945]. LNA LSHA, Latvian Legation London fund, box No. 460 (the archival file has not yet been assigned a file number).

[13] *Bilmanis, A*. Latvia under German Occupation, 1941–1943. Washington: Press bureau of the Latvian Legation, 1943, Vol. I, 114 p.; 1944, Vol. II, 30 p.; *Bilmanis, A*. The Baltic States in Postwar Europe. Washington: Press bureau of the Latvian Legation, 1943, 48 p.; *Bilmanis, A*. Latvia Between the Anvil and the Hammer. Washington: The Latvian Legation, 1945, 64 p.; etc.

The foreign courts studied the documents submitted by the diplomats, the legal acts of Latvia and took these into account. While the Baltics were occupied by Nazi Germany, there were several legal proceedings before the US courts in connection with the attempts by the Soviet Union to take over the ships of the Baltic states.[14]

From 1940 to 1945, foreign powers replaced one another in Latvia three times. After the end of the Second World War and the beginning of the second Soviet occupation, the activities of the Latvian foreign service in defending the interests of the state and citizens, and supporting the self-organisation of the exile community in the countries of residence was of particular importance,[15] especially during the initial stage when strong exile political organisations had not yet formed.

Over time, K. Zariņš appointed several diplomatic representatives, promoted several diplomats and consuls or transferred them to other places of service, he also appointed personal representatives. The persons from former diplomatic or consular circles were appointed as career consuls in several countries to which large numbers of Latvian refugees had moved.[16]

For fifty years, the Latvian diplomats abroad tirelessly reminded the world about Latvia's existence and defended its rights, ensured the legal existence of the state, preserved the largest part of Latvian gold abroad, safeguarded the small territories of Latvia's representations in the capitals of the Western states also at the time when, for long years, there was almost no hope of change. Within the limits and traditions of the existing law and legal acts, they defended the rights and interests of the Latvian citizens who had gone abroad. Employees tried to find resources to purchase medicines and support refugees. The diplomatic representatives abroad defended the property issues of the vessels owned by the Republic of Latvia in foreign ports and seamen's interests, property issues of legation's buildings, understood the need to unite the exile Latvians. Significant work was done to settle matters of consular nature, seeking lost relatives and news about Latvians dispersed in foreign countries, issuing Latvian foreign passports and extending their terms of validity (passports of the Republic of Latvia were recognised by several West European, Latin American, Asian and African states and by Australia), issuing certificates, etc. The USSR repeatedly attempted to force the Western states to close the representations of the Baltic states. Latvian legations published the declarations by the Western states and other documents, insofar as these pertained to Latvia, provided information about the situation in Latvia, obtained from various sources. The legation in Washington published "Latvian Information Bulletin". Latvian representations cooperated with the Latvian and Baltic organisations in the Western states.[17] Latvian diplomats sometimes were received by the heads of several states and other high-standing officials, representatives of international organisations.

The Latvian legation in the US regularly submitted documents to the US Department of State and the United Nations Organisation, pointing to international law violations against Latvia, requested that the interests of the Latvian state and

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[14] File "Miscellaneous (War time), mainly Washington". LNA LSHA, Latvian Legation London fund (the archival file has not yet been assigned a file number).

[15] *Kangeris, K*. Latvijas pavalstnieki kara laika Eiropā [Latvian Subjects during the War in Europe]. *Mājas Viesis*, 19.04.2003, pp. 8–9.

[16] [*Lerhis, A.*]. Ieskats … [Insight …], pp. 17–19.

[17] *Lerhis, A*. Neatkarības idejas saglabāšana pēckara gados: Latvijas diplomātiskā dienesta ieguldījums mūsu valsts *de iure* statusa saglabāšanā (1940.–1988. g.) [Maintaining the Idea of Independence during the Post-War Years: Contribution of the Latvian Diplomatic Service to Maintaining *de iure* Status of Our State (1940–1988)]. *Diena*, 13.02.1998, p. 13.

people would be taken into account in preparing and adopting various decisions by the governments of the Western states and international organisations, in cases of convening international conferences, and also followed that the position of the Western states in the matter of non-recognition of the occupation and incorporation of the Baltic states would not be reviewed.

1.3. Main Activities During the Years of Third Awakening Until Full Restoration of the Independence of Latvian State (1988–1991)

At the end of 1988, the Latvian legation in Washington initiated unofficial contacts with the representatives of movements for supporting independence from Latvia. In 1989, the representatives of the Latvian Popular Front (LPF) commenced foreign policy activities. Cooperation between LPF and the Latvian foreign service began. Representatives of the legation in Washington provided assistance in preparing the visits by the LPF's representatives to the US State Department and participated in these themselves. Latvia's diplomatic representatives supported the LPF's course towards regaining the independence.

Following the adoption of "Declaration on the Restoration of Independence of the Republic of Latvia" on 4 May 1990, the re-establishment of the Ministry of Foreign Affairs of the Republic of Latvia began. In 1990–1991, the legation in Washington and the whole Latvian foreign service did not represent the government of Latvia of the transitional period (from 4 May 1990 until 21 August 1991) and was not subjected to the Ministry of Foreign Affairs in Riga. Diplomats did not recognise the Supreme Council as the parliament of independent Latvia and the Council of Ministers as an independent government because the restoration of independence had not been internationally recognised yet. However, already since the summer of 1990, the foreign service unofficially cooperated with the new government and the legation in Washington – with the new Ministry of Foreign Affairs. Measures were implemented to expand the Latvian diplomatic and consular network abroad by the representatives, appointed by the legation in Washington, in several capitals of the Western countries. The legation and the Ministry of Foreign Affairs reached an agreement on coordinating the appointment of honorary consuls. In 1989–1991, the Latvian foreign service in the Western countries attached great importance to the issues of legal continuation of the Latvian state and provided recommendations to the Latvian leaders on these matters.

The constitutional law "On the Statehood of the Republic of Latvia", adopted by the Supreme Council on 21 August 1991, was of decisive importance in restoring the full independence of the State of Latvia. After this date, the foreign policy of the Republic of Latvia and the operations of the Ministry of Foreign Affairs developed in full scope. Those several long-serving Latvian diplomats, who experienced the restoration of the state's independence actually linked both periods of the independence of the Latvian state in person. Just like the diplomatic and consular representations, for many years they were perceived as the symbols of the state's existence.

In brief, maintaining *de iure* status of Latvia and of the other Baltic states, as well as continuing the work of the three states' foreign services for 50 years, the diplomats' work for many years and faith in restoring the state's independence is an unprecedented case in the history of global diplomacy and international law, which, *inter alia*, explains the scope of the principle of non-recognition of unlawful actions. The Latvian diplomats acted in compliance with the provisions of international law,

the legal acts of the Republic of Latvia and the state's international commitments, retained their diplomatic status and the status of the legations, used political and legal arguments in assessing the crimes committed by the occupation powers, explaining the status of the Latvian citizen and constitutional matters of Latvia to the exiles abroad, in analysing the international situation and using the existence of *de iure* status of the state on the way towards regaining the independent statehood in accordance with the doctrine of the legal continuity of the State of Latvia.

2. Full Restoration of Sovereign State Power

2.1. Validity of Satversme During Occupation

Although the functioning of the *Satversme* was suspended after the *coup d'état* of 15 May 1934, the *Satversme*, nevertheless, was not revoked. Moreover, during the period of Latvia's occupation, it continued to be in legal force as the only permanent constitution of Latvia. Pursuant to the *Satversme* and the principles included therein, it was possible to identify the anti-constitutionality of the procedure of sovietisation, "staged" by the USSR, aiming to liquidate the State of Latvia.[18]

The *Satversme* became the legal basis for the activities of the national resistance movement, when the citizens of Latvia engaged in the fight for regaining the lost independence. References to the violated norms of the *Satversme* were used to substantiate the illegality of the actions by the USSR; likewise, the attempts to restore the independence of the state were based on the *Satversme*. The leading organisations of the national resistance movement – the Latvian Central Council, formed in 1943, recognised the validity of the *Satversme* and the powers of the Latvian parliament, elected in the last free election, – the 4th Convocation of the *Saeima* – to lead the country until the election of the 5th Convocation of the *Saeima* in election that would comply with the *Satversme*. The highest officials of the 4th Convocation of the *Saeima* became involved in the leadership of the Latvian Central Council – Pauls Kalniņš, the Speaker of the *Saeima*, as well as the Vice-Speakers Kārlis Pauļuks and Jāzeps Rancāns.[19] On 8 September 1944, the Latvian Central Council adopted the Declaration on the Restoration of the State of Latvia, with Pauls Kalniņš, as the highest official of the state, on the basis of the *Satversme*, assuming the role of the acting president of the state.[20] Although the attempts to restore the independence of the state did not lead to immediate success, the Latvian Central Council continued its activities in exile and attempted to form the government in exile.[21] Following the death of P. Kalniņš and K. Pauļuks, the Latvian Central Council established, on 26 April 1947, that, pursuant to the *Satversme*, the powers of the President of the State and the Speaker of the *Saeima* had been transferred to J. Rancāns.[22] Upon J. Rancāns' request, the judges of the supreme

[18] Judgement of the Constitutional Court of the Republic of Latvia in the case No. 2007-10-0102, para. 29.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/04/2007-10-0102_Spriedums_ENG.pdf [last viewed 10.03.2021].

[19] *Jundzis, T., Turčinskis, Z.* Resistance to the Soviet and Nazi Regimes in Latvia, 1940–1985. In: Latvia and Latvians. Collection of scholarly articles in 2 volumes. Vol. II. Rīga: Latvian Academy of Science, 2018, pp. 720–722.

[20] *Pleps, J.* Role of the Latvian Central Council's Practice in Interpretation of the Constitution of Latvia. *Journal of the University of Latvia. Law*, No. 9, 2016, pp. 129–131.

[21] *Deksnis, E. B.* Latvian Exile Government Proposals. *Journal of the University of Latvia. Law*, No. 9, 2016, pp. 84–85.

[22] *Pleps, J.* Role …, pp. 130–132.

court of Latvia – the Latvian Senate – provided their opinion, in which they established the continuous existence of the Latvian state *de iure* and the validity of the *Satversme* even in the conditions of occupation.[23] In these conditions, the *Satversme* turned into a political symbol of the lost independence and the legal grounds for demanding restoration of an independent state.

2.2. Reinstatement of Satversme and Restoration of Constitutional Bodies Defined Therein

The leading political force in regaining Latvia's independence – the Popular Front of Latvia – included in its political programme the restoration of Latvia's independence on the basis of the state continuity.[24] In the Supreme Council's election, those supporting regaining of Latvia's independence gained the needed majority of votes, and, on 4 May 1990, the Supreme Council adopted the declaration "On the Restoration of Independence of the Republic of Latvia".[25] Para. 3 of the Declaration reinstated *Satversme* on the territory of Latvia; however, at the same time, para. 4 and para. 7 of the Declaration envisaged recasting of the *Satversme*. Pursuant to para. 4 of the Declaration, Articles 1, 2, 3 and 6 of the *Satversme*, which define the constitutionally legal basis of the Latvian state, remained in force.

The conviction regarding the possibility and even necessity to reinstate *Satversme* in full consolidated, and the idea of drafting a new constitution was abandoned.[26] Article 1 of the constitutional law of 21 August 1991 "On the Statehood of the Republic of Latvia"[27] declared that the *Satversme* defined the statehood of the Republic of Latvia. On 6 July 1993, when the 5th Convocation of the *Saeima*, elected in accordance with the *Satversme*, convened for its first sitting, the *Satversme* was reinstated in full *de facto*.[28] Reinstatement of the *Satversme* is a relatively rare occasion, marking an occasion when a constitution has been successfully reinstated in the legal and social reality following an interruption of almost half a century. It also consolidates and confirms the continuity of the Latvian state.[29]

The reinstatement of the *Satversme* meant also reinstating the constitutional bodies referred to therein. After the reinstatement of the *Satversme*, all constitutional bodies envisaged in the *Satversme* and the laws regulating their operation were re-established. It is worth emphasising that these laws predominantly were restored very close to their wording in the period until Latvia's occupation. In several cases, even the titles of the adopted laws pointed to this.[30]

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[23] Senatoru atzinums [Advisory Opinion of the Senatores]. *Latvju Ziņas*, No. 29, 17.04.1948, pp. 1–2.

[24] *Jundzis, T.* Regaining the Independence of Latvia. In: Latvia and Latvians. Collection of scholarly articles in 2 volumes. Vol. I. Rīga: Latvian Academy of Science, 2018, pp. 79–80.

[25] Augstākās padomes deklarācija "Par Latvijas Republikas neatkarības atjaunošanu" [Declaration of the Supreme Council "On the Restoration of Independence of the Republic of Latvia"] (04.05.1990). Available: https://likumi.lv/ta/id/75539-par-latvijas-republikas-neatkaribas-atjaunosanu [last viewed 10.03.2021].

[26] *Ziemele, I.* State Continuity and Nationality: The Baltic States and Russia: Past, Present and Future as Defined by International Law. Leiden: Martinus Nijhoff Publishers, 2005, pp. 32–35.

[27] Konstitucionālais likums "Par Latvijas Republikas valstisko statusu" [Constitutional Law "On the Statehood of the Republic of Latvia"] (21.08.1991). Available: https://likumi.lv/ta/id/69512-par-latvijas-republikas-valstisko-statusu [last viewed 10.03.2021].

[28] Latvijas Republikas 5. Saeimas pirmās sēdes 1993. gada 6. jūlijā stenogramma [Transcript of the first sitting of the 5th Convocation of the *Saeima* of the Republic of Latvia on 6 July 1993]. Available: https://www.saeima.lv/steno/st_93/060793.html [last viewed 10.03.2021].

[29] *Ziemele, I.* State Continuity …, pp. 35–36.

[30] *Kusiņš, G., Pleps, J.* Valsts iekārtas un tiesību sistēmas atjaunošana [Restoration of the Constitutional Order and the Legal System]. In: Latvijas valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana

On 20 October 1992, the Supreme Council also adopted a law on holding the election of the 5th Convocation of the *Saeima* in accordance with the *Satversme*. The law of the Supreme Council of 20 October 1992 "On the Election of the 5th *Saeima*"[31], with some derogations, actually took over in full the regulation of the "Law on Elections of the *Saeima*" of 9 June 1922. It is also relevant that the Supreme Council confirmed the continuity of legislators in the Republic of Latvia – by announcing the election of the 5th *Saeima* it continued the numbering of the parliament, commenced before Latvia's occupation.[32] With the election of the 5th Convocation of the *Saeima* in accordance with Article 12 and Article 13 of the *Satversme*, the powers of the 4th *Saeima* legally expired. J. Rancāns, as the acting Speaker of the *Saeima* in conditions of occupation, is officially included in the gallery of the *Saeima*'s Speakers.[33]

Upon commencing its work, the 5th Convocation of *Saeima* decided at its first sitting to apply to its work the Rules of Procedure of the *Saeima* of 1929, until new Rules of Procedure of the *Saeima* would be drafted. This decision by the *Saeima* attested not only to the symbolic or technical reinstatement of old laws but also to the returning of the practice of applying laws, parliamentary traditions and doctrine into the legal reality. The first election of the president following the reinstatement of the *Satversme* also was held in compliance with the parliamentary customs that had developed before Latvia's occupation. The first election of the president following the full reinstatement of the *Satversme* marked symbolic continuity of the state, since the newly elected President Guntis Ulmanis was a close relative of the last head of the state before the Republic of Latvia was occupied – the acting President Prime Minister Kārlis Ulmanis. Similarly to the Speaker of the *Saeima*, the Acting Presidents during the occupation – P. Kalniņš and J. Rancāns – are included on the list of the presidents of the state.[34]

Chapter VI of the *Satversme*[35] "Courts" regained validity in full and unamended.[36] Thus, the continuity of the basic principles for the functioning of the judicial power was ensured.[37] On 15 December 1992, the Supreme Court adopted the law "On

[Legal Sources of the Latvian State. Foundation of the State – Restoration of Independence]. Rīga: Tiesu namu aģentūra, 2015, p. 238.

31 Likums "Par 5. Saeimas vēlēšanām" [Law "On the Elections of the 5th *Saeima*]. Available: https://likumi.lv/ta/id/66524-par-5-saeimas-velesanam [last viewed 10.03.2021].

32 *Kusiņš, G.* Latvijas parlamentārisma apskats [A Survey of the Latvian Parliamentarism]. Rīga: Latvijas Republikas Saeima, 2016, p. 57.

33 Ināra Mūrniece: godinām Jāzepu Rancānu par Latvijas valstiskuma stiprināšanu mūža garumā [Ināra Mūrniece: We pay homage to Jāzeps Rancāns for lifelong strengthening of Latvia's statehood] (21.08.2018). Available: https://www.saeima.lv/lv/par-saeimu/saeimas-darbs/12-saeimas-priekssedetaja-inara-murniece/12-saeimas-priekssedetajas-aktualitates/27113-inara-murniece-godinam-jazepu-rancanu-par-latvijas-valstiskuma-stiprinasanu-muza-garuma [last viewed 10.03.2021].

34 Address by H. E. President of Latvia Mr Egils Levits Assuming the Office at the *Saeima* (08.07.2019). Available: https://www.president.lv/en/news/news/address-by-h-e-president-of-latvia-mr-egils-levits-assuming-the-office-at-the-saeima-25796 [last viewed 10.03.2021].

35 Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [last viewed 03.03.2021].

36 See more: *Lazdiņš, J.* Clashes of Opinion at the Time of Drafting the *Satversme* of the Republic of Latvia. *Journal of the University of Latvia. Law*, No. 10, 2017, pp. 98–100. Available: https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No10/J.Lazdins.pdf) [last viewed 03.03.2021].

37 "Judges shall be independent and subject only to the law" (Art. 83 of the *Satversme*) and "Judicial appointments shall be confirmed by the *Saeima* and they shall be irrevocable" (Art. 84 of the *Satversme*).

Judicial Power".[38] In many respects, the court system was restored as it had been until the Soviet occupation, in compliance with Provisional Statute on the Courts of Latvia and Procedure of Litigations of 6 December 1918.[39] The continuity of the legal thought is proven, in particular, by the case law of the Latvian courts, *inter alia*, also by the Constitutional Court's references to the case law of the Senate which had evolved before Latvia's occupation.[40] The use of the Senate's case law was made possible by the reinstatement of a large number of pre-occupation laws.[41] The central place among them is occupied by the reinstatement, in 1992–1993, of the Latvian Civil Law, adopted on 28 January 1937[42].

The use of the Senate's case law for the purposes of the further development of the case law in Latvia attests to the continuity of the legal system.[43] Likewise, it must be highlighted that, following Latvia's occupation, the Senate's Senators in exile, upon the request by the Vice-Speaker of the *Saeima* Jāzeps Rancāns, prepared a special legal opinion on Latvia's legal status and the validity of the *Satversme* following the Soviet occupation.[44]

2.3. Restitution of the Right to Property

In a democratic state governed by the rule of law, the right to property is a protected value.[45] Following full restoration of the sovereign state power *de facto* (1990–1991), elimination of injustices inflicted by the Soviet regime, *inter alia*, also with respect to the right to property, turned into one of the obligations of the State of Latvia. This also meant denationalisation of properties that had been nationalised by communists.[46]

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[38] Par tiesu varu [On Judicial Power] (15.12.1992). Available: https://likumi.lv/ta/en/en/id/62847-on-judicial-power [last viewed 03.03.2021].

[39] Pagaidu nolikums par Latvijas tiesām un tiesāšanas kārtību [Provisional Statute on the Courts of Latvia and Procedure of Litigations] (06.12.1918). *Pagaidu Valdības Vēstnesis*, No. 1, 14. (01.)12.1918. See more: Nepārtrauktības doktrīna … [The Continuity Doctrine …], pp. 345–359.

[40] See, for instance: Judgment in the case No. 2007-10-0102, Riga, 29 November 2007. In: Selected Case-Law of the Constitutional Court of the Republic of Latvia: 1996–2017. Riga: The Constitutional Court of the Republic of Latvia, 2018, pp. 271, 282. Available: http://www.satv.tiesa.gov.lv/other/2018-ST-Zelta-gala%20versija.pdf [last viewed 03.03.2021]; Augstākās tiesas Civillietu departamenta (paplašinātā sastāvā) 2005. gada 7. decembra spriedums lietā Nr. SKC-542/2005 [Judgment of the Department of Civil Cases of the Supreme Court (in extended composition) of 7 December 2005 in case No. SKC–542/2005]. Available: http://www.at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?year=2005 [last viewed 03.03.2021]; Augstākās tiesas Administratīvo lietu departamenta 2008. gada 16. oktobra spriedums lietā Nr. SKA-404/2008 [Judgment of the Department of Administrative Cases of the Supreme Court of 16th October 2008 in case No. SKA–404/2008], point 10. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi. [last viewed 03.03.2021].

[41] *Lazdiņš, J.* Tendencies in the Development of Laws in the Republic of Latvia after the Renewal of Independence in 1990–1991. *Journal of the University of Latvia. Law*, No. 8, 2015, pp. 47–67. Available: https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No8/3.Janis_Lazdins.pdf) [last viewed 03.03.2021].

[42] Latvijas Civillikums [The Civil Law] (28.01.1937). Available: https://likumi.lv/ta/en/en/id/225418-the-civil-law [last viewed 03.03.2021].

[43] *Lēbers, D. A.* Latvijas Senāts viņdienās un mūsdienās [The Latvian Senate in the Olden and the Current Times]. *Latvijas Vēstnesis*, No. 387, 29.12.1998, p. 4.

[44] Senatoru atzinums [Advisory Opinion of the Senatores]. *Latvju Ziņas*, No. 29, 17.04.1948, pp. 1–2.

[45] Pursuant to Article 1 of the *Satversme*, Latvia is a democratic republic.

[46] See Par agrāro reformu Latvijas Republikā [On Agrarian Reform in the Republic of Latvia] (13.06.1990). Available: https://likumi.lv/ta/id/76206-par-agraro-reformu-latvijas-republika [last viewed 03.03.2021]; Par valsts īpašuma un tā konversijas pamatprincipiem [On the basic principles

There was a considerable variety of the objects of property that had been subjected to denationalisation. To ensure property reform, they were conditionally divided into six groups: 1) land property in rural areas;[47] 2) land property in cities;[48] 3) homeownership;[49] 4) undertakings;[50] 5) property of religious organisations,[51] and 6) property of academic lifelong organisations.[52]

Not all objects of property were included in the aforementioned six groups. Therefore, denationalisation of property was implemented also on the basis of a special law. For instance, the right to property was reinstated in this way to the Association of Latvian Estonians[53], the Association of the Jewish Hospital "Bikur Holim"[54], etc.

Denationalisation of property in Latvia was aimed at restitution of the right to immovable property.[55] Restitution of the right to movable property was viewed more as an exception to the general procedure, while the value of nationalised deposits was not compensated at all. Hence, restitution of the right to property in Latvia was not comprehensive. Likewise, it was not always possible to carry out the restitution of the right to immovable property *in natura*. For example, personal (family) homes, lawfully purchased during the years of Soviet occupation, remained the property of buyers as *bona fide* acquirers. Likewise, the land on which public roads, national

of the state property and its conversion] (20.03.1991). Available: https://likumi.lv/doc.php?id=65829 [last viewed 03.03.2021].

47 Par zemes reformu Latvijas Republikas lauku apvidos [On Land Reform in Rural Areas of the Republic of Latvia] (21.11.1990). Available: https://likumi.lv/ta/en/en/id/72849-law-on-land-reform-in-the-rural-areas-of-the-republic-of-latvia [last viewed 03.03.2021]; Par zemes privatizāciju lauku apvidos [On Land Privatisation in Rural Areas] (09.07.1992). Available: https://likumi.lv/ta/en/en/id/74241-on-land-privatisation-in-rural-areas [last viewed 03.03.2021].

48 Par zemes reformu Latvijas Republikas pilsētās [On Land Reform in the Cities of the Republic of Latvia] (20.11.1991). Available: https://likumi.lv/ta/id/70467-par-zemes-reformu-latvijas-republikas-pilsetas [last viewed 03.03.2021].

49 Par namīpašumu atdošanu likumīgajiem īpašniekiem [On Returning Homeownerships to their Legal Owners] (30.10.1991). Available: https://likumi.lv/ta/id/70828-par-namipasumu-atdosanu-likumigajiem-ipasniekiem [last viewed 03.03.2021]; Par namīpašumu denacionalizāciju Latvijas Republikā [On Denationalisation of Homeownership in the Republic of Latvia] (30.10.1991). Available: https://likumi.lv/ta/id/70829-par-namipasumu-denacionalizaciju-latvijas-republika [last viewed 03.03.2021].

50 Par īpašuma tiesību atjaunošanu uz uzņēmumiem un citiem īpašuma objektiem [On Renewal of Property Rights to Undertakings and Other Property Objects] (30.03.1993). Available: https://likumi.lv/ta/en/en/id/60054-on-renewal-of-property-rights-to-undertakings-and-other-property-objects [last viewed 03.03.2021].

51 Par īpašumu atdošanu reliģiskajām organizācijām [On Returning Property to Religious Organisations] (12.05.1992). Available: https://likumi.lv/ta/id/65537-par-ipasumu-atdosanu-religiskajam-organizacijam [last viewed 03.03.2021].

52 Par nekustamo īpašumu atdošanu akadēmiskajām mūža organizācijām [On Returning Immovable Property to Academic Lifelong Organisations] (28.11.1996). Available: https://likumi.lv/ta/id/41487-par-nekustamo-ipasumu-atdosanu-akademiskajam-muza-organizacijam [last viewed 03.03.2021].

53 Par īpašuma tiesību atjaunošanu Latvijas Igauņu biedrībai [On Restituting the Title to Property to the Association of Latvian Estonians] (16.01.1997). Available: https://likumi.lv/ta/id/42064-par-ipasuma-tiesibu-atjaunosanu-latvijas-igaunu-biedribai [last viewed 03.03.2021].

54 Par īpašuma tiesību atjaunošanu Ebreju slimnīcas "Bikur Holim" biedrībai [On Restituting the Title to Property of the Association of the Jewish Hospital "Bikur Holim"] (21.05.1998). Available: https://likumi.lv/ta/id/48410-par-ipasuma-tiesibu-atjaunosanu-ebreju-slimnicas-bikur-holim-biedribai [last viewed 03.03.2021].

55 *Lazdiņš, J.* Īpašuma denacionalizācija Latvijas Republikā [Denationalisation of Property in the Republic of Latvia]. In: Nepārtrauktības doktrīna … [The Continuity Doctrine …], pp. 362–363.

sports facilities, etc. were located, was not denationalised.[56] In such cases, former owners and their heirs had the right to be allocated equivalent property, to receive compensation in cash or privatisation certificates in compliance with the procedure set out in law.[57]

At the time when the reform was implemented, extensive public discussions ensued regarding the framework of denationalisation and state's obligations in relation to it. The Constitutional Court of the Republic of Latvia provided an answer to this question:

> *The State of Latvia is not responsible for the human rights violations, including nationalisation of property, which were committed by the occupation power in the period lasting half a century. The Republic of Latvia does not have the possibilities and neither is it obliged to compensate in full for all damages caused to persons as the result of actions taken by the occupation power.*[58] *[The legislator] had the obligation to take measures to redress, to the extent possible, [..] the damages caused by the former regime and to restore justice*[59].

Latvia has completed restitution of the right to property to the extent possible for the state at a given time. Of course, a significant number of errors was made within the framework of this reform. Thus, the conversion process of the state property was unnecessarily hasty. For example, natural persons were given less than four months to apply for the recovery of the objects of property owned by undertakings, hotels, cinemas, pharmacies, hospitals, etc. (land and home ownership was an exception, regulated by other laws).[60] Another problem was caused by expanding the circle of heirs during the period of restitution of property rights. At the time when land reform was commenced in rural areas, the Civil Code of the Latvian Soviet Socialist Republic (27.12.1963)[61] was in effect. Pursuant to the Civil Code, the closest relatives were

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[56] See more *Lazdiņš, J.* Zemes īpašuma nacionalizācijas un denacionalizācijas pieredze Latvijā (19.–21. gadsimts) [The Experience of Nationalising and Denationalising Land Property in Latvia (19th–20th century]. *Likums un Tiesības*, Vol. 7, No. 6, 2005, pp. 168–178; *Grūtups, A., Krastiņš, E.* Īpašuma reforma Latvijā [Property Reform in Latvia]. Rīga: Mans īpašums, 1995.

[57] Par zemes privatizāciju lauku apvidos [On Land Privatisation in Rural Areas], Art. 4 (3), 12–14; Par zemes reformu Latvijas Republikas pilsētās [On Land Reform in the Cities of the Republic of Latvia], Art. 14; Par privatizācijas sertifikātiem [On Privatisation Certificates] (16.03.1995.). Available: https://likumi.lv/ta/id/34503-par-privatizacijas-sertifikatiem [last viewed 03.03.2021] and other regulatory enactments [last viewed 03.03.2021].

[58] Latvijas Republikas Satversmes tiesas 2003. gada 25. marta spriedums lietā Nr. 2002-12-01 [Judgement of the Constitutional Court of the Republic of Latvia of 25 March 2003 in case No. 2002-12-01], para. 1 of the Findings. Available: https://likumi.lv/doc.php?id=73143 [last viewed 03.03.2021].

[59] Latvijas Republikas Satversmes tiesas 2011. gada 28. novembra spriedums lietā Nr. 2011-02-01 [Judgement of the Constitutional Court of the Republic of Latvia of 28 November 2011 in case No. 2011-02-01], para. 8.1. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2011-02-01_Spriedums.pdf [last viewed 03.03.2021].

[60] Par pieteikumu pieņemšanu no nacionalizēto un citādi nelikumīgi atņemto nekustamo īpašumu (uzņēmumu un citu īpašuma objektu) īpašniekiem – fiziskajām personām [On Accepting Applications from Owners – Natural Persons – of Nationalised or Otherwise Unlawfully Divested Immovable Property (undertakings and other objects of property)] (31.03.1992). Available: https://likumi.lv/ta/id/65486-par-pieteikumu-pienemsanu-no-nacionalizeto-un-citadi-nelikumigi-atnemto-nekustamo-ipasumu-uznemumu-un-citu-ipasuma-objektu [last viewed 03.03.2021].

[61] Latvijas Padomju Sociālistiskās Republikas Civilkodekss [The Civil Code of the Latvian Soviet Socialist Republic] (27.12.1963). *Latvijas Padomju Sociālistiskās Republikas Augstākās Padomes un Valdības Ziņotājs*, No. 1, 09.01.1964.

invited to inherit property.[62] On 1 September 1992, general clauses, rights *in rem* and inheritance rights contained in the 1937 Latvian Civil Law were reinstated.[63]

The Civil Law, drawn up in the Romano-Germanic legal tradition, did not limit the circle of heirs to close relatives. Consequently, after the Civil Law entered into effect, a considerable number of persons, who pursuant to the Civil Code were not recognised as heirs, became entitled to request restitution of the title to property. However, before the more distant relatives, in accordance with the circle of relatives expanded by the Civil Law, could apply for the restitution of the title to property, the land could have been transferred into permanent use to another person in the general procedure for privatising state property. In such a case, the former owners had to accept allocation of an equivalent land plot or compensation.

The emergence of the so-called divided property rights takes a special place in the "list of problems" of property reform. It originated in restoring the right of property to land on which multiapartment residential buildings had been erected. The divided immovable property right was legalised by the Supreme Council of the Republic of Latvia on 7 July 1992 by adopting the law "On the Time of Entry into Force and Procedure of Application of the Introductory Part, Parts on Inheritance Law and Property Law of the Renewed Civil Law of the Republic of Latvia of 1937".[64] The purpose of the law to legalise the existing property relations was reached but this could not be said about the future relationships between owners.

Setting the amount of land lease has turned into "the apple of discord" for landowners and owners of multiapartment residential buildings. Following several judgements by the Constitutional Court, the legislator's attempts to resolve this problem by setting the ceiling for the land lease have failed. Currently, the amount of land lease is set by the parties, agreeing in writing.[65] To date, the legislator has not succeeded in adopting legal regulations on how the owners of apartments in multiapartment residential buildings could purchase land from landowners, nor in enforcing the findings included in the Constitutional Court's case law:

> *The legislator is the one who, abiding by the case law of the Constitutional Court in matters of compulsory lease, must find such a solution to a particular situation in a procedure within which possible restrictions of persons' fundamental rights are duly assessed and where the rights of landowners and the owners of multiapartment buildings are justly balanced.*[66]

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[62] "Firstly – children of the deceased (also, adopted children), the spouse and parents (also, adoptive), as well as the deceased person's child born after his death; the second line – siblings of the deceased, his grandfather and grandmother from both his father's and mother's side of the family. [..] Grandchildren and great-grandchildren of the leaver of the estate are lawful heirs if, at the opening of the succession, the parent, who himself would have been the heir, is not alive." (Art. 555).

[63] Par atjaunotā Latvijas Republikas 1937.gada Civillikuma ievada, mantojuma tiesību un lietu tiesību daļas spēkā stāšanās laiku un piemērošanas kārtību [On the Time of Entry into Force and Procedure of Application of the Introductory Part, Parts on Inheritance Law and Property Law of the Renewed Civil Law of the Republic of Latvia of 1937] (07.07.1992). Available: https://likumi.lv/ta/id/75530-par-atjaunota-latvijas-republikas-1937gada-civillikuma-ievada-mantojuma-tiesibu-un-lietu-tiesibu-dalas-speka-stasanas-laiku-un-piemerosanas-kartibu [last viewed 03.03.2021].

[64] Ibid., Art. 14.

[65] See Par zemes reformu Latvijas Republikas pilsētās [On Land Reform in the Cities of the Republic of Latvia], Art. 12 (2^1); Par valsts un pašvaldību dzīvojamo māju privatizāciju [On Privatisation of State and Local Government Residential Homes] (21.06.1995), Art. 54 (2). Available: https://likumi.lv/ta/id/35770-par-valsts-un-pasvaldibu-dzivojamo-maju-privatizaciju [last viewed 03.03.2021].

[66] Latvijas Republikas Satversmes tiesas 2018. gada 12. aprīļa spriedums lietā Nr. 2017-17-01 [Judgement of the Constitutional Court of the Republic of Latvia of 12 April 2018 No. 2017-17-01], para. 24.

No major property reform proceeds without errors and valid criticism. In this respect, Latvia is no exception. However, the conversion of state property into private property, even with all its deficiencies, has significantly reinforced the foundations of Latvia as a democratic state governed by the rule of law ensuring (substantially) the continuity of the right to property of former owners and their heirs. Therefore, denationalisation of property should be viewed as an important aspect in substantiating the continuity of the State of Latvia[67], also symbolising restitution of the sovereign power of Latvia as a state governed by the rule of law in full in the area of property rights.

Summary

1. Since its proclamation on 18 November 1918, the Republic of Latvia has continuously existed *de iure* as an internationally recognised subject of international law. The Republic of Latvia continued to implement the functions of state even during occupation. Throughout the entire period of occupation, the diplomatic and consular services of the Republic of Latvia operated continuously, representing the interests of the Republic of Latvia abroad and expressing its official position.
2. During the entire period of occupation, the *Satversme* continued to be valid as the only constitution of the Republic of Latvia, and the perseverance of the national resistance movement was the necessary evidence in the fight for restoration of the independence of the Republic of Latvia. The Central Council of Latvia was organised on the basis of the *Satversme* as the most significant organisation of the national resistance movement, ensuring the continuity of state power.
3. Pauls Kalniņš, the Speaker of the 4th *Saeima*, is to be recognised as the legitimate acting President of the State, who undertook these obligations based on the *Satversme* in the circumstances where the state was unlawfully occupied. Similarly, the Vice-Speaker of the *Saeima*, Jāzeps Rancāns, is to be considered a legitimate acting President of the state and the Speaker of the *Saeima*, who, pursuant to the *Satversme*, assumed these obligations after Pauls Kalniņš' demise.
4. Restitution of the right to property to the former owners and their heirs implemented after the collapse of the Soviet power, is an important aspect in substantiating the continuity of the State of Latvia and symbolises a full restitution of the sovereign state power of Latvia as a state governed by the rule of law also in the area of the right to property.

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The Aims and Discussions of the Foundation of Land Reform in Estonia After the WWI[1]

Dr. iur. **Marju Luts-Sootak**
Faculty of Law, University of Tartu
Professor of Legal History
E-mail: *marju.luts-sootak@ut.ee*

MA **Karin Visnapuu**
Law School, University of Tartu
PhD candidate
E-mail: *karin.visnapuu@ut.ee*

The land reform was one of the most important tasks of independent Estonia after World War I. The groundwork started even before gaining its independence which shows the significance of this extensive reform. Similar reforms were carried out in other Eastern- and Middle-European countries after World War I, but the Estonian land reform was considered to be among the most radical ones at that time period. The decisions about the scope, intensity and the radicality of a reform would influence the later outcome, therefore it is important to understand the legislative discussions in the beginning and during the reform. In the article we will examine the legislative discussions of Estonian Constituent Assembly and Parliament about the expropriation of large-scale estates in Estonia, the legal solutions and, consequently, the reasons why the question about compensation and redistribution of the expropriated land was left unregulated in the Land Reform Act.

Keywords: Republic of Estonia, Land Reform Act 1919, Constitution 1920, parliamentary discussions.

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Introduction

The current year, 2021, marks the 30th anniversary of the land reform, whereby the Republic of Estonia, after regaining independence on 20 August 1991, sought to rearrange the institutions of Soviet agriculture: exclusive state ownership of land, large-scale agricultural production in state-owned or quasi-cooperative enterprises, central planning and absence of free market. Estonia chose the route of reprivatisation to return the land to private ownership. The beneficiaries of the process were the former owners or legal holders of the land nationalised during the Soviet era, or their descendants. The reform mainly dealt with small-scale land ownership, as this was the dominant agrarian structure in Estonia by 1940, when the Soviet Union occupied and annexed the Republic of Estonia. The agrarian structure predominantly based on small-scale ownership was substantially different from the conditions in the Republic of Estonia at its beginning in 1918–19, when large-scale land ownership also dominated, albeit the ownership was mostly held by Baltic German estate owners, necessitating a comprehensive land reform to rearrange the agrarian conditions.

The land reform of Estonian Republic between the two World Wars is considered to be one of the most radical ones[2] – all the former large-scale estates were expropriated all at once and initially without paying any compensation whatsoever. This was done by adopting the Land Reform Act[3], which was supposed to form the basis of the land reform in Estonia. Still, the Land Reform Act itself left some fundamental issues unsolved.[4] The two key topics, which needed to be decided, were to what extent should the large-scale holdings be expropriated (and should there be any compensation for the expropriation), and to what extent and under which conditions should the land be redistributed. In this article, we will focus on the first key topic and examine the reasons, why some of these fundamental topics were left unregulated in Land Reform Act and its implementation act. At the outset, we examine the causes and aims of Estonian land reform (1). Subsequently, we demonstrate the crucial significance of the land reform for the internal consolidation and security of an independent Estonian statehood (2). The next chapter views the crucial discussions in the Constituent Assembly about the expropriation of the land from estate owners (3) and the last chapter concerns the discussions in the Constituent Assembly, continued later in the parliament, as to whether a compensation for the expropriated land would be determined or not.

As land reforms took place in several Central and Eastern European countries during the same period, both contemporary and modern literature has been published on the Estonian land reform alone, as well as in comparison with the land reforms that took place in other European countries.[5] One of the purposes of this

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[2] In contrary to the contemporary "land reforms" in other European states, the reforms in Estonia, as well as in Latvia were called "agrarian revolutions". Cf. *Korfes, O.* Die Agrarrevolutionen in Estland und Lettland. In: *Sering, M.* (Hg.). Die agrarischen Umwälzungen im außerrussischen Osteuropa. Berlin, Lepizig 1930, S. 72–127; *Jörgensen, H.* The Inter-War Land Reforms in Estonia, Finland and Bulgaria: A Comparative Study. *Scandinavian Economic History Review*, Vol. 54, Issue 1, 2006, p. 87.

[3] *State Gazette*, No. 79/80, 1919.

[4] The question whether to compensate the previous large-scale estates was left unregulated, the same as the question on what legal basis the land would be redistributed.

[5] In foreign languages, e.g., Gert von Pistohlkors. Tiefgreifende agrarische Umwälzungen und Umstrukturierungen in den neu gegründeten baltischen Staaten Estland, Lettland und Litauen 1919/1920/1922: Motivationen und Ergebnisse bis 1940. *Krauss, K. P.* (Hg.). Agrarreformen und ethnodemographische Veränderungen. Südosteuropa vom ausgehenden 18. Jh. bis in die Gegenwart.

article is to show the discussions in Estonian legislative bodies and to introduce the material found in Estonian language literature and archive sources to an international audience.

1. The Economic Situation at the Beginning of the Republic of Estonia and the Purpose of the Land Reform

The land reform that took place in Estonia after World War I was neither the first nor last in the Estonian territory. Estonian historians consider the first land reform to have been the agrarian reform of the early 19th century, which established the ownership of farmlands by the estate owners and the duty of estate labour by the peasants. The second land reform took place in the middle of the 19th century, which lead to the beginning of selling land by the estate owners to farmers in addition to tenure.[6] The process of separating farmsteads from the estates and selling them to peasants started in the 1860s in Southern Estonia and reached Northern Estonia a couple of decades later.[7] Despite that, large-scale holdings still made up 58% of agricultural land in 1919.[8] This meant a total of 2 428 087 hectares of 1149 estates with an average area of 2113 hectares. Many estate owners owned more than one estate, making their total land assets even greater. 23% of the estates had been leased to peasants for use under tenure with the average farmer leasing a plot of land of 24.2 hectares. Around a third of the tenants, however, had less than 10 hectares of land. By that time, 42% of the agricultural land in the whole of Estonia was in private ownership by farmers. The average size of a farmstead bought by the farmers was 34.1 hectares, although about a quarter of the farms encompassed less than 10 hectares. Such small farmsteads were often not sufficient for feeding a family.[9]

As such, one of the most important objectives of the land reform was to guarantee the chances to obtain sustenance for as large a part of the Estonian populace as possible. This concerned those who did not have any land to cultivate at all. The former tenants were also meant to gain confidence that they could continue farming the land in their use and possibly become its owners in the future.

Stuttgart, 2009, S. 175–2006; *Jörgensen, H.* The Inter-War Land Reforms in Estonia, Finland and Bulgaria, pp. 64–97; *Kõll, A.-M.* The Agrarian Question in Eastern Europe: Some Answers from the Baltic Region. In: *David, T., Batou, J.* (eds.). Uneven Development in Europe 1918–1939. Librarie Droz, 1999, pp. 201–229; *Roszkowski, W.* Land Reforms in East Central Europe after World War One. Warsaw, 1995; *Lipping, I.* Land Reform Legislation in Estonia and the Disestablishment of the Baltic German Rural Elite 1919–1930. Dissertation, University of Maryland Faculty of the Graduate School. Michigan, London, 1980; *Uluots, J.* Grundzüge der Agrargeschichte Estlands. Tartu, 1935; *Bernmann, O.* Die Agrarfrage in Estland. Berlin, 1920; *Luiga, G. E.* Die Agrarreform in Eesti. Helsinki, 1920.

6 *Nõu, J.* Eesti põllumajanduse omariiklusaegne koetus ja arengutase [The structure and level of development of Estonian agriculture during the period of independence]. In: Omariikluse taustal. Üliõpilasselts Raimla koguteos [In the context of independence. Collected works by Student Society Raimla]. Uppsala, 1955, pp. 59–70.

7 A good overview of the process of purchasing farmsteads with an impressive array of sources has been given in: *Laur, M., Lust, K., Pirsko, P., Tarkiainen, Ü.* Talude päriseksostmine Pärnumaa andmestiku põhjal [The purchasing of farmsteads on the basis of data from Pärnumaa]. Tartu, 2014, pp. 9–14.

8 *Rosenberg, T.* Maaküsimus ja 1919. aasta maareform Eestis: põhjused, eeldused ja tulemused [The land question and the land reform of 1919 in Estonia: reasons, preconditions and results] (first published in 1994). In: *Rosenberg, T.* Künnivaod. Uurimusi Eesti 18.–20. sajandi agraarajaloost [Ploughed fields. Inquiries on the agrarian history of Estonia in the 18th to 20th century]. Tartu, 2013, p. 374.

9 *Pool, T.* Maauuendus Eestis ja selle tulemusi [Land reform in Estonia and its results]. In: Fenno-Ugrica V. Soome-ugri kultuurkongress (ettekanded) [Finno-Ugric cultural congress (lectures)]. Tallinn, 1936, pp. 4–8; *Virma, F.* Maasuhted ja maakorraldus Eestis [Land relations and land arrangement in Estonia]. Tartu, 2004, p. 118.

The land reform was not just a rearrangement of agrarian conditions, but also a necessary step in solidifying the constitutional order of the democratic Republic of Estonia. Theodor Pool (1890–1942), an agronomist and a politician, has been considered the "father" of the land reform.[10] He argued that breaking up the estates eliminated the economic foundation of the nobility, which was hostile to the newly created republic, and prevented the threat of (German) colonisation. In addition to the former small farmers, it also created a new class of independent farmers who were connected to Estonian independence, forming a strong support and backbone of the young country.[11]

In the legislative discussions in the Constituent Assembly, the land reform was also regarded as solidifying the independence of Estonia. During a debate over the Land Reform Act, Karl Ast (1886–1971), a member of the Social Democratic Party, said: "The Estonian land reform, however, is most closely connected to Estonian independence". The land reform was also seen as a means of ameliorating centuries-long injustice. Prime Minister Otto Strandman (1875–1941) of the Labour Party remarked in a session of the Constituent Assembly on the estate owners' land possessions: "This power must be taken from them and given to the people". Ast seconded him: "The time has come in Estonia, when the historical injustice, which has greatly impeded our spiritual and imperial development, is beginning to be ameliorated". Aleksander Veiler (1897–19590), another member of the Labour Party also emphasized the historical injustice: "Not just in the sense of making good the historical injustice, but also in the sense of ensuring our national independence, must we eliminate large-scale land ownership. [..] Estonian independence can surely never preserve, if land is to remain in possession of the nobles who are the fiercest enemies of our independence."[12]

The thousands of beneficiaries of the land reform were supposed to become loyal citizens of the Republic of Estonia. As Johannes Lehtmann (1886–1953) of the Labour Party said in a late-night session of the Assembly on 1 August 1919: "We must especially emphasize this economic moment, because the Land Reform Act is the lever with which our independence will be pulled up. We cannot execute our independence without deciding the question of land."[13]

In addition to the political purpose emphasized by the left-wing parties, the so-called bourgeoisie parties introduced purely economic considerations into the debate. A few months earlier, during a session of the Committee on the Land Reform Act on 1 May 1919, Jaan Tõnisson (1868–1941?), leader of the People's Party, emphasized that the political motive of the reform (mollifying the people and ensuring their loyalty) should not force anyone to neglect to pay attention to

[10] *Karelson, M.* Theodor Pool Eesti Vabariigi põllumajanduses [Theodor Pool in the agriculture of the Republic of Estonia]. Tartu, 2000; *Karelson, M.* Theodor Pool – maaseadus ja maareform [Theodor Pool – the Land Reform Act and land reform]. In: Agraarteadus (Akadeemilise Põllumajanduse Seltsi Toimetused 13) [Agrarian Science (Publications of the Academic Aricultural Society 13)]. Tartu, 2000, pp. 10–15.

[11] *Pool, T.* Maauuendus Eestis … [Land reform …], p. 9.

[12] Asutawa Kogu protokoll 29.07.1919 [Minutes of the Constituent Assembly 27 July 1919], No. 40. In: Asutawa Kogu II istungjärk: protokollid nr. 28–97 (17. juuni – 20. dets. 1919. a) [II session of the Constituent Assembly: minutes No. 28–97 (17 June 1919 – 20 December 1919)]. Tallinn, 1920, col. 433, 441, 444–446, 452.

[13] Asutawa Kogu protokoll 01.08.1919 [Minutes of the Constituent Assembly 1 August 1919], No. 41. In: Asutawa Kogu II istungjärk: protokollid nr 28–97, col. 537.

the agricultural viewpoint. Tõnisson called upon the members of the Committee to weigh the matter impartially and without partisanship so as not to hurt the people.[14]

On the other hand, caution was necessary, because backlash from the former landowners was probably inevitable. The same also applied to the owners' farmsteads that had already been purchased. They had received their farmsteads from lands that had been separated by the estate owners during the mid-19th century agrarian reforms as agriculturally less productive. The lands distributed as a result of the land reform, on the other hand, had been kept by the estate owners for their own households and were more fertile or otherwise better.

The threat of international backlash, which the local nobility was not slow to incite, also necessitated caution. In order to balance the "poetic colours" of the left-wing parties, as Jüri Uluots (1890–1945), a member of the Country People's Union, described at the debates in the Constituent Assembly, he himself considered it necessary to focus on the analysis of the legal provisions of the Land Reform Act.[15] He also spoke of Estonian independence, albeit in a somewhat different context. Uluots emphasized that Estonian independence had only the *de facto* recognition of other countries and international organisations, and it was therefore necessary to be cautious and avoid recklessness in the implementation of the land reform. However, the left-wing parties formed a majority in the Constituent Assembly, and it was largely a consequence of their influence that the decision was made to carry out the land reform in Estonia which was to be one of the most radical among its contemporaries.

2. The Constitutional Order and the Legal Foundation of the Land Reform

In 1918, the Manifesto of Independence on 24 February declared Estonia an independent democratic republic. Point 7 of the Manifesto stated: "The Provisional Government shall be tasked with developing the proposals for legislation to solve the questions of land, labour, sustenance and finance according to democratic principles immediately".[16] As the Constituent Assembly convened on 23 April 1919, its primary task was drafting the Constitution, but solving the land question mentioned in the Manifesto could not be considered any less important. The matter of land reform had already been at the centre of the election campaign of all parties.[17] The question of land was also more important than the Constitution for the contemporary general public, as not just the local Estonian and German

[14] Asutava Kogu maaseaduse komisjoni koosolek 01.05.1919, protokoll nr 2 [Minutes of the Land Reform Act commission of the Constituent Assembly 1 May 1919, No. 2]. *Rahvusarhiiv* [Estonian National Archive], ERA.15.2.370, p. 3.

[15] Asutawa Kogu protokoll 01.08.1919, nr 41 [Minutes of the Constituent Assembly 1 August 1919, No. 41], col. 489–490.

[16] *State Gazette*, No. 1, 1918.

[17] *Pilve, E.* Millele nad lootsid?: Eesti Rahvaerakonna ja Eesti Maarahva Liidu maailmapoliitika ning selle kujunemine 1919. aasta maaseaduse eel [What did they hope for?: World politics of the Estonian People's party and Estonians Country People's Union]. *Akadeemia*, No. 2, 2017, pp. 239–259, No. 3, 2017, pp. 413–442; *Roasto, M*. Konstantin Pätsi "maaküsimus" ja selle ajalooline kontekst [The "land question" of Konstantin Päts and its historical context]. *Ajalooline ajakiri / The Estonian Historical Journal*, No. 4, 2014, pp. 303–328; *Roasto, M*. The political debate about the land question in the Estonian area of the Baltic provinces, 1905–1914. *Journal of Baltic Studies*, No. 51(4), 2020, pp. 611–630.

newspapers[18], but also the foreign press paid more attention to the Land Reform Act than the Constitution.[19]

Before gaining independence, the territory of Estonia was a part of the Russian Empire which was far from democracy or true parliamentarism and rule of law even after the limited modernisation that followed the revolution of 1905. Meanwhile, the ideals of democracy and rule of law were always at the forefront of the Estonian independence movement. The first thorough Estonian language work on the nature of rule of law was published during the German occupation in 1918.[20] Although Estonia's Constitution of 1920 did not explicitly mention the term "rule of law" or the concept of *Rechtsstaat*, the structural elements of the basic principles of rule of law did exist and the contemporary lawyers and public figures repeatedly pointed that out. For example, Ferdinand Karlson (1875–1941), an attorney and public figure, wrote, "Free Estonia is a legal state or at least she has a desire to be that."[21] In 1937, Eduard Laaman (1888–1941), who was a companion of the authoritarian president Päts and at the time rarely had much good to say about the early days of the Republic, said that the most positive aspect of the Constitution of 1920 was the great influence of lawyers in its development. He argued that the whole public life of the country had thus been built on a foundation of justice and that the legal rationalisation of life had led to a state with a rule of law.[22]

At the beginning of independence, Estonian economy and society were still predominantly agrarian and in this particular field the way of life largely continued to resemble a feudal order. It may be questioned whether all of the so-called landless men really desired their own plot of land, but it is undeniable that "hunger for land" was the crucial factor that shaped Estonian governance and politics. It is important to remember with regard to the land reform that at the time the Republic of Estonia was still fighting a War of Independence to preserve its freedom and sovereignty. The men, who were tired of the Great War, were not exactly eager to return to the battlefield. The poor country, on the other hand, did not have any resources to raise their morale. Thus, it is no wonder that this oft-mentioned hunger for land was to become the driving force that would drive the men to enlist. A decree by the Provisional Government on 20 December 1918 explicitly promised that "all the citizens of Estonia who have demonstrated extraordinary bravery on the frontline against the enemy or been injured in battle, as well as the families of those fallen in action, shall receive land for personal use at no cost."[23] According to Point 2 of the

[18] See the overview in: *Mertelsmann, M., Mertelsmann, O.* Landreform in Estland 1919. Die Reaktionen von Esten und Deutschbalten. Hamburg, 2012, S. 47–68.

[19] E. g. *Keyserling, H. von.* Esthonia's Future – The Land Question. *The Daily Telegraph*, 17.09.1919; *Leminkainen, Y.* [= Hermann von Keyserling]. Die Politische Bedeutung von Estland: Das Verhältnis zum Bolschewismus. *Neue Freie Presse* (Wien), 08.01.1921, S. 2. It must be noted that it was the Baltic Germans who had lost their land, who turned to the foreign public. Most active ones were Heinrich von Stryk, Alfred von Schilling and Hermann von Keyserling, but also baroness Mary Ann Knorring and others. More about the opposition of the Baltic Germans: *Loit, A.* Baltisaksa rüütelkondade seisukohad ja tegevus Eesti iseseisvumisel 1918–1920 [The views and activity of the Baltic German knighthood at the independence of Estonia 1918–1920]. *Tuna*, No. 4, 2006, pp. 60–61, 65–68; *Undusk, J.* Eesti kui Belgia. Viimane baltlane Hermann Keyserling [Estonia like Belgium. The last Baltic Hermann Keyserling]. *Tuna*, No. 2, 2003, pp. 59–60, 68–89.

[20] *Einbund, K.* Õiguslik riik [The Rule of Law]. Tartu, 1918.

[21] *Karlson, F.* Õigusteaduse oskussõnad [Terms of law]. *Õigus*, No. 1, 1920, p. 6.

[22] *Laaman, E.* Isik ja riik Eesti põhiseadustes [Person and state in Estonian constitutions]. *Õigus*, No. 3, 1937, p. 104.

[23] Ajutise Valitsuse määrus [Decree of the Provisional Government] (20.12.1918). *State Gazette*, No. 9, 1918. Also the § 21 of the Land Reform Act stated: "the first people to get the land are: 1) citizens

same decree, they were to be given land from the national land reserves of the state and the National Agriculture Bank even before the question of land had been solved in the Constituent Assembly.

The state did not have enough land of its own to fulfil the promises given during the war. The (mainly Baltic German) estate owners, whose loyalty to the Republic of Estonia was not particularly reliable anyway,[24] on the other hand, had more than enough land. Already in the 19th century, one of the most important theses of the Estonian national movement had been the narrative that, after conquering the Estonian lands during the crusades, the German nobles had taken the Estonians' land also in the literal sense. In other words, the German right to ownership of land in Estonian territory was not considered justified or lawful anyway. The Baltic German propaganda literature, spread in Germany and elsewhere, depicted the Estonian land reform as a great act of revenge against centuries-long injustice.[25]

3. Expropriation of Land

Although the Land Reform Act may have been more important than the Constitution in the eyes of the contemporary people and media, the Constituent Assembly had first and foremost convened with the purpose of drafting the Constitution and establishing a strong legal basis for a democratic Republic of Estonia. Before the Assembly started compiling the final text of the Constitution, a temporary constitution was passed on 4 June 1919 for the period of the Constituent Assembly's session.[26] Although this act also contained a section on the basic rights of citizens[27] and was rather noteworthy in that regard[28], the right to protection of private property was not included in this temporary constitution. This does not mean that the Committee on Constitution of the Constituent Assembly did not discuss the potential inclusion of a clause on protection of private property. This was already included in the preliminary draft by Jüri Uluots, on which the committee based its own work. Uluots thought that the matter of private property

who have showed extreme courage in the War of Independence; 2) soldiers who have been injured in the War of Independence; 3) the families of soldiers who have died in the War of Independence; 4) soldiers who have taken part in combat activities against the enemy taken the length of the activities into consideration". *State Gazette*, No. 79/80, 1919.

[24] The attempt of the Baltic German to create the so-called United Baltic Duchy (*Vereinigtes Baltisches Herzogtum*) is quite well-known. Much less known is how the Baltic Germans worked hard to establish and obtain the consents of Estonian and Latvian to merge Estonian and Latvian areas with the German Empire. More about this attempt: *Kuldkepp, M.* Rahvusliku enesemääramise kaudu Saksamaa külge: eestlased anneksionistliku Saksa poliitika sihtmärgina 1918. aasta okupatsiooni eel [Unification with Germany through national self-determination: Estonians as a target of annexionist German policy before the 1918 German occupation]. In: *Tannberg, T.* (ed.). Esimene maailmasõda ja Eesti. II [WWI and Estonia. II]. Tartu, 2016, pp. 369–433.

[25] Quotations by: *Rosenberg, T.* Eesti 1919. aasta maareformi historiograafia [Historiography of the Estonian land reform of 1919] (first published in 2002). In: *Rosenberg, T.* Künnivaod … [Ploughed fields …], p. 383.

[26] *State Gazette*, No. 44, 1919, p. 91. Usually in literature about the history of Estonian constitutionalism, this legal act is addressed rather briefly. See more or less all of the relevant references: *Vallikivi, H.* Kodanikuõiguste peatükk Eesti 1919. aasta ajutises põhiseaduses [Civil rights chapter in Estonia's 1919 Preliminary Constitution]. *Ajalooline Ajakiri / The Estonian Historical Journal*, No. 3/4, 2019, pp. 294–295.

[27] Vallikivi has dedicated his detailed article to the analysis of the development and discussions held over this specific topic. *Vallikivi, H.* Kodanikuõiguste … [Civil rights …], pp. 293–330.

[28] *Kalmo, H., Luts-Sootak, M.* Eesti riik kui kunstiteos [Estonian state as a piece of art]. *Sirp*, 06.09.2019, p. 12.

ought to be explicitly stated in the Constitution; it should either be allowed and protected, or outlawed altogether. The Marxist assembly members supported a ban on private property, whereas Uluots himself considered defence of private property necessary as a right to property was also meant to protect the individual. Konstantin Päts (1874–1956) who was Uluots' fellow party member, supported this view as well, albeit he wished to add that expropriation of private property had to remain possible and take place in the interests of the country in accordance with relevant laws. Both of these proposals were rejected by the committee. Uluots raised the matter of private property again in front of the full Assembly, arguing that, as the state was to be granted strong powers to intervene in private enterprise (as demanded by the left-wing majority), a strong defence of the citizens' private property was needed. His new proposal included a clause stating that expropriation of private property was allowed for the greater societal good with adequate legal basis and for a just compensation. Jaan Tõnisson of the People's Party also supported this proposal. The proposal was still rejected by the left-wing majority with the justification that private property was already protected by other laws.[29]

Laaman later explained that the strong opposition by the left-wing parties to free enterprise, as well as private property rights was caused by the specific context of 1919: during the war, it was feared that expanded freedom of enterprise would lead to the growth of speculation, black-market business activities and the reluctance to approve strong protection of private property was caused by the ongoing preparations for the expropriation of large-scale land holdings under the Land Reform Act.[30]

The Committee on the Constitution started compiling the constitution proper in August of 1919. Uluots was once again the author of the preliminary projects. These included a section on protection of private property with all the classical elements: private property was protected, but could be expropriated without the owner's consent if the expropriation took place on a legal basis and for a just compensation. During the first reading in the committee, the draft was amended to restrict the protections of the norm to Estonian citizens, to exclude all property rights' violations except for expropriation from the protections of the draft, and to exclude the right to compensation. An amendment specifying that property could only be expropriated in the interests of the common good was added during the second reading. Uluots tried to reintroduce the requirement for just compensation, but his proposal was rejected. Ado Anderkopp (1894–1941) of the Labour Party explained that the matter of compensation had already been solved in the Land Reform Act and if the right to compensation were to be included in the Constitution, the Land Reform Act would also require amendment. Anderkopp was referring to Section 10[31] of the Land Reform Act, which did refer to compensation, but postponed a concrete solution to the matter.

Jaan Teemant (1872–1941) of the Country People's Union then proposed that the words "for a just compensation" be added, because, while the Land Reform Act referenced a compensation, it never mentioned that the compensation ought to be

[29] *Vallikivi, H.* Kodanikuõiguste … [Civil rights …], pp. 310–312.

[30] *Laaman, E.* Kodaniku põhiõigused ja kohused [Civil rights and obligations]. In: Põhiseadus ja Rahvuskogu [Constitution and National Assembly]. Tallinn, 1937, p. 343.

[31] "The specifics of the compensation paid for the aforementioned expropriated land and, if necessary, determining the size of the compensation and the types of land exempt from compensation will be solved in appropriate special legislation".

just. He argued that this could lead to difficult consequences in the future and the expropriation of private property could only be allowed for a just compensation. This proposal was also rejected twice.[32] In the Constitution, as it was ratified on 15 June 1920[33], a section on the protection of private property did exist, but it did not mention a right to compensation for expropriated property. Despite the caution taken by Estonia's legislature, the former landowners soon questioned why their land was being taken away by a country whose Constitution's Section 24 explicitly stated the principle of private property rights: "Private property is protected for all citizens of Estonia." The same clause contained an exemption allowing privately owned land to be expropriated "only in the general interests of society in accordance with the law". The Land Reform Act was considered a law that sought to advance the greater good.

Ten years after the passing of the Land Reform Act, Ants Piip (1884–1942), a diplomat, professor of international law, politician and Labour Party assembly member said that from the perspective of international law, the greatest difficulty of the land reform was reconciling the reform with the efforts to gain support and recognition of Western European countries. Large-scale nationalisation of land was hardly going to increase the support for Estonia in countries that valued private property rights and remembered the actions of the Soviet regime in Russia. Hence, Estonian foreign delegations had to explain the preparations for the planned land reform to Western governments. Once the necessity of the reform had been explained on the basis of economic, social, and political reasons, it was no longer seen as a characteristically Bolshevik policy.[34]

4. The Question on Compensation for Expropriated Land

Although the Constitution did not place a requirement for compensation for expropriated property, and the Land Reform Act also left the matter unclear, the laws that were valid in Estonia at the time did mandate compensation. The main source of civil law was the codification of the private law of Russian Empire's Baltic provinces, the so-called Baltic Private Law Act.[35] Its Article 868 (6) stated that private property could be expropriated without the owner's consent, provided the expropriation was necessary for the nation or the community, but the owner was to be compensated for the full value of the property before any such transfer of property took place. This was the basis for many lawsuits by former estate owners during the period of independence, some of which reached the Supreme Court of

[32] *Vallikivi, H.* Põhiõiguste peatükk Eesti 1920. aasta põhiseaduses [Civil rights chapter in Estonia's 1920 Constitution]. In: Riigiõiguse aastaraamat 2020 [Yearbook of Constitutional Law 2020] 2020, pp. 55–56.

[33] Eesti Vabariigi põhiseadus [Constitution of the Republic of Estonia] (15.06.1920). *State Gazette*, No. 113/114, 1920, p. 243.

[34] *Piip, A.* Maareform meie välispoliitikas [Land reform in our foreign policy]. *Waba Maa*, 25.10.1929, p. 6.

[35] The third volume of Baltic Provincial Law Code (also known as the Estonian, Livonian and Courland Private Law or more commonly – as the Baltic Private Law Act), which was confirmed in 1864 and entered into force the following year, was at first applicable only for local nobility, town citizens, Lutheran clergymen and so-called literates. In the Republic of Estonia, with the law of abolition of estates (from 09.06.1920; *State Gazette*, No. 129/130, 1920, p. 54), its validity was expanded to all of the population of Estonia. Initially only the former Russian areas, which were united with Estonia according to the Tartu peace treaty (Petseri county and a strip of land east of the Narva River) were left out.

Estonia. Several former estate owners claimed that as no compensation had been paid for their lands, even though such compensation was required according to the statutory Baltic Private Law, then no transfer of property had taken place. The Supreme Court dismissed their claims, arguing that the Land Reform Act was a special law in relation to the Baltic Private Law Act, therefore overriding the norm of compensation as described in general law. As such, the Land Reform Act was to take precedence. Even though the question of compensation had not been solved in a substantive and regulatory manner in the Land Reform Act, compensation had been explicitly mentioned. It was merely the specific details that had been postponed and were to be determined by additional legislation. This invalidated the claims that compensation was not regulated at all in the special law, which would have necessitated the application of Baltic Private Law as the general norm.[36] Both the Supreme Court of Estonia, as well as the Secretariat and the Council of the League of Nations dismissed any lawsuits relating to matters of compensation.[37]

All the parties in the Constituent Assembly agreed that large-scale estates had to be liquidated with only the German party opposing it for obvious reasons.[38] According to Section 1 of the Land Reform Act, not only the lands, but all of the agricultural inventory belonging to the estates was to be nationalised. Sections 11 and 12 specified compensations for livestock, as well as any other inventory. This did not cause disagreements in the Constituent Assembly. Compensation, or the lack thereof for expropriated land, on the other hand, was the cause of heated debate.

In the Committee on the Land Reform Act, arguments were presented in support and against compensation on political, economic, and legal grounds. Uluots was in favour of compensation, although he was mainly concerned about any reactions to the reform in Western Europe, if land were to be expropriated without any compensation whatsoever. He assumed that Estonia would have problems being accepted into the League of Nations, as all the other Eastern European countries, with an exception of Latvia and Russia, had paid compensation.[39] The proposals for compensation were introduced to the Assembly by the People's Party and Uluots himself emphasized in the committee on 5 May 1919 that the matter needed to be decided so that Estonia could be accused of neither Bolshevism nor injustice. He argued that expropriation without compensation was unjust, and Estonia would likely come to regret the decision.[40]

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[36] E.g., the decision of the Civil Department of the Estonian Supreme Court of 20.11.1924, 1483. *Rahvusarhiiv*, ERA 1356.3.64, in which the complaint of the previous owner (Georg von Stackelberg) of the Roosna-Alliku Manor was solved. Stackelberg was able to use the land which was not redistributed during the reform up until 1939 (altogether 37.5 hectares). He was also allowed to use the first-floor premises of the manor. A school operated in other rooms of the manor: Roosna-Alliku mõisa ajalugu. Roosna-Alliku mõisa koduleht [History of the Roosna-Alliku Manor. Website of the Roosna-Alliku Manor]. Available: http://roosnaallikumois.ee/?c=ajalugu&l=et [last viewed 11.04.2021].

[37] More about the discussions about Estonian minorities and land question in the League of Nations see *Made, V.* Külalisena maailmapoliitikas. Eesti ja Rahvasteliit 1919–1946 [As a guest in the world politics. Estonia and the League of Nations]. Tartu, 1999, pp. 145–172.

[38] *Valge, J.* Eesti parlament 1917–1940. Poliitiline ajalugu [Estonian Parliament 1917–1940. Political history]. Tallinn, 2019, pp. 153–171.

[39] Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 3 (05.05.1919). In: Asutava Kogu maaseaduse komisjoni protokollid [Minutes of the Land Reform Act Commission of the Constituent Assembly], 1919, 1920. *Rahvusarhiiv*, ERA.15.2.369, pp. 8–10.

[40] Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 2 (01.05.1919), No. 3 (05.05.1919), No. 13 (30.05.1919). In: Asutava Kogu maaseaduse komisjoni protokollid [Minutes of the Land Reform Act Commission of the Constituent Assembly], pp. 7–8, 26.

Johan Jans (1880–1941), a lawyer and a Social Democratic assembly member was strongly opposed to compensation. Whilst he did not deny the right to private property *per se*, he did find that paying compensation for the estates could not be based on private property rights, as this property had been obtained illegally. Jans emphasized that he did not consider unpaid expropriation a revenge for historical injustice but rather a means of establishing a stable social order in accordance with the societal sense of justice. August Jürmann (1887–1942) of the Country People's Union opposed him, arguing that non-payment was actually a denial of property rights. Left-wing assembly members were not always in agreement either. When Jans mentioned unpaid expropriation as a national necessity, Johannes Zimmermann (1882–1942) of the Labour Party immediately responded, arguing that Jans' own arguments lead to the conclusion that abolition of private property altogether was necessary from the perspective of the state.[41] Although the principal matter of compensation or a lack thereof was still undecided, the committee already started discussing actual evaluations to base the compensation on.[42]

The *Landeswehr* war had broken out by the time of the next committee meeting. Jans now said that he did not agree with compensation and the debates started all over again.[43] By the time of the next meeting on 11 July the war was over. Although the Estonian victory did not necessarily seem decisive at the time, as only a ceasefire had been agreed upon in Riga on 3 July, Jans said, "Compensation cannot be discussed now, even if it could have been an option before the *Landeswehr* war. We will destroy unity at home if we pay compensation." Johannes Ernesaks (1876–1952), the other representative of the Social Democrats in the committee, seconded him. Anton Laar of the Christian People's Party argued that the best course of action was to wait and see what the reaction to unpaid compensation was abroad.[44] In the end, the committee decided to postpone any decisions on the matter of compensation. As a consequence, the Land Reform Act vaguely stated, "the matter of compensation for expropriated land will be solved by appropriate special legislation".

In 1920, when the Land Reform Act had been passed and the War of Independence was over, discussions over compensation continued in the Constituent Assembly. Although a draft of a statute on compensation for expropriated lands already existed,[45] the committee continued to argue over whether to pay compensation at all. This time the discussions had a new nuance. According to the draft, compensation was not to be paid, but the state was to take liability for any debts

[41] Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 13 (30.05.1919). In: Asutava Kogu maaseaduse komisjoni protokollid protokollid [Minutes of the Land Reform Act commission of the Constituent Assembly], p. 26.

[42] Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 15 (02.06.1919). In: Asutava Kogu maaseaduse komisjoni protokollid protokollid [Minutes of the Land Reform Act commission of the Constituent Assembly], pp. 28–30.

[43] Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 16 (18.06.1919). In: Asutava Kogu maaseaduse komisjoni protokollid protokollid [Minutes of the Land Reform Act commission of the Constituent Assembly], pp. 31–32.

[44] Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 27 (11.07.1919). In: Asutava Kogu maaseaduse komisjoni protokollid protokollid [Minutes of the Land Reform Act commission of the Constituent Assembly], p. 44.

[45] Asutava Kogu maaseaduse komisjoni protokollid [Minutes of the Land Reform Act Commission of the Constituent Assembly], 1919, 1920. In: Asutava Kogu maaseaduse komisjoni protokollid [Minutes of the Land Reform Act commission of the Constituent Assembly], p. 102.

on the expropriated properties.[46] During a committee session on 11 June 1920, a draft titled "On paying compensation for lands expropriated according to the Land Reform Act" was discussed. The discussions in the committee referred to the Land Reform Act itself, finding that paying compensation was inevitable, because doing the opposite would have required amending the Land Reform Act and contradicted the principle of private property rights. Strandman pointed out that Section 1 of the Land Reform Act already determined the payment of compensation and the new draft under discussion was only meant to specify the conditions and size of compensation. Giving up compensation entirely would have required amending the Land Reform Act.[47] Despite that, Section 1 of the draft said: "compensation shall not be paid for expropriated land". Section 2, on the other hand, stated: "Any debts engrossed on the expropriated lands will be the liability of the Republic of Estonia".[48] The full Assembly debated the draft further on 29 June 1920. Jans proposed moving the draft forward to the first reading, because uncertainty over debts of the former estates and compensation was beginning to delay the reform itself.[49] The Ministry of Agriculture also requested that the draft should move forward.[50] Thus started the first reading of the draft. Strandman argued that the draft should be sent to the Committee on Finance, as no proposal was likely to receive the support of a majority in the Committee on the Land Reform Act and the same result could be expected in the full Assembly.[51] Theodor Pool pointed out that the draft, as introduced by the committee, was diametrically contradictory to the government's draft: the committee decided to expropriate the lands without compensation, whereas the government's plan included compensation. He also found that the committee should have supported compensation if it also supported the state taking liability for debts.[52]

Hugo Kuusner (1887–1942), an attorney and a member of the People's Party declared that their party did not support the draft but would support sending it to the Committee on Finance. The Christian People's Party took the same position and although Rudolf von Stackelberg (1872–1934) of the Baltic German Party proposed rejecting the draft altogether, the majority of the assembly voted for sending the draft to the Committee on Finance.[53] In the end, the Constituent Assembly left the matter of compensation undecided.

As there was no clear legal order, contemporary legal scholars and jurists presented contradictory opinions on the matter. Eduard Berendts, (1860–1930),

[46] The first reading of the draft which was developed by the Ministry of Agriculture was conducted on 09.06.1920 at the meeting of the Land Reform Act Committee. By the end of the meeting, the draft was agreed to be adopted and submitted to the second reading: Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 7 (09.06.1920). In: Asutava Kogu maaseaduse komisjoni protokollid [Minutes of the Land Reform Act Commission of the Constituent Assembly], p. 90.

[47] Maaseaduse komisjoni koosoleku protokoll [Minutes of the Land Reform Act Commission], No. 8 (11.06.1920). In: Asutava Kogu maaseaduse komisjoni protokollid [Minutes of the Land Reform Act commission of the Constituent Assembly], p. 96.

[48] Asutava Kogu maaseaduse komisjoni protokollid [Minutes of the Land Reform Act Commission of the Constituent Assembly], p. 101.

[49] Asutawa Kogu protokoll [Minutes of the Constituent Assembly], No. 145 (29.06.1920). In: Asutawa Kogu IV istungjärk: protokollid [IV session of the Constituent Assembly. Minutes], No. 120–154 (13.04–31.12.1920). Tallinn, 1920, col. 1188.

[50] Ibid.

[51] Ibid., col. 1199.

[52] Ibid., col. 1200.

[53] Ibid., col. 1207.

a professor of financial law at the University of Tartu, claimed that expropriation without compensation was unconstitutional, emphasizing primarily the preamble and the spirit of the constitution. Only thereafter did he equate expropriation without compensation with violations of constitutionally granted equality before law and private property rights.[54] Eugen Maddison (1886–1954), an official of the Ministry of Internal Affairs, disagreed with Berendts.[55] To Berendts' argument that expropriating land without compensation ("confiscating private property") was in conflict with "justice" as mentioned in the preamble, Maddison responded that unjust would be a situation wherein the state would need to expropriate the property of a certain social stratum and to maintain the supposed justice the state should not "rob the people blind with taxes". Berendts had also pointed to Section 4 of the Constitution, which mentioned generally recognised norms of international law as a part of the Estonian legal order. As the constitutions of other countries required just compensation for expropriation, this should be considered as a norm of international law. Maddison responded that such norms were not a part of international law and were the rules of each sovereign state. Thirdly, Berendts referred to Section 6 of the Constitution (equality before law), saying that expropriation did not concern formal titles of societal class which had been abolished, but rather land owners as a social class. As large-scale land owners were also members of the land-owning class, Berendts argued that they should be constitutionally protected from unequal treatment. Maddison, on the other hand, claimed that Section 6 could not be interpreted as meaning social class, but rather as just abolishing existing privileges and titles which could only have been restored by amending the Constitution. The fourth justification Berendts provided was the principle of private property protection as outlined in Section 24 of the Constitution. According to Berendts, the Section did not explicitly mention compensation because the preamble and the spirit of the Constitution (justice, legality, liberty) meant that compensation was to be taken for granted. Maddison thought that compensation was deliberately excluded from the Constitution. Section 24 solely specified that expropriation could take place only in the general interest (consequently, not on someone's personal whim), in accordance with the law (thus, not administratively), and in a manner specified by the law (not according to the plans of the executive branch). How the expropriation was to take place (with or without compensation) was to be decided by special laws in every individual case. Therefore, if compensation was intended to be a necessary condition of expropriation, this would have been explicitly stated in the Constitution.

The Berendts-Maddison debate took place against the backdrop of a draft introduced to the Parliament by the Social Democratic Workers' Party in 1924, which would have legalised expropriation of lands without compensation. By contrast, in 1925 the Baltic German Party introduced a draft that would have mandated compensation to a relatively large extent. The Committee on the Land Reform Act instead based its decisions on the government's draft that specified compensation in 60-year governmental bonds.[56]

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[54] *Berendts, E.* Die Verfassungsentwicklung Estlands. Tübingen, 1924, S. 194.

[55] *Maddison, E.* Kas lubab põhiseadus mõisat tasuta võõrandada [Does the Constitution allow to expropriate a manor without any compensation]? *Waba Maa*, 29.05.1924, p. 2.

[56] While the parliamentary discussions were still ongoing, Johan Jans, who participated actively already in the Constituent Assembly, published several critical writings about this topic: *Jans, J.* Kas oleme kohustatud võõrandatud mõisate eest tasu maksma [Are we obliged to pay compensation for expropriated land]? Tallinn, 1926; *Jans, J.* Maaseadusega võõrandatud maade eest tasu maksmise

Eventually, the question of compensation was settled in the manner proposed by the Government and in 1926 the II Parliament passed the corresponding statute.[57] The Social Democrats proposed holding a referendum on the Compensation Act on 5 March 1926. If their proposal had received majority support in the Parliament, the people may well have voted against paying compensation. The III Parliament was elected in May 1926 and the Social Democrats, inspired by their electoral success, proposed a draft for referendum on 10 August 1926 which would have legalised not paying compensation. On 25 October of the same year, a demand for a referendum with 500 signatures was presented to the Parliament. In accordance with Section 15 of the Constitution, arrangements for a referendum began. The Parliament declared another round of signature collection, which ended on 23 December with 76 450 valid signatures.[58] According to Section 32 of the Constitution, this meant the dissolution of the Parliament and new elections.

The Board of the Parliament, however, started a new debate. The so-called bourgeoisie parties argued that the expropriation of lands under the Land Reform Act can be considered as legislation on taxation and according to Section 34 of the Constitution, legislation regarding taxation was not to be subject to referenda. The tax legislation argument had been introduced to the legal discussion by the aforementioned professor Berendts. He regarded expropriation of land without compensation as taxation of a certain amount of property, making it exempt from referenda.[59] Kaarel Parts, Chief Justice of the Supreme Court, did not agree with Berendts. He said that the relevant arguments originated from the state socialist economist Adolph Wagner (1835–1917) who thought that expropriation of land for societal purposes was included in the definition of taxation. Parts claimed that the Land Reform Act had different aims than a tax law, and any decisions ought to be based on the statutory order and the will of the legislator, and not arise from competing scientific theories. If the Land Reform Act and Compensation Act could be counted as tax laws, then so could any laws that had an effect on the state budget be considered as tax legislation.[60] This was Parts' dissenting opinion, which he published in a legal journal after the Board of the Parliament had concluded, after a consultation with legal experts on 7 February 1927, that the Land Reform Act was an act of legislation on taxation and therefore as exempt from being voted on in a referendum. The professors Uluots and Piip were also present at the consultation in addition to Parts. Referencing the expert opinion, the board ruled with three votes to two that the draft of Social Democrats was legislation on taxation, deciding not to present it to the Parliament for confirmation.[61] Artur Mägi (1904–1981), then a law student at the University of Tartu and later a university teacher, the secretary general of the elections to the National Assembly and the VI Parliament, the Secretary of State and the Chancellor of Justice of the Estonian government in exile and one of the most important scholars of constitutional law in Estonia later

küsimus [The question about compensation for lands expropriated with the Land Reform Act]. *Õigus*, No. 1, 1926, pp. 1–9, No. 2, pp. 33–41.

[57] Riikliku maatagavara loomiseks võõrandatud maade eest tasumaksmise seadus [Law on paying fee for expropriated land which was created for national land reserve] (05.03.1926). *State Gazette*, No. 26, 1926.

[58] *Uuet, L.* Ärajäänud rahvahääletus [The cancelled referendum]. *Postimees*, 30.01.2021, pp. 6–7.

[59] *Berendts, E.* Die Verfassungsentwicklung Estlands, p. 201.

[60] *Parts, K.* Mis on "maksuseaduste" all Põhiseaduse § 34 mõeldud [What is meant with "tax laws" in article 34 of the Constitution]? *Õigus*, No. 1, 1927, pp. 6–10.

[61] *Uuet, L.* Ärajäänud rahvahääletus [The cancelled referendum], p. 7.

claimed: "It is clear that the course of action taken by the Board of Parliament was unconstitutional. The Board had already given permission to the Social Democrats to present their draft and had declared it constitutional. A different opinion by a panel of experts did not justify a change of the decision by the Board, particularly as such a privately expressed opinion had no binding authority. Section 34 of the Constitution also contained a specific list of matters that could not be decided by a referendum." The Parliament and its Board in particular had no authority to extend this list "by means of interpretation".[62]

In 1927, though, life and legal practice went on as if the decision of the Board of Parliament had been constitutional. In accordance with the Compensation Act of 5 March 1926, committees were formed and payments of compensation for expropriated land started, albeit, in the opinion of the former estate owners, in a manner too slow and shamefully stingy. Perhaps the fact that even some kind of a solution could be found for the question of compensation was the reason why the second Constitution of the Republic of Estonia, passed in 1937 included a clause on the protection of private property with all its elements as had already been proposed by Uluots for the Constitution of 1920: "Article 26. The right to property is protected. Any restrictions to those rights shall be determined by relevant legislation. Expropriation of private property without the consent of the owner can only take place in accordance with the law in the general interest and for a just compensation. The right to settle the matter in court is ensured for any disputes."

Summary

The early years of the land reform were marked by the expropriation of large-scale land holdings and the creation of a national land reserve. Although it formed the basis of the land reform, it was not by far limited to that. In order to execute the land reform, far wider legal basis was necessary. The redistribution of the lands followed and, in some cases, also returning of these lands. Redistribution was not possible without exact planning of the land which was not an easy task, considering the large amount of distributed land and the great numbers of eligible beneficiaries. All this required a lot of further laws, decrees and ordinances, which could not be reviewed in the current paper. Here we could only present the very first decisions and legal solutions concerning the Estonian land reform, as well as their backgrounds. In terms of their significance, however, both the expropriation of the lands and the question of compensation for these lands have been fundamental in their nature and have shaped the image of land reform in Estonia, especially outside the country to a greater extent than all the other stages of the same reform.

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Appointment of the Constitutional Court Justice: Some Issues

Dr. iur. **Anita Rodiņa**
Faculty of Law, University of Latvia
Associate Professor of the State Law Department
E-mail: *anita.rodina@lu.lv*

This article analyses important issues brought up in public regarding one of the constitutional institutions – formation of the Constitutional Court. At the outset, the article looks at the models of accessing the position of the Constitutional Court justice, their weaknesses and also responsibility of persons engaged in the appointment of justices. Challenges of parliamentary procedures are also discussed, especially considering that the platform *e-Saeima* was used as the voting platform to appoint the justice. The article also reflects a debate on whether a Constitutional Court justice can be appointed only once in a lifetime, keeping in mind the recent amendments to the Constitutional Court Law, including reappointment mechanism if the judge has had to leave the position before expiration of 10 years' mandate. Finally, the article analyses the role and meaning of decisions made by a special institution – Judicial Council – when appointing the Constitutional Court justice.

Keywords: justice, appointment, Constitutional Court, *Saeima*, Judicial Council.

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Introduction

In every society, judges play an important role as they are invited to protect the Constitution and democracy as such[1] and actually "hold mighty power in their hands"[2]. The role of a justice has been widely discussed both in doctrine[3] and in

[1] *Barak, A.* The Judge in a Democracy. Princeton: Princeton University Press, 2008, p. 20.
[2] *Levits, E.* Par dažiem tiesneša neatkarības aspektiem [On some aspects of the independence of a justice]. *Latvijas Republikas Augstākās Tiesas Biļetens*, No. 16, 2018, p. 69.
[3] See for instance, *Shetreet, Sh.*, *Forsyth, Ch.* (eds.). The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges. Leiden: BRILL, 2011; *Barak, A.* The Judge in a Democracy.

practice.[4] No doubt, persons who engage in selection and appointment of the justice or in process which leads to granting this special status, undertake an immense responsibility.

Considering the special role of the Constitutional Court in the state, all the countries with Constitutional Courts employing a special model of European constitutional control always put great emphasis on appointment of the justice of that court. Latvia is no exception in this regard, and appointment of the Constitutional Court justice, particularly considering the entire process, always entails some "excitement" for persons who are directly involved in the process or observe it.

Appointment of the Constitutional Court justice, discussions on candidates and appointment of the justice saw a lot of novelties on the second half of 2020. Firstly, there were five candidates running for the position of the justice. Almost each coalition party and opposition members offered their candidates, a move unprecedented so far. Besides, the Constitutional Court justice failed to be appointed in seven election rounds. Secondly, appointment of the Constitutional Court justice allowed returning to an issue debated many years ago, namely, if a person who had once assumed a position of the Constitutional Court justice can be reappointed. Thirdly, the Judicial Council for the first time in its history created a new formula of decision – its opinion – when presenting its point of view on the candidates of justice.

1. Appointment of the Constitutional Court Justice: Persons, Decisions and Responsibility

In order to ensure building of competent and independent Constitutional Court, all countries usually put a lot of effort in formation of corps of the Constitutional Court judges. It cannot be denied that the Constitutional Court may fulfil its mission only if the justices are impartial and independent from politicians, persons who have appointed them, and are free from any external influence.[5] An independent court is an essential guarantee of democracy and freedom in each country.[6] Also experience of the European Court of Human Rights recognises the appointment of the justice as one of the elements of the judge's independence.[7]

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[4] See for instance, Judgement of 18 January 2010 by the Constitutional Court of the Republic of Latvia in case No. 2009-11-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/05/2009-11-01_Spriedums_ENG.pdf#search=2009-11-01 [last viewed 28.03.2021]; Judgement of 14 December 2010 by the Constitutional Court of the Republic of Latvia in case No. 2010-39-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/05/2010-39-01_Spriedums_ENG.pdf#search=2010-39-01 [last viewed 28.03.2021]; Judgement of 26 October 2017 by the Constitutional Court of the Republic of Latvia in case No. 2016-31-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/12/2016-31-01_Judgment_ENG-3.pdf#search=2016-31-01 [last viewed 28.03.2021].

[5] *Schwartz, H., Lee, H. P.* (eds.). The Struggle for Constitutional Justice in Post-Communist Europe. Chicago: University of Chicago Press, 2000, p. 39.

[6] *Shetreet, S.* Judicial Independence and Accountability: Core Values in Liberal Democracies. In: Judiciaries in Comparative Perspective. Cambridge: Cambridge University Press, 2011, p. 3. Available: http://ebookcentral.proquest.com/lib/lulv/detail.action?docID=775093 [last viewed 28.03.2021].

[7] Judgement of the European Court of Human Rights *Case of Findlay v. The United* (application No. 22107/93), para. 73. Available: http://hudoc.echr.coe.int/eng?i=001-58016 [last viewed 28.03.2021].

It can be said that a way of appointing the justice, appointment criteria and term of the mandate are crucial factors behind the court's independence and autonomy.[8]

Theoretician A. S. Sweat speaks of two appointment systems for the Constitutional Court judges.[9] a study conducted by the Venice Commission "Democracy Through Law" lists three systems for Constitutional Court justice appointment.[10] The first is the co-called nomination or direct appointment system when a person holding such right chooses a justice nominee and there are no other procedures required (approval or electing). Nomination system according to Article 56 of the French Constitution is applied when forming the Constitutional Council of France.[11] It is known that all former presidents of France *ex officio* are members of the Constitutional Council of France, as well. In this system, nomination of justice mostly depends on politics and politicians, because even though a justice must qualify for certain requirements, political influence cannot be excluded.

The second is the election system with the parliament as the last instance in decision-making. Decision to appoint the judge usually requires a qualified majority. In this system, the final decision is left to the parliament regardless of the persons who can nominate the candidates. Even though the studies show that this system aims at ensuring more democratic representation, it still depends on agreement in politics and among politicians, especially if a qualified majority is required to approve the candidate in the position.[12] On the other hand, even it is impossible to avoid political influence on appointment of a justice[13], it cannot be treated as inherently dangerous.[14] The main criteria when choosing a justice should be his/her professional qualities, compliance with certain requirements, not his/her support for an ideology or lines of some political parties. This is the model pursued when forming the Constitutional Court in Germany, Lithuania, Slovenia and Poland.[15] The Constitutional Court justice is also appointed based to this system in

[8] *Engstad, N. A.* (ed.), et al. The Independence of Judges. The Hague: Eleven International Publishing, 2014, p. 67. Available: http://ebookcentral.proquest.com/lib/lulv/detail.action?docID=1922214 [last viewed 28.03.2021].

[9] *Sweet, A. S.* Governing with Judges: Constitutional Politics in Europe. Oxford: Oxford University Press, 2000, p. 46.

[10] The Composition of Constitutional Courts. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 4. Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e [last viewed 28.03.2021].

[11] Three of the 9 members of the French Constitutional Council are nominated by the President, three by the President of the National Assembly and three by the President of the Senate. See Constitution of October 4, 1958. Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf [last viewed 26.01.2021].

[12] *Sadurski, W*. Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe. The Netherlands: Springer, 2005, p. 15; The Composition of Constitutional Courts. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 7. Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e [last viewed 26.01.2021].

[13] *Ferejohn, J.* Judicializing Politics, Politicizing Law. *Law and Contemporary Problems*, Vol. 65, No. 3, Summer 2002, p. 43.

[14] *Safjan, M*. Politics – and Constitutional Courts (Judge's Personal Perspective). *Polish Sociological Review*, Issue 1, January 2009, pp. 3–25.

[15] The Composition of Constitutional Courts. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 5. Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e [last viewed 26.01.2021].

Latvia and a decision of the *Saeima* emphasizes independence of justices.[16] That is to say, regardless of the fact that implementers of all three functions of state power are involved in nomination of justices, the last word is reserved to politicians – the parliament; besides, the candidate must win 51 votes of the *Saeima* members to get this position.[17]

The third system, which is a hybrid of both previous systems, must be emphasized, as well. This system is applied when forming the corps of Constitutional Court in Austria, Spain, Romania and Italy.[18]

In doctrine, other division of those systems is also known. For example, M. De Visser offers three types of systems by considering the institutions involved in decision making (only parliament (I), parliament and executive power (II), various institutions (III)).[19]

In compliance with Article 4(1) of the Constitutional Court Law, three persons (institutions) are entitled to nominate the Constitutional Court justice: 10 *Saeima* deputies, Cabinet of Ministers and plenary meeting of the Supreme Court.[20] In forming the corps of the Constitutional Court, they abide by the principle that the next candidate is nominated by an entity (person) who previously nominated the justice whose mandate has expired regardless of the reason (expiration of term, his/her initiative, reaching of certain age, dismissal or losing of the office). At the end of 2020, 10 deputies of the *Saeima* became entitled to nominate the candidate of the Constitutional Court justice. As already stated, this time five candidates were running for the justice position.[21] Each of the ten *Saeima* deputies are not prevented from exercising such rights granted under Article 4(1) of the Constitutional Court Law. It was nevertheless unusual that coalition parties (union of parties "Jaunā Vienotība", political party "KPV LV", New Conservative Party, union of parties "Attīstībai/Par!", National Alliance "Visu Latvijai!" – "Tēvzemei un Brīvībai/LNNK") did not manage to agree on one candidate.[22] Legally, the majority of the *Saeima* is not bound by an obligation to agree on one candidate. Of course, unity and consolidation of current coalition is another issue which does not pertain to the law. At the same time, when promoting their nominees, the political parties must always consider if any of these numerous candidates can obtain the necessary 51 votes.

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[16] Judgement of 5 November 2004 by the Constitutional Court of the Republic of Latvia in case No. 2004-04-01, para. 10.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2004/04/2004-04-01_Spriedums_ENG.pdf#search=2004-04-01 [last viewed 28.03.2021].

[17] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922), art. 85. Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme [last viewed 28.03.2021].

[18] The Composition of Constitutional Courts. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 5. Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e [last viewed 26.01.2021].

[19] *De Visser, M.* Constitutional Review in Europe: A Comparative Analysis. Oxford: Hart Publishing, 2014, pp. 206–209.

[20] Satversmes tiesas likums [Constitutional Court Law] (05.06.1996). Available: https://likumi.lv/ta/id/63354-satversmes-tiesas-likums [last viewed 28.03.2021].

[21] Lēmumprojekta teksts: "Par Satversmes tiesas tiesneša apstiprināšanu" [Text of the draft decision: On approval of a judge of the Constitutional Court]. Available: https://titania.saeima.lv/LIVS13/saeimalivs_lmp.nsf/0/D2C8717CB92BA9A7C225860F00321943?OpenDocument [last viewed 26.01.2021].

[22] Latvijas Republikas Ministru kabinetu veidojošo 13. Saeimas frakciju sadarbības līgums [Cooperation Agreement of the 13th *Saeima* Factions Forming the Cabinet of Ministers of the Republic of Latvia]. Available: https://mk.gov.lv/sites/default/files/editor/sadarbibas_ligums_gala-redakcija_red.pdf [last viewed 26.01.2021].

Undoubtedly, it is in the best interests of society that the best lawyers work in the court. The Constitutional Court is an important constitutional institution which has a power to invalidate a legal provision adopted by the legislator. Therefore, it is crucial to appoint persons with the highest possible professional qualification in this very important office – Constitutional Court justice.[23] Professional knowledge and personal qualities are recognised as fundamental prerequisite of justice's independence.[24] For this reason, the legislation has set high requirements for candidate to the post of justice. Such requirements integrated in the Constitutional Court Law (Article 4, paragraph 2[25]) match the common trends in other European countries. They are sufficient and adequate. Experience of the European countries shows that, for instance, in constitutional courts of Germany, Italy and Spain justices are law professors followed by justices of other courts, then lawyers.[26] Former politicians may also become justices, it is very common in the Constitutional Council of France. The former politicians have been seen assuming Constitutional Court justice office also in Latvia. It was notable in the so-called first composition of the Constitutional Court, where the court comprised several ex-politicians (Prof. A. Endziņš, Prof. I. Čepāne, Prof. R. Apsītis). In other words, it is a duty of all three entities (persons) who participate in candidate nomination procedure and after – Judicial Council and also the *Saeima* (Legal Commission and collegial institution of the *Saeima*) – to ensure that the best law specialists (or lawyers) work in the Constitutional Court.

Appointment of the Constitutional Court justice at late 2020[27] was unique also because voting took place in a remote *Saeima* sitting, using the platform *e-Saeima*. A need to use such platform was associated with varying restrictions imposed to limit the spread of COVID-19.[28] It must be explained that the Constitution does not

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[23] Judgment of 18 October 2007 by the Constitutional Court of the Republic of Latvia in case No. 2007-03-01, para. 24.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/01/2007-03-01_Spriedums_ENG.pdf#search=2007-03-01 [last viewed 28.03.2021].

[24] *Engstad, N. A.* The Independence …, p. 3.

[25] Article 4(2) of the Constitutional Court Law determines that such person may be appointed as a justice of the Constitutional Court who:
1) is a citizen of the Republic of Latvia;
2) has an impeccable reputation;
3) has reached 40 years of age, on the day when the proposal regarding the confirmation as a justice of the Constitutional Court was submitted to the Presidium of the *Saeima*;
4) has acquired a higher professional or academic education (except the first level professional education) in law science and also a master's degree (including a higher legal education, which in regard to rights is equal to a master's degree) or a doctoral degree;
5) has at least 10 years of service in a law speciality or in a judicial speciality in scientific educational work at a scientific or higher educational establishment after acquiring a higher professional or academic education (except the first level professional education) in law science.
Paragraph 2.[1] of the same Article, in turn, stipulates that a person who cannot be a candidate for the position of a justice in accordance with Art. 55 of the Law "On Judicial Power" may not be appointed as a justice of the Constitutional Court. Satversmes tiesas likums [Constitutional Court Law] (05.06.1996). Available: https://likumi.lv/ta/id/63354-satversmes-tiesas-likums [last viewed 28.03.2021].

[26] *Sweet, A. S.* Governing with Judges, p. 48.

[27] Latvijas Republikas 13. Saeimas rudens sesijas četrdesmit trešā (attālinātā ārkārtas) sēde 2020. gada 21. decembrī [Forty-third (remote extraordinary) sitting of the 13th autumn session of the *Saeima* of the Republic of Latvia on 21 December 2020]. Available: https://www.saeima.lv/steno/Saeima10/Skana/1221_001-1200.htm [last viewed 26.01.2021].

[28] Ministru kabineta 2020. gada 6. novembra rīkojums Nr. 655 "Par ārkārtējās situācijas izsludināšanu" [Cabinet of Ministers Order of 6 November 2020 No. 655 "On the declaration of extraordinary situation"]. *Latvijas Vēstnesis*, No. 216A, 06.11.2020.

allow delegating parliamentary functions to another constitutional body due to an extraordinary situation. The *Saeima* was obliged to find a way to continue operating as a legislator, since the activity of the parliament as the single constitutional body of the state is essential and indispensable under any circumstances. This principle was strengthened in the statement of the State President dated 23 March 2020 on operational principles of the State adopted by the constitutional power entities to overcome extraordinary situation, stressing that the *Saeima* should continue working also remotely, whenever required, to organise work of the *Saeima*.[29] When an extraordinary situation was declared nation-wide, the *Saeima* started working in the extraordinary mode, concurrently developing an online platform *e-Saeima*. *E-Saeima* is found to be a modern tool of the 21st century suitable for work of the *Saeima* and a custom-made technology for specific procedures, allowing to implement parliament procedures during physical absence from the *Saeima* building.[30] Domain of constitutional law of Latvia has seen discussions on compliance of this platform with Article 15 of the *Satversme* stating that the *Saeima* shall hold its sittings in Riga, and only in extraordinary circumstances may it convene elsewhere.[31] This discussion was actually ended by the judgement of the Constitutional Court which, among other questions, evaluated compliance of the *e-Saeima* platform with the Constitution, stating that "[h]olding of a remote *Saeima* sitting is an extraordinary measure enabling continued work of the parliament also under circumstances where deputies cannot meet in person due to epidemiological safety and restrictions imposed in this regard. It is crucial to create a mechanism in the State to allow continuation of the parliament's activities and deciding on important issues by the legitimate constitutional body."[32]

An interesting procedural issue emerged during appointment (voting) procedure at the *Saeima* sitting. Pursuant to the *Saeima* Rules of Procedure, Article 31(8), if the number of nominees for a position exceeds the number of officials to be elected, the voting takes place (may take place) in several rounds.[33] In compliance with the *Saeima* Rule of Procedures, Article 26(4), if nobody collects the necessary number of votes in the first round, the voting is repeated for all the candidates. If nobody is elected then, the elections continue by excluding a candidate who received the least votes in previous round. The elections continue until one of candidates gets the necessary number of votes. Voting for the Constitutional Court justice in the second round of the *Saeima* sitting of 21 December 2020 led to equal number of

[29] Valsts prezidenta paziņojums Nr. 8 "Valsts konstitucionālo orgānu darbības pamatprincipi ārkārtējā situācijā" [President Notification No. 8 "Basic Principles of Activity of State Constitutional Bodies in an Extraordinary Situation"], para. 3. Available: https://likumi.lv/ta/en/en/id/313400 [last viewed 28.03.2021].

[30] E-Saeima. Available: https://www.saeima.lv/lv/likumdosana/saeimas-sedes/e-saeima/ [last viewed 28.03.2021]; see also *Lībiņa-Egnere, I.* Par e-Saeimas jauno platformu un tās priekšrocībām [About the new e-Saeima platform and its advantages]. *Jurista Vārds*, No. 23(1133), 09.06.2020, pp. 5–6.

[31] See for instance, *Pleps, J.* Saeima turpina noturēt sēdes attālinātā veidā [The Saeima continues to hold sittings remotely]. *Jurista Vārds*, No. 24/25(1134/1135), 16.06.2020, pp. 6–7; *Meistare, D.* Saeimas Juridiskā biroja viedoklis par Saeimas attālinātajām sēdēm [Opinion of the Legal Bureau of the Saeima on remote sittings of the Saeima]. *Jurista Vārds*, No. 24/25(1134/1135), 16.06.2020, pp. 5–6.

[32] Judgement of 12 March 2021 by the Constitutional Court of the Republic of Latvia in case No. 2020-37-0106, para. 4.2.24. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/07/2020-37-0106_spriedums-1.pdf#search=2020-37-0106 [last viewed 28.03.2021].

[33] Saeimas kārtības rullis [*Saeima* Rules of Procedure] (28.07.1994). Available: https://likumi.lv/ta/id/57517-saeimas-kartibas-rullis [last viewed 28.03.2021].

votes for two candidates (Gunārs Kūtris – 13 votes "for" and 80 votes "against" and Inese Druviete with 13 votes "for" and 80 votes "against").[34] Pursuant to Article 26(4) of the aforementioned law, in the next – third – round, four candidates would proposed for election. Since the least number of votes was received by two candidates, the Chair of *Saima* and Chair of the *Saeima* sitting found a quick solution, announcing the third round of elections with all five candidates and laying down a condition that "[i]f the number of least votes for the candidates will be equal, we will vote for three candidates in the round four."[35] Nobody was elected as the Constitutional Court justice in the sitting of 21 December 2020, because also in the last round Mrs I. Ņikuļceva received only 47 votes of the *Saeima* deputies.[36]

Since the parliament did not manage to appoint any of the five nominated justice candidates at the end of 2020, it does not automatically mean that the procedure of Constitutional Court justice appointment in Latvia is incorrect and inadequate. It has been useful and appropriate all the previous years. Obviously, the problem lay in achieving common ground in the parliament and differing views of the position members at the parliament, which cannot be affected by the law.

2. Restriction on Justice Reappointment: A Myth or Reality

One of issues brought to light by appointment of the Constitutional Court justice in 2020 concerned a question whether a person can be appointed as the Constitutional Court justice for given term only once in a lifetime, or can he/she be reappointed.[37]

It must be specified that normative regulation in Latvia is not very explicit and accurate in prohibiting a person to be reappointed to the office of the Constitutional Court judge as it is, for example, in Poland[38], Slovenia[39], Slovakia[40], Germany[41] and a number of other countries.[42] The doctrine of Latvia has witnessed contrary opinions in this regard.[43] Author of this article admits that by commenting on

[34] Latvijas Republikas 13. Saeimas rudens sesijas četrdesmit trešā (attālinātā ārkārtas) sēde 2020. gada 21. decembrī [Forty-third (remote extraordinary) sitting of the 13th *Saeima* autumn session of the Republic of Latvia on 21 December 2020].

[35] Latvijas Republikas 13. Saeimas rudens sesijas četrdesmit trešā (attālinātā ārkārtas) sēde 2020. gada 21. decembrī [Forty-third (remote extraordinary) sitting of the 13th *Saeima* autumn session of the Republic of Latvia on 21 December 2020].

[36] Ibid.

[37] Lēmumprojekta teksts: "Par Satversmes tiesas tiesneša apstiprināšanu" [Text of the draft decision: On approval of a justice of the Constitutional Court].

[38] The Constitution of The Republic of Poland. Article 194, para. 1. Available: https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/ [last viewed 28.03.2021].

[39] Constitution of Slovenia. Article 165, para. 1. Available: https://www.us-rs.si/legal-basis/constitution/?lang=en [last viewed 28.03.2021].

[40] The Constitution of the Slovak Republic. Article 134, para. 3. Available: https://www.prezident.sk/upload-files/46422.pdf [last viewed 28.03.2021].

[41] Act on the Federal Constitutional Court. Article 4, para. 2. Available: https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=10 [last viewed 28.03.2021].

[42] See The Composition of Constitutional Courts. European Commission for Democracy Through Law, CDL-STD (1997)020, pp. 13–15. Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e [last viewed 28.03.2021].

[43] See *Neimanis, J.* Tiesneša atkārtotas apstiprināšanas aizliegums Satversmes tiesā [Prohibition of reappointment of a justice in the Constitutional Court]. *Jurista Vārds*, No. 4(1166), 26.01.2021 and also *Priekulis, J.* Par tiesībām atkārtoti ieņemt Satversmes tiesas tiesneša amatu [On the right to re-hold the position of a justice of the Constitutional Court]. *Jurista Vārds*, No. 4(1166), 26.01.2021.

Article 85 of the Constitution, which is the basis of the Constitutional Court's legitimacy, both debates on this issue when elaborating the Constitutional Court Law in the *Saeima* and arguments stating that regardless of revising the provision (Article 7(3) of the Constitutional Court Law) "[o]ne and the same person may not hold the position of a Constitutional Court judge for longer than ten consecutive years", the person should be appointed as Constitutional Court justice only once in a lifetime.[44]

In order to understand this issue, it must be analysed in context of recent developments associated with the appointment of Mrs. I. Ziemele as a justice of the Court of Justice of the European Union and amendments to the Constitutional Court Law.[45] Actually, the mandate term of Mrs. I. Ziemele as the Constitutional Court justice, i.e., 10 years, had not expired when she assumed the new position (in Court of Justice of the European Union). In order to allow Mrs. I. Ziemele to return to the Constitutional Court at a later point, the Constitutional Court Law was amended. Analysis of *Saeima* materials reveals that a proposal to include the following provision in first sentence of Article 7 of the Constitutional Court Law: "[i]f a person has left the position of the Constitutional Court justice to assume a position in international court or to represent the State of Latvia by assuming a position in an international institution and no more than 10 years have elapsed since leaving the position of Constitutional Court justice, this person may be reappointed for the remaining mandate period" was submitted by the Minister for Justice, J. Bordāns and it was supported also by the Legal Commission of the *Saeima*.[46] J. Bordāns wrote a letter to the Legal Commission where he elaborated on the main arguments of his proposal: to promote the best professionals to work in international institutions, also keeping the door open for their returning to Latvia and provide an opportunity to work as the Constitutional Court justice for the intended 10 years once in a lifetime, and to split this period, if necessary, taking into account interests of the State (best representation).[47] Besides, the minister based his proposal on what the doctrine said about Article 7(3) of the Constitutional Court Law and that it "is interpreted to mean that a person can be a Constitutional Court justice only once in a lifetime and not more than for 10 years altogether."[48]

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[44] *Rodiņa, A., Spale, A.* Satversmes 85. panta komentārs [Commentary to Article 85 of the Constitution]. In: Latvijas Republikas Satversmes komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole [Comments on the Constitution of the Republic of Latvia. Chapter VI. The Court. Chapter VII. State Control]. Collective of authors, scientific ed. Prof. *Balodis, R.* Rīga: Latvijas Vēstnesis, 2013, pp. 151–152.

[45] Sāks pildīt EST tiesneša pienākumus [Will start the duties of a judge of the CJEU]. *Jurista Vārds*, No. 39(1149), 29.09.2020.

[46] Latvijas Republikas 13. Saeimas ārkārtas sesijas attālinātā sēde 2020. gada 2. jūlijā [13th *Saeima* of the Republic of Latvia, remote sitting of an extraordinary session on 2 July 2020]. Available: http://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/E7DA72F06903BD48C22585EE004A44C5?OpenDocument [last viewed 26.01.2021]; Latvijas Republikas 13. Saeimas rudens sesijas pirmā (ārkārtas) sēde 2020. gada 3. septembrī [The first (emergency) sitting of the autumn session of the 13th *Saeima* of the Republic of Latvia on 3 September 2020]. Available: http://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/27CBAA76F2E67346C22585DE0022D824?OpenDocument [last viewed 26.01.2021].

[47] Ministru prezidenta biedra, Tieslietu ministra J. Bordāna 18.05.2020. vēstule Nr. 1-11/1636 Latvijas Republikas Saeimas Juridiskās komisijas priekšsēdētājam J. Jurašam [Deputy Prime Minister, Minister of Justice J. Bordans 18.05.2020. letter No. 1-11/1636 to the Chairman of the Legal Commission of the *Saeima* of the Republic of Latvia J. Jurass]. Available: http://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/B060CCA35A65CEA9C225856D0022CA49?OpenDocument [last viewed 26.01.2021].

[48] Ibid.

Amendments to the Constitutional Court Law were adopted in the *Saeima* on 3 September 2020 and they came in force on 29 September 2020.[49]

This time the mechanism integrated in this new paragraph 1 of Article 7 is not so important. A special emphasis must be placed on a fact that the new provision does not guarantee justice's (for example, for Mrs. I. Ziemele) returning for the remaining mandate term, but to participate in justice selection from the very beginning, in line with the justice nomination procedure. In the author's opinion, it is important that "returning mechanism" included in paragraph 1 of Article 7 reflected an understanding of the *Saeima's* composition of that time of Article 7(3) of the Constitutional Court Law: A person may assume Constitutional Court justice position for full 10 years, including also breaks in between, which is stipulated in the new paragraph 1 of Article 7, only once in a lifetime. If this provision were understood differently, there would be no sense whatsoever to amend the Constitutional Court Law and add this new "returning mechanism" of a justice, since then, for example, Mrs. I. Ziemele could again become the Constitutional Court justice for a new 10-year term instead of the remaining term stipulated in Article 7(1).

When the previously mentioned amendments to the Constitutional Court Law came in force, a person who had been a justice for entire 10 years was nominated as the candidate after all. This issue appeared in the Judicial Council in a section of questions and answers, however, nothing was said about it in a decision on this Constitutional Court justice's candidate. It is possible that this issue was debated among the members of the Judicial Council, but it was not reflected in the available decision. It is also possible that debates were not held (on this issue) in the Judicial Council and it did not even notice any obstacles in this aspect. More accurately, this assumption is only a probability, since materials of the Judicial Council which would reflect this discussion is not publicly available.

The *Saeima* Legal Commission (as revealed in the minutes of the sitting) decided that "all nominated Constitutional Court justice candidates meet all the criteria and all candidates are suitable for a position of the Constitutional Court justice."[50] In this case, one Commission member voted against, since she believed that not all candidates qualified for the criteria, however, she did not specify which criterion exactly or which candidate or candidates did not qualify. The decision of the *Saeima* Legal Commission certainly raises a question as to what an opinion of the *Saeima* Commission was regarding this so-called "second chance issue", because the opinion of the Legal Commission stated on 27 October 2020 did not match or it was contrary to the one expressed when supporting amendments of the Constitutional Court Law integrating "returning mechanism" of the Constitutional Court justice (Article 7(1)).

Ideally, candidate nominators, i.e., 10 *Saeima* deputies, Cabinet of Ministers and plenary meeting of the Supreme Court, first of all, are responsible for nominating a person as the Constitutional Court justice once in a lifetime. Afterwards, other persons involved – Judicial Council and the *Saeima* – may express their opinions in

[49] Grozījumi Satversmes tiesas likumā [Amendments to the Constitutional Court Law] (03.09.2020). Available: https://www.vestnesis.lv/op/2020/178.5 [last viewed 28.03.2021].

[50] Saeimas Juridiskās komisijas 2020. gada 27. oktobra sēdes protokols Nr. 151 [Minutes of the sitting of the *Saeima* Legal Commission of 27 October 2020 No. 151]. Available: http://titania.saeima.lv/livs/saeimasnotikumi.nsf/0/06dba78d96c5e0b2c225860800463b84/$FILE/PR_2020_10_27_10_00_JK.pdf [last viewed 26.01.2021].

this regard. This time, the persons involved remained silent, obviously believing that there are no obstacles for a person to assume the position repeatedly.

3. Decision of the Judicial Council or What is Expected from the Judicial Council

Article 4(5) of the Constitutional Court Law states that "The Presidium of the *Saeima* shall inform the Judicial Council regarding the candidacies for Constitutional Court justice position, inviting to provide an opinion on them." This provision was included in the Constitutional Court Law on 19 May 2011 when adopting the law "Amendments to the Constitutional Court Law"[51] – after a similar provision was already integrated in another law. Paragraph 3 of Article 89[11] of the Law "On Judicial Power" (amendments of 3 June 2010) stated that "The Judicial Council shall hear the candidates for the office of a justice of the Constitutional Court and provide an opinion on them to the *Saeima*."[52] Annotation of the amendments to Article 4(5) of the Constitutional Court Law reveals a remark that "[a]mendments to the Constitutional Court Law must be made in a way to harmonise its wording also with other laws already in force."[53] Provisions included in these two normative acts are complementary, not mutually excluding, creating a mechanism for the Judicial Council to engage in the appointment of the Constitutional Court justice.

Involvement of the Judicial Council in this procedure is rather unique, since usually other persons/institutions comprising professionals or public representatives are not engaged in appointment of the Constitutional Court justice.[54] Transcript of the *Saeima* sittings shows that this provision was not particularly debated.[55] However, it is most likely that the legislator wanted to involve the Judicial Council in forming of the corps of Constitutional Court judges, considering its composition and also the tasks[56], in order to evaluate the candidate professionally and impartially.

The Judicial Council must, firstly, hear out the candidate and, secondly, present its opinion on them. Hearing obligation allows a candidate to speak about their suitability for this position, to answer the questions. Meanwhile, a phrase "to present its opinion on them" which is integrated in the law means providing a substantiated and understandable opinion adopted by a collegial institution regarding a particular person. The legislator, most probably, expected to hear an opinion from the Judicial

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[51] Grozījumi Satversmes tiesas likumā [Amendments to the Constitutional Court Law] (19.05.2011). Available: https://likumi.lv/ta/id/230990-grozijumi-satversmes-tiesas-likuma [last viewed 28.03.2021].

[52] Grozījumi likumā "Par tiesu varu" [Amendments to the Law "On Judicial Power"] (03.06.2010). Available: https://likumi.lv/ta/id/212199-grozijumi-likuma-par-tiesu-varu- [last viewed 28.03.2021].

[53] Likumprojekta "Grozījumi Satversmes tiesas likumā" anotācija [Annotation of the draft law "Amendments to the Constitutional Court Law"]. Available: http://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/A8825E46508D27C4C22577D80024DB17?OpenDocument [last viewed 26.01.2021].

[54] *Schwartz, H., Lee, H. P.* The Struggle …, p. 42.

[55] See Materiāli likumprojektu reģistrā likumprojektam "Grozījumi likumā "Par tiesu varu"" Nr. 165 [Materials in the *Saeima* draft law register No. 165. Amendments to the Law "On Judicial Power"], p. 9. Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/webSasaiste?OpenView&restrictto category=1657/Lp9 [last viewed 26.01.2021].

[56] *Bičkovičs, I.* Tieslietu padome ir tiesu neatkarības stiprināšanas garants [The Judicial Council is a guarantor of strengthening the independence of the judiciary]. *Latvijas Republikas Augstākās Tiesas Biļetens*, No. 16, 2018, p. 97.

Council on suitability of the candidate for given position covering two important aspects. Firstly, the Council should evaluate what the candidate has achieved and done before in his/her professional carrier. Secondly, the Council should evaluate whether the candidate is able to deliver what is expected from the Constitutional Court justice, taking into account his/her professional and personal qualities. The Judicial Council can, of course, define and come up with their own evaluation criteria.

Decisions of the Judicial Council regarding the Constitutional Court justice candidates can be divided in two groups.

Decisions of the Judicial Council regarding the Constitutional Court justice candidates were concise and constructive until 26 October 2020. They expressed support for appointing a relevant candidate to this position. It was the case with candidates S. Osipovs[57], I. Ziemele[58], A. Laviņš[59], G. Kusiņš[60], D. Rezevska[61], A. Kučs[62], J. Neimanis[63]. It is noteworthy that in these cases the Judicial Council had to express an opinion only about one nominee.

The second period outlines another reality since on 26 October 2020 when Judicial Council had to state its opinion on several candidates for this office. For the first time, the Judicial Council had defined exact criteria which it took into consideration when providing its opinion on them. Namely, evaluation was aimed at: professional authority and professional performance; contribution to development of the legal system; professional and private reputation within the framework of available data; perspective on the place and role of the Constitutional

[57] Tieslietu padomes 04.07.2011. lēmums Nr. 50. Par Satversmes tiesas tiesneša amata kandidāti S. Osipovu [Judicial Council's decision of 04.07.2011 No. 50. On the candidate for the position of a justice of the Constitutional Court S. Osipova]. Available: http://www.at.gov.lv/files/uploads/files/docs/nr50.pdf [last viewed 26.01.2021].

[58] Tieslietu padomes 18.08.2014. lēmums Nr. 48. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 18.08.2014 No. 48. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2014/Nr.48-2014.PDF [last viewed 26.01.2021].

[59] Tieslietu padomes 10.03.2014. lēmums Nr. 10. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 10.03.2014 No. 10. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2014/Lemums%20Nr.10-2014.PDF [last viewed 26.01.2021].

[60] Tieslietu padomes 27.01.2014. lēmums Nr. 1. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 27.01.2014 No. 1. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2014/1_2014.PDF [last viewed 26.01.2021].

[61] Tieslietu padomes 06.10.2015. lēmums Nr. 91. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 06.10.2015 No. 91. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2015/Lemums%20Nr.%2091-2015.pdf [last viewed 26.01.2021].

[62] Tieslietu padomes 15.12.2016. lēmums Nr. 87. Par Satversmes tiesas tiesneša amata kandidātu A. Kuču [Judicial Council's decision of 15.12.2016 No. 87. On the candidate for the position of a justice of the Constitutional Court A. Kučs]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2016/LemumsNr_87-2016.pdf [last viewed 26.01.2021].

[63] Tieslietu padomes 28.11.2016. lēmums Nr. 81. Par Satversmes tiesas tiesneša amata kandidātu J. Neimani [Judicial Council's decision of 28.11.2016 No. 81. On the candidate for the position of a justice of the Constitutional Court J. Neimanis]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2016/Lemusm%20Nr_%2081-2016.pdf [last viewed 26.01.2021].

Court in country.[64] It can be concluded that three capacities of a candidate were subject to evaluation: evaluation of current activity (achievements), evaluation of reputation and evaluation of knowledge about the place and role of the Constitutional Court in a state.

In general, setting of precise criteria of candidate evaluation is a positive sign. They clearly indicate that Judicial Council has set high standards for the Constitutional Court justice candidates. Such criteria, most likely, will be applied also to next prospective Constitutional Court justice candidates, without ruling out a possibility to specify, redefine and change such criteria. In terms of content, the Judicial Council has taken a big step forward when evaluating the Constitutional Court justice candidates according to content and essence. It can be acknowledged as a very good practice.

In the meantime, three decisions of the Judicial Council dated 26 October 2020 revealed a brand new and unprecedented formula. Namely, on the one hand, the Judicial Council approved candidates of the Constitutional Court justice as suitable, yet expressed remarks or commentaries, for instance, "the candidate lacks wider up-to-date perspective on the place of the Constitutional Court in the State".[65] If one takes into account criteria set by the Judicial Council – a perspective on place and role of the Constitutional Court in the State – such decision made by the Judicial Council may lead to think that given candidate has a perspective of the Constitutional Court concerning this criteria, but it is not wide and up-to-date, yet it has not affected the final decision. An even broader formula was included in other decision, where it was admitted that a person is a suitable candidate for the Constitutional Court justice position, nevertheless, a remark was made on lack of authority, practical experience and wider perspective on constitutional issues.[66] Furthermore, here it is possible to conclude that the said shortcomings have not interfered with making the final decision and they have remained insignificant, because they have not influenced the central formula that the candidate is suitable for the position.

Unfortunately, there are no other publicly available materials to understand what considerations have given rise to such remarks. Yet, it is clear that the Judicial

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[64] Tieslietu padomes 26.10.2020. lēmums Nr. 61. Par Satversmes tiesas tiesneša amata kandidāti Inesi Nikuļcevu [Judicial Council's decision of 26.10.2020 No. 61. On the candidate for the position of a justice of the Constitutional Court Inese Nikuļceva]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_61_2020.pdf [last viewed 12.04.2021]; Tieslietu padomes 26.10.2020. lēmums Nr. 60. Par Satversmes tiesas tiesneša amata kandidāti Inesi Lībiņu-Egneri [Judicial Council's decision of 26.10.2020 No. 60. On the candidate for the position of a justice of the Constitutional Court Inese Lībiņa-Egnere]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_60_2020.pdf [last viewed 26.01.2021].

[65] Tieslietu padomes 26.10.2020. lēmums Nr. 62. Par Satversmes tiesas tiesneša amata kandidātu Gunāru Kūtri [Judicial Council's decision of 26.10.2020 No. 62. On the candidate for the position of a justice of the Constitutional Court Gunārs Kūtris]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_62_2020.pdf [last viewed 26.01.2021]; Tieslietu padomes 26.10.2020. lēmums Nr. 58. Par Satversmes tiesas tiesneša amata kandidātu Ringoldu Balodi [Judicial Council's decision of 26.10.2020 No. 58. On the candidate for the position of a justice of the Constitutional Court Ringolds Balodis]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_58_2020.pdf [last viewed 26.01.2021].

[66] Tieslietu padomes 26.10.2020. lēmums Nr. 59. Par Satversmes tiesas tiesneša amata kandidāti Inesi Druvieti [Judicial Council's decision of 26.10.2020 No. 59. On the candidate for the position of a justice of the Constitutional Court Inese Druviete]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_59_2020.pdf [last viewed 26.01.2021].

Council is not merely a formal institution engaged in appointment of the Constitutional Court justice and all the future candidates of the Constitutional Court justice must take into account the named criteria.

Summary

1. It is in the interests of the society if the best lawyers work in the Constitutional Court. A prerequisite of justice's independence and impartiality is also his/her professional competence and personal qualities. Therefore, the legislation has set a high standards and requirements for a justice candidate. Such requirements integrated in the Constitutional Court Law (Article 4, Paragraph 2) match the common trends in other European countries. They are sufficient and adequate.
2. Appointment of the Constitutional Court justice at the end of 2020 in Latvia was unique also because the voting for the Constitutional Court justice took place in a remote *Saeima* sitting, in platform *e-Saeima*. Furthermore, the Chair of the *Saeima* sitting had to quickly resolve an adequate application of Article 26(4) of the *Saeima* Rules of Procedure ensuring a proper voting procedure.
3. Even if the parliament did not manage to appoint any of 5 nominated justice candidates at the end of 2020, it does not automatically mean that the procedure of Constitutional Court justice appointment in Latvia is not good and appropriate. It was useful and correct throughout all the previous years. The problem was obviously in finding compromises in the parliament which is outside the scope of law.
4. Provision of the so-called "returning option" integrated in Article 7(1) of the Constitutional Court Law does not promise a safe return of the justice in his/her position for the remaining mandate term; instead, it offers participation in the justice selection process from the start, in line with the nomination procedure in place.
5. Amendments to the Constitutional Court whereby the law offers a possibility for the Constitutional Court justice to return in his/her position for the remaining term reflects an understanding of current *Saeima* composition on Article 7(3) of the Constitutional Court Law that a person can assume a position of Constitutional Court justice for 10 years only once in a lifetime. If this provision were understood differently, there would be no need to amend the Constitutional Court Law and supplement this new "returning mechanism" of the justice.
6. Involvement of the Judicial Council in appointing of Constitutional Court justice is quite unique. The Judicial Council must, firstly, hear out the candidate and secondly, – present its opinion on him/her. Hearing obligation allows a candidate to speak about his/her suitability for this position, to answer the questions. Meanwhile, a phrase "to present its opinion on them" which is integrated in the law means providing a substantiated and understandable opinion adopted by a collegial institution regarding suitability of particular person for the position.
7. Opinion of the Judicial Council on suitability of a candidate for given position can cover two important aspects. Firstly, the Council should evaluate what the candidate has achieved and done before in his/her

professional life (career). Secondly, the Council should evaluate whether the candidate will be able to perform what is expected from the Constitutional Court justice, by considering his or her professional and personal qualities.

8. Determination of evaluation criteria for the candidate by the Judicial Council is a good practice, and the criteria already defined clearly shows that the Judicial Council has set high standards for Constitutional Court justice candidates. The Judicial Council is not merely a formal institution engaged in appointment procedure to the Constitutional Court justice office, and all future candidates must take into account the named criteria.

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The Latvian Marriage Law 1918–1940 Betwixt and Between the Poles of Conflicting Moral Values

Dr. jur. **Philipp Schwartz**
Turku, Finland
E-mail: *philschw@aol.com*

The article looks at the Latvian marriage law during the period of 1918–1940, and how it copes with being betwixt and between the poles of conflicting moral values. The article sheds light on the discussions in the newly established Republic of Latvia regarding its marriage law, which was to be created and the development of the codification work took culminating in the Latvian Civil Code of 1937. Additionally, it draws parallels with the contemporary discussions in Latvia between the supporters of a more traditional conservative and a more modern liberal family and marriage law.

Keywords: marriage law, confessional and civil marriage, individual and common interests, patriarchal marriage law, gender equality, divorce law.

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Introduction[1]

The legal system of a country mirrors the country's value system. A legal system is based on and at the same time defines the common values of a country and its society. But what happens when these values change, and a society can no longer agree on a common understanding? Does in such case the legal system automatically has to (be) change(d) to once more arrive at a common understanding?

The marriage law is constantly in between, on the one hand, the established value and legal system and its proponents who want to protect and conserve it, whereas on the other hand, those who consider the legal and value system

[1] All translations from German and Latvian into English by the author of this article.

"outdated" and no longer reflecting the changes in society and, thus unsuitable. The decision by the Constitutional Court of Latvia of 12 November 2020,[2] the subsequent public and political discussion and the initiative to amend Art. 110 of the Constitution[3] are a good proof of this conflict and the disagreement between those supporting a more narrow, traditional definition of the family and those supporting a more open, flexible definition of the family. Interestingly enough, the very same Article 110 had been amended only 15 years ago specifying that that marriage is the union of a man and a woman.[4]

This conflict between preserving the existing order and introducing changes is not a modern phenomenon. It is well known in those fields of law which are closely linked to people's values and beliefs, to concepts of life and changes in societal views and realities. It has happened already more than 100 years ago when the Republic of Latvia elaborated its own civil law after having declared its independence in 1918. The Latvian marriage law specifically is a very rewarding case study.[5]

After Latvia had declared its independence on 18 November 1918, it was decided that, for the time being, the laws which were in force until the beginning of the October Revolution 1917 and the takeover by the Bolsheviks will be further applied as long as they were not in contradiction to the Latvian state order.[6] However, it became quite obvious that the presently applicable law due to various reasons (social and local particularism, casuistry and need of modernisation) had ceased to be suitable for the newly independent Republic of Latvia.[7] It was therefore decided to elaborate a new and own Latvian Civil Code. While the work on the all-encompassing Latvian Civil Code took nearly 20 years until it was adopted on 28 January 1937, legislative groundwork was done during the years in between.[8]

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2 Judgement of the Constitutional Court of Latvia of 12 November 2020 in case No. 2019-33-01 "Par Darba likuma 155. panta pirmās daļas atbilstību Latvijas Republikas Satversmes 110. panta pirmajam teikumam" ["On the conformity of Art. 155 First Paragraph Labour Law with Art. 100 First Sentence of the Constitution of the Republic of Latvia"]. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Spriedums-3.pdf [last viewed 03.02.2021].

3 Nacionālā apvienība rosina Satversmes grozījumu, lai nostiprinātu ģimenes jēdzienu [The National Alliance proposes an amendment to the Constitution to strengthen the notion of family]. Available: https://www.nacionalaapvieniba.lv/aktualitate/nacionala-apvieniba-rosina-satversmes-grozijumu-lai-nostiprinatu-gimenes-jedzienu/ [last viewed 06.02.2021].

4 Grozījums Latvijas Republikas Satversmē [Amendment to the Constitution of the Republic of Latvia]. *Latvijas Vēstnesis*, No. 1, 03.01.2006. Available: https://www.vestnesis.lv/ta/id/124957 [last viewed 07.02.2021]. The original draft Art. 114 which was at the end not adopted back in 1922 read "The marriage is based on the principle of gender equality and is protected by the state as foundation of the family".

5 While this article is focusing on the Latvian marriage law between 1918 and 1940, an overview on the evolution and development of the marriage law in Latvia from the 10th to the 20th century is provided by *Lazdiņš, J.* Die Entstehung und Entwicklung des Eherechts in Lettland [The evolution and development of the marriage law in Latvia]. In: Latvijas Universitātes Raksti. Juridiskā zinātne [Scientific Papers University of Latvia. Law], Vol. 719. Rīga: Latvijas Universitāte, 2007, pp. 76–90.

6 Pagaidu nolikums par Latwijas teesam un teesaschanas kahrtibu [Provisional regulation of Latvia's courts and court procedure]. *Latwijas Pagaidu Waldibas Likumu un Rihkojumu Krahjums*, No. 1, 15.07.1919, pp. 12–13; Likums par agrāko Krievijas likumu spēkā atstāšanu Latvijā [Law on the former Russian laws' continued application in Latvia]. *Likumu un valdības rīkojumu krājums*, No. 13, 31.12.1919, p. 170.

7 Extensively on the local an social particularism, casuistry and need of modernisation *Schwartz, P.* Das Lettländische Zivilgesetzbuch vom 28. Januar 1937 und seine Entstehungsgeschichte [The Latvian Civil Code of 28 January 1937 and its historical origin]. Aachen: Shaker Verlag Verlag, 2008, pp. 235–244.

8 For an overview on the different parts of the marriage law and how they were included in the Baltic Provincial Law Code, the Marriage Act of 1921 and the Civil Code of 1937 see *Schwartz,* P. Das

"Groundwork" might be too modest a designation to do justice to the substantial regulation of certain legal fields as, e.g., the Marriage Act of 1921.[9] Even if this Marriage Act in 1921 did not encompass all the areas of marriage law (it did not address engagement, matrimonial property scheme and personal rights of the spouses), it was a substantial step forward in the creation of a new and country's own civil code. Furthermore, three drafts covering the missing aspects were prepared in 1921, 1929/30 and 1932[10], reflecting a very vivid discussion on the matrimonial property regime for the young Republic of Latvia with the foreseen statutory matrimonial property scheme changing from draft to draft.[11]

Different key players were involved throughout these nearly 20 years of codification work. The elected deputies of the Constitutional Assembly (1920–1922) worked out and adopted the Marriage Act of 1921. Three Codification Committees (1920–1923, 1924, 1933–1936), all chaired by Vladimir Bukovsky (1867–1937) and gathering respected legal experts from different (national) backgrounds, elaborated the draft Latvian Civil Code.[12] Since the Latvian Parliament had been dissolved as result of the *coup d'état* in 1934 by the then Prime Minister Kārlis Ulmanis (1877–1942), the draft Latvian Civil Code was handed over at the end of May 1936 to the Cabinet of Ministers. The codification work was finalised in the so-called Small Cabinet of Ministers[13] and the Latvian Civil Code adopted by the regular Cabinet of Ministers on 28 January 1937.

The codification work on the Latvian Civil Code of 1937 and its marriage law is a good reflection of 20 years of discussion on the best civil and hence also best marriage law for the young Republic of Latvia. Furthermore, it provides an

Eherecht der jungen Republik Lettland 1918–1940 [The marriage law of the young Republic of Latvia 1918–1940]. In: Kulturkampf um die Ehe. *Löhnig, M.* (ed.). Tübingen: Mohr Siebeck, 2020, pp. 269–271.

Extensively on the Latvian Civil Code of 27 January 1937 and its codification history: *Schwartz, P.* Das Lettländische Zivilgesetzbuch vom 28. Januar 1937 …; Švarcs, *F.* Latvijas 1937. gada 28. janvāra Civillikums un tā rašanās vēsture [The Latvian Civil Code of 28 January 1937 and its historical origin]. Rīga: Tiesu namu aģentūra, 2011; *Schwartz, P.* Das Lettländische Zivilgesetzbuch von 1937 [The Latvian Civil Code of 1937]. In: „Nichtgeborene Kinder des Liberalismus"? Zivilgesetzgebung im Mitteleuropa der Zwischenkriegszeit. *Löhnig, M., Wagner, S.* (eds.). Tübingen: Mohr Siebeck, 2018, pp. 317–358.

[9] Likums par laulibu [Marriage Act]. *Likumu un waldibas rihkojumu krahjums*, No. 5, 28.02.1921, pp. 91–96; Papildinajums pee likuma par laulibu [Addendum to the Marriage Act]. *Likumu un waldibas rihkojums krahjums*, No. 9, 21.05.1921, p. 146, with a supplement on 27 April 1921 to Art. 63.

[10] Likumprojekts par saderināšanos, laulāto personiskām un mantiskām attiecībām un viņu mantošanu [Draft law on the Engagement, matrimonial property regime and inheritance law of the spouses] (1921). *Tieslietu Ministrijas Vēstnesis*, No. 5(3), 1924, pp. 101–116; Likums par ģimenes tiesībām. Projekts [Family Law. Draft] (1929/ 30). *Tieslietu Ministrijas Vēstnesis*, No. 13(1/2), 1932, pp. 1–29. Reform of the matrimonial property regime and the personal rights of the spouses (1932) published as part of the draft: Civillikumi. Pirmā grāmata. Ģimenes tiesības. Projekts [Civil Law. First Book. Family Law. Draft]. *Tieslietu Ministrijas Vēstnesis*, No. 15(9/10), 1934, pp. 233–284 (the provisions on the engagement and the matrimonial property regime nearly matching word-for-word the draft from 1921).

[11] *Schwartz, P.* Das Eherecht ..., p. 278.

[12] On the (composition of the) different codification committees and their individual members: *Schwartz, P.* Das Lettländische Zivilgesetzbuch von 1937, pp. 333–342.

[13] The Small Cabinet of Ministers had the task to prepare proposals and draft laws respectively to assess from a legal and technical perspective draft laws and draft decisions submitted to the Cabinet of Ministers. Its composition was decided on a case-by-case basis. On the Small Cabinet of Ministers: *Schwartz, P.* Das Lettländische Zivilgesetzbuch vom 28. Januar 1937 …, pp. 124–125 (esp. footnote 503).

image of the changing views and values in the Latvian society between 1918 and 1937. When looking at the marriage law and its key aspects, it would therefore be too simplistic to confine the current review to the Civil Code of 1937 in its final shape and to compare it with the pre-independence legal system before 1918. It is much more honest and rewarding to look at the 20 years of legislative work, of legal developments and societal discussions between 1918 and 1937. With the pre-independence legal system before 1918 as starting point and the Latvian Civil Code of 1937 as endpoint.

There are four key aspects which very well characterise the discussions and legislative work on the marriage law during these 20 years. A discussion between *old* and *new*, between *traditional* and *modern*, between *strict* and *liberal*. Four key issues found their final answer in the Latvian Civil Code of 1937: first of all, the decision between retaining the confessional marriage law or introducing a new civil marriage law; secondly, a more general choice between individual interest (of the spouses) and common interest (of the society and the state); thirdly, a choice between preserving a patriarchal marriage law and developing a marriage law based on gender equality. And, last but not least, the choice between a strict conservative matrimony or a modern liberal marriage, and especially – divorce law.[14]

1. Confessional v. Civil Marriage Law

The Marriage Act of 1921 replaced the confessional marriage law (Art. 1–4, Baltic Provincial Law Code)[15] with a civil marriage law, introducing the facultative civil marriage as its main symbol (Art. 24 Marriage Act of 1921).[16] It was now left at the discretion of the spouses to choose whether they wanted to get married in church or at the civil registry office. While the marriage ceremony could take place either in church or at the civil registry office, in order for the marriage to be legally effective, it had to be registered at the civil registry office (according to the Law on Registration of Civil Status Documents of 1921). This led to a heated discussion between the defenders of the confessional marriage and the supporters of the civil marriage. The conflict mainly concerned the question whether the church wedding should be only a ceremony without a legal effect, or if the right to register the marriage could also be given to the priest. The opposition against the registration of the marriage only at the civil registry office was especially strong in the Catholic part of Latvia, namely, the south-eastern region of Latgale. With 32.21% of the total population in Latvia in 1920 the (Roman and Greek) Catholics were the second biggest confession after the Evangelical Lutherans. making up 57.29%.[17] In their

[14] For a detailed presentation of the substantive marriage law: Lettlands Zivilgesetzbuch vom 28. Januar 1937 in Einzeldarstellungen. Erster Band: Einleitung – Familienrecht – Erbrecht [Latvia's Civil Code of 28 January 1937 in individual presentations. First volume: Introduction – Family law – Heritage Law]. Herderinstitut zu Riga (ed.). Riga: Ernst Plates, 1938, pp. 139–232; *Schwartz, P*. Das Lettländische Zivilgesetzbuch vom 28. Januar 1937 ..., pp. 164–186 (with extensive references).

[15] Provinzialrecht der Ostseegouvernements, dritter Theil, Liv-, Est- und Curländisches Privatrecht, zusammengestellt auf Befehl des Herrn und Kaisers Alexander des II. [Baltic Provincial Law Code, third Part, Private law of Livonia, Estonia and Courland, compiled by the order of Emperor Alexander II.] St. Petersburg, 1864.

[16] Worth adding – Art. 10 Marriage Act of 1921, according to which judgements by former ecclesial courts concerning the legal prohibition of a marriage lost their validity. Hereinafter, the exclusive jurisdiction for marital matters was in the responsibility of the secular courts.

[17] 23.51% Roman Catholics and 8.70% Greek Catholics in addition to (in 1920) 4.99% Jews, 4.59% Old Believers, 0.61% other protestants and 0.31% other confessions respectively unknown. See *Skujenieks,*

fight for the confessional marriage and the right for the church to also be entitled to registering the marriage, its supporters used both parliamentary means and, already at that time, mass media. Their resistance to the registration exclusively at the civil registry office took the form that could be considered civil disobedience, shunning the set rules. This eventually led to an amendment to the Law on Registration of Civil Status Documents of 1921, which was introduced in 1928, conferring the right to register the marriage both upon the state and the church.[18]

2. Individual v. Common Interest

The introduction of the facultative civil marriage and the opportunity for the spouses to freely choose between a wedding at the civil registry office or in church was a first step to emancipate the spouses not only from confessional, but also from social and legal expectations and limitations. It was complemented by giving the spouses the possibility to getting divorced by agreement (Art. 51 Marriage Act of 1921) or based on the principle of irretrievable breakdown as sufficient grounds for divorce (Art. 49 Marriage Act of 1921). And when the Civil Code of 1937 introduced the engagement in its para. 26 (and in para. 27 – the possibility to withdraw from it), it was now a free decision of the spouses to enter the matrimony.

All these new possibilities very much took into account the individual interest of husband and wife. Furthermore, it can be asserted that introducing the facultative civil marriage and a simplified divorce was a step towards individual interest gaining centre stage instead of community and common interest. However, there was no linear development from these first steps in the Marriage Act of 1921 until the Civil Code of 1937 with the one extreme (individual interest) simply replacing the other extreme (common interest). On the one hand, the contraction of marriage, as well as the liberal divorce law as introduced by the Marriage Act of 1921 brought the individual and individual interest into focus. On the other hand, the Civil Code of 1937 rather places an emphasis upon the community and the common interest.[19]

The overall change towards the common interest must be observed in the historical and political context and development in Latvia, especially in the second half of the 1930s. On 15 May 1934, the then Prime Minister Kārlis Ulmanis (1877–1942) came into power by a *coup d'état* and established an authoritarian regime. The communities – family, nation and state – gained centre stage, and the understanding of the family as the basic unit of nation and state was also expressed in the Civil Code of 1937. Firstly, the family was confirmed as one of the four leading civil law principles besides succession, private property and freedom

M. (red.). Otrā tautas skaitīšana Latvijā. 2. daļa [Second census of population in Latvia. 2nd Part]. Rīga: Valsts statistiskā pārvalde, 1925, p. 76.

[18] Pārgrozījumi un papildinājumi likumā par civīlstāvokļa aktu reģistrāciju [Amendments and addenda to the Law on Registration of Civil Status Documents]. *Likumu un Ministŗu kabineta noteikumu krājums*, No. 5, 27.03.1928, pp. 62–63. In more details about this development (with further references) *Lipša, I*. Restriction of Freedom of Consciousness in Democracy: Catholic Protests against the Law on Registry of Civil Status in Latvia (1921–1928). *Istorija*, No. LXXXIV/84, 4, 2011, pp. 78–81; *Lipša, I*. Sabiedriskā tikumība Latvijā demogrāfisko problēmu aspektā, 1918–1940 [Public morality in Latvia in the facet of problems of demography, 1918–1940]. *Latvijas Vēstures Institūta Žurnāls*, No. 70(1), 2009, pp. 68–70.

[19] *Būmanis, A*. Vispārējs pārskats par jauno Civīllikuma [General overview of the new Civil Code]. In: Prezidenta Ulmaņa Civīllikums (rakstu krājums). Rīga: Pagalms, 1938, pp. 99–100.

of contract.[20] Secondly, in the order of the different fields of law in the Civil Code of 1937, which reflects these four leading principles, the Civil Code literally puts the family law in the first place (First Part, paras 26–381), immediately after the 25 articles of the introduction and collision regulations – a general part was completely missing. It is followed by the heritage law (paras 382–840), property law (paras 841–1400) and law of obligations (paras 1401–2400). This is actually the same order which Krišjānis Barons (1835–1923) had used for his collection of *dainas* (four-line Latvian folk songs). However, constitutional protection of the family is provided only since 1998 when an up-to-then missing catalogue of fundamental rights (here – Article 110) was included in the Latvian Constitution of 1922.[21]

At the same time, the Civil Code of 1937 and its marriage law also introduced (engagement) and retained (facultative civil marriage, liberal divorce law) those provisions which rather focussed on the individual and individual interest. By understanding the marriage as alliance built on mutual trust, which should not be artificially and compulsively preserved if the basis for such alliance, the mutual trust between the spouses, is lost,[22] hereby giving priority to the individual interest of the spouses (to dissolve their marriage) instead of the common interest (to preserve the marriage, the family as the basic unit of the state).

Hence, the family and marriage law created a balance between individual and common interest. Or, as the jurist and son of the first Latvian State President Jānis Čakste (1859–1927) Konstantīns Čakste (1901–1945) wrote:

> *Every civil law institution contains individual and social elements which recognise the interests of the society. The marriage is no exception. Therefore, also in the family law the institution of marriage as well as other family law institutions have to be shaped on the basis of these two principles, a certain synthesis has to be formed.*[23]

3. Patriarchal Marriage Law v. A Marriage Law Based on Gender Equality

While the Marriage Act of 1921 introduced significant and progressive changes to the pre-independence approach (facultative civil marriage, divorce by agreement, introduction of the principle of irretrievable breakdown as sufficient grounds for divorce), it did not fundamentally change the legal status of women. As the Marriage Act of 1921 did not contain any specific provisions on the legal status of women, the old patriarchal legal situation inherited from pre-independence times continued to determine the legal status of women.[24] Likewise, the Constitution did not provide constitutional protection of gender equality as the catalogue of

[20] *Būmanis, A.* Vispārējs pārskats par jauno Civīllikuma [General overview of the new Civil Code]. In: Prezidenta Ulmaņa Civīllikums (rakstu krājums). Rīga: Pagalms, 1938, pp. 99–100. pp. 99–101.

[21] Art. 110 of the Latvian Constitution reads "The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child. [..]" Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme [in Latvian, last viewed 07.02.2021] or https://likumi.lv/ta/en/id/57980-the-constitution-of-the-republic-of-latvia [in English, last viewed 13.02.2021].

[22] *Apsīts, H.* Jaunais civīllikums [The new Civil Code]. In: Prezidenta Ulmaņa Civīllikums, pp. 90–91.

[23] Čakste, *K.* Civiltiesības. Lekcijas. Raksti [Civil Law. Lectures. Articles]. Rīga: Zvaigzne ABC, 2011, pp. 198–199.

[24] On the legal status of women before and (immediately) after Latvia had gained independence in 1918: *Osipova, S.* Sieviešu tiesības Latvijā 1918–1940: starp politisko pilntiesību un civiltiesisko

fundamental rights had not been adopted in 1922. The drafted, but not adopted Part 8 of the Latvian Constitution on the fundamental rights would have foreseen equal rights of men and women in general (Art. 87) and with regard to the marriage (Art. 114).[25]

The first steps towards an improved, more equal legal status of women were, however, considered already before, for example, the suggested limitations to the guardianship of the husband (so far stipulated in Art. 11 of Baltic Provincial Law Code) in the aforementioned draft law on "Engagement, matrimonial property regime and inheritance law of the spouses" (1921)[26] or the idea in the mid-1920s to have a statutory matrimonial property scheme (separation of property with administration and usufruct by the husband) built on the principles of usufruct and not on a lower status of the wife.[27]

A real change in the legal status of women was only achieved with the Civil Code of 1937, which liberated the wife from the guardianship of her husband. From now on, with the Civil Code entering into force on 1 January 1938, both spouses had the same rights (para. 85 subpara. 1 sentence 1). However, in case both could not agree, the husband still had the deciding vote (para. 85 subpara. 1 sentence 2).[28] At the same time, the wife got the right to administer the household and the power to represent her husband in matters concerning the household (para. 87 subpara. 1). An improvement in the legal status of women can also be seen in the specific property which is excepted from the administration und usufruct by the husband (paras 90 subpara. 1, 91) or the now equality of husband and wife when it comes to the obligation to pay alimony after the dissolution of the marriage (paras 79, 81).

While these are considerable steps towards an improved, more equal legal status of women the Latvian Civil Code of 1937 included and still includes also provisions which rather preserve the old role model of men and women. Although "the dowry was already in the moment of the adoption of the Civil Code an archaic legal institution", paras 111–113 Latvian Civil Code of 1937 (still today) regulate the dowry[29] "as a legal institute characteristic for the Latvian national law". [30] Likewise,

nevienlīdzību [Women's Rights in Latvia 1918–1940: Between Equality in Political Rights and Civil Inequality]. *Journal of the University of Latvia. Law*, No. 8, 2015, pp. 114–115.

[25] Available (document 28) in *Lazdiņš, J., Kučs, A., Pleps, J., Kusiņš, G.* (eds.). Latvijas valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri [The sources of law of the Latvian state. Founding of the state – restoration of independence. Documents and commentaries]. Rīga: Tiesu namu aģentūra, 2015, pp. 124–126.

[26] *Osipova, S.* Sieviešu tiesības ..., pp. 118–119.

[27] *Bukowsky, W.* Zur Frage des Systems des ehelichen Güterrechts in Lettland [On the question of the matrimonial property regime]. *Rigasche Zeitschrift für Rechtswissenschaft*, Nr. 1(4), 1926/1927, p. 254.

[28] Čakste, *K.* Civiltiesības, p. 206, actually argues that the reason for giving preference to the husband's voice is not based on his guardianship. But derives from the nature of the marriage with the husband more participating in social life and hence having more practical experience than his wife.

[29] For an extensive examination of the dowry including the question of its conformity with the Latvian Constitution in view of the principle of gender equality see the 2018 doctoral thesis by *Nikolājeva, I.* Laulāto mantisko attiecību institūta – pūra – vēsturiskā evolūcija un vieta mūsdienu kontinentālo tiesību saimē [Historical evoluation of the institution of pecuniary relationship of spouses – dowry – and place in the family of modern continental law]. Rīga, 2018. Summary available in English: https://www.turiba.lv/storage/files/synopsis-nikolajeva.pdf and in Latvian: https://www.turiba.lv/storage/files/kopsavilkums-nikolajeva.pdf.

[30] Referring to Arveds *Švābe* (1888–1959): *Osipova, S.* Familienrecht in der Republik Lettland im XX–XXI Jahrhundert [Family law in the Republic of Latvia in the XX-XXI century]. In: Kieler Ostrechts-Notizen, Schwerpunkt Recht der Baltischen Staaten. Institut für Osteuropäisches Recht der Universität Kiel (ed.). Kiel: Institut für Osteuropäisches Recht der Universität Kiel, 2012 (15. Jahrgang), 1–2, p. 50; *Osipova, S.* Sieviešu tiesības ..., p. 121.

the statutory matrimonial property scheme which was ultimately chosen for the Latvian Civil Code of 1937, the "administration and usufruct", in para 90 subpara. 1 still stipulated that the husband had the right to administer and usufruct both the wife's premarital property and the property the wife had acquired during the marriage (but with an exception of specific property).

This development towards a more equal legal status of women was not welcomed unanimously.[31] However, although some contemporaries were of the opinion that this development went too far, from today's point of view it was not all that advanced and one can hardly speak about a complete gender equality in the Latvian Code of 1937. The Latvian Civil Code of 1937 rather preserved the patriarchal family, although in a liberalised form.[32] The next steps towards gender equality in the Civil Code were taken only as it was reinstated and amended after Latvia had regained independence in 1990/91.[33]

4. Till Death Do Us Part v. A Modern and Liberal Divorce Law

The changes to the divorce law introduced by the Marriage Act of 1921 were quite radical and progressive for their time, with the new divorce law being in total contradiction to the former confessional marriage law. Following the example of the Swiss Civil Code of 1907,[34] which together with the Swiss Code of Obligations of 1911 and the German Civil Code of 1896 were the main foreign codes of law influencing the Latvian Civil Code of 1937, the latter introduced the principle of irretrievable breakdown as sufficient grounds for divorce (Art. 49). By introducing the divorce by agreement (Art. 51), the Civil Code of 1937 substantially facilitated the dissolution of the marriage.[35] The secular and no longer confessional court only had to examine whether the joint application for divorce satisfied all the procedural requirements. It did not matter, and the court did not examine the reasons or the question of fault. Moreover, the spouses did not even have to reveal the reasons for the failure of their marriage. Clearly, it might have been comfortable for the spouses not to have to disclose the real reasons for the failure of their marriage.

What were the reasons behind introducing such a radical and progressive divorce law? It had to do with the understanding of the marriage as a union built on mutual trust of the spouses. Such union built on trust should not be artificially

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31 For some examples, see *Schwartz, P*. Das Eherecht ..., p. 293.

32 *Osipova, S*. Sieviešu tiesības ..., p. 121.

33 *Ciematniece, I*. Laulāto mantisko attiecību regulējums Latvijā [The regulation of property relations of spouses in Latvia]. *Jurista Vārds*, No. 20, 27.05.2008; No. 21, 03.06.2008, Chapter 2 (available as online article from www.juristavards.lv without page numbers).

34 *Schwarz, A. B*. Das Schweizerische Zivilgesetzbuch in der ausländischen Rechtsentwicklung [The Swiss Civil Code in foreign legislative trends]. Zürich: Schulthess & Co. A.G., 1950, p. 46; *Berent, B*. Schliessung und Auflösung der Ehe [Contraction and rescission of marriage]. In: Lettlands Zivilgesetzbuch vom 28. Januar 1937 in Einzeldarstellungen. Erster Band: Einleitung – Familienrecht – Erbrecht [Latvia's Civil Code of 28 January 1937 in individual presentations. First volume: Introduction – Family law – Heritage Law]. *Herderinstitut zu Riga* (ed.). Riga: Ernst Plates, 1938, p. 168 (footnote 1).

On the influence of foreign codes of law on the Latvian Civil Code of 1937 briefly *Schwartz, P*. Das Lettländische Zivilgesetzbuch vom 28. Januar 1937 …, p. 153.

35 Extensively on the(se) grounds for divorce: *Opss, L*. Laulības šķiršanas iemesli pēc laulības lik. 49., 50. un 51. pantiem [The grounds for divorce according to Art. 49, 50 and 51 Marriage Act]. Rīga, 1937. On the Latvian liberal marriage (and divorce) law introduced by the Marriage Act of 1921 and similar developments in other countries: *Schwartz, P*. Das Eherecht …, pp. 297–298.

and compulsively maintained, once the trust is gone.[36] It is obvious that this way of thinking had its origin also in the experiences of the First World War as referred to in the Constitutional Assembly on 10 December 1920:

> *During the current era when we have experienced the years of war, refugee times, when a husband and wife sometimes have been totally separated for a long time and have got alienated from each other to such degree what no cohabitation is possible.*[37]

Although some might have feared otherwise, in the years immediately after introducing this modern and liberal divorce law in 1921, it did not immediately lead to an excessive and careless recourse to an easy divorce. But in the mid-1930s, the number of divorces was very high and different measures were taken to counteract this development (i.a. by increasing the divorce fees).[38] At the same time, such simplified ways to dissolve the marriage appealed also beyond national borders, as it was sufficient to have one's registered place of residence in Latvia to make use of these simplified options. Art. 1 of Marriage Act of 1921 stipulated that it and, hence, the simplified divorce options applied to all inhabitants of Latvia, and not only to the nationals of this country. The Austrian actor and stage director Max Reinhardt (1873–1942) was most probably the most prominent "divorce tourist". In 1931, Reinhardt changed his place of residence to Riga and one week later filed for divorce – with success.[39]

Summary

Naturally, what the one praises as the right development towards a modern, progressive and liberal marriage law, another criticises as too liberal or radical.[40] Furthermore, while for some the new provisions were overly liberal and radical, others supported even more radical changes,[41] like introducing the mandatory and not only facultative civil marriage fully replacing the church marriage,[42] or the divorce on demand of a single spouse without the need to indicate any reason for divorce, which was originally included in the draft Marriage Act of 1921 (but later rejected during the third reading of the draft law).[43]

As mentioned above, vivid and strong discussions and reactions to new laws, court decisions or, more generally, regarding legal developments are not uniquely characteristic to our time and the phenomenon of social media. Already 100 years

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[36] *Apsīts, H*. Jaunais civīllikums, pp. 90–91.

[37] Minutes from the Constitutional Assembly on 10 December 1920 quoted in *Lipša, I*. Restriction of Freedom ..., p. 76.

[38] In greater detail – *Schwartz, P*. Das Eherecht ..., pp. 300–301.

[39] On the causa Max Reinhardt, in greater detail (with further references) – ibid., pp. 301–302.

[40] *Schilling, C. von*. Lettlands neues Zivilgesetzbuch [Latvia's new Civil Code]. *Zeitschrift für Ausländisches und Internationales Privatrecht*, Nr. 11, 1937, p. 492; *Stegman, H*. Zur Entwicklung des lettländischen Zivilrechts, 1918–1928 [On the development of the Latvian civil law, 1918-1928]. In: Baltische Rechtsangleichung, 10 Jahre Gesetzgebung Estlands und Lettlands, Referate der I. Baltischen Juristenkonferenz zu Dorpat (1928). Reval: F. Wassermann, 1929, p. 42.

[41] *Schwartz, P*. Das Eherecht ..., pp. 298–300.

[42] During the discussions of the Marriage Act of 1921, this idea was supported by the Social Democrats and the mandatory civil marriage included in its first preliminary draft. On this *Osipova, S*. Sieviešu tiesības …, p. 117; *Stegman, H*. Zur Entwicklung …, p. 28.
While the mandatory civil marriage did not become reality during the years 1918–1940, it was then introduced in during the Soviet Occupation of Latvia: *Lazdiņš, J*. Die Entstehung ..., p. 84.

[43] With further references *Schwartz, P*. Das Eherecht …, pp. 298–299.

ago, the codification work on the marriage law led to controversies, as it touched upon and questioned the prevailing views and values. In some cases, criticism and opposition to new regulations lead to changes re-introducing the previous provisions. For example, in 1928 such case was granting the right to register a marriage also to the priests and not only the civil registry office, as originally foreseen in 1921. At the same time, the common understanding on certain issues can change over time, especially during legislative work spanning a longer period, like the preference for the statutory matrimonial property scheme changing over the years, as shown above. Consequently, the marriage law is very much a mirror of a society's (changing) value system.

This article demonstrated how the marriage law is betwixt and between the past and the present on the one hand, and the future on the other hand, where the discussions around the marriage law, whether the one in force or the one to be drafted, are an indicator and benchmark for the different opinions and moral values in the society. The article also showed and substantiated that the marriage law is betwixt and between those who want to preserve the *status quo* and those who aim to go a step further by adapting the marriage law to what they perceive to be the new and different reality. How the marriage law is betwixt between following legal and societal developments on the one hand, and playing a leading role in developing the civil law further on the other hand – possibly serving as inspiration for other countries.[44] The current article also reveals how the marriage law and especially its drafts are betwixt and between being considered from an *ex-ante* perspective as too radical and progressive, while from an *ex-post* perspective – as modern and liberal, a trendsetter at the time. The Latvian marriage law in the period of 1918–1940 comprehensively illustrates the challenge of being betwixt and between the poles of different moral values, and the parallels to this phenomenon can be drawn to this day.

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[44] On the family and especially the divorce law of the Latvian Civil Code of 1937 in the context of legal developments in other (not only) European countries in that time: *Schwartz, P*. Das Eherecht …, pp. 297–298.

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7. Likumprojekts par saderināšanos, laulāto personiskām un mantiskām attiecībām un viņu mantošanu [Draft law on the Engagement, matrimonial property regime and inheritance law of the spouses]. *Tieslietu Ministrijas Vēstnesis*, No. 5(3), 1924, pp. 101–116.
8. Pārgrozījumi un papildinājumi likumā par civīlstāvokļa aktu reģistrāciju [Amendments and addenda to the Law on Registration of Civil Status Documents]. *Likumu un Ministŗu kabineta noteikumu krājums*, No. 5, 27.03.1928, pp. 62–63.
9. Likums par ģimenes tiesībām. Projekts [Family Law. Draft]. *Tieslietu Ministrijas Vēstnesis*, No. 13(1/2), 1932, pp. 1–29.
10. Civillikumi. Pirmā grāmata. Ģimenes tiesības. Projekts [Civil Law. First Book. Family Law. Draft]. *Tieslietu Ministrijas Vēstnesis*, No. 15(9/10), 1934, pp. 233–284.
11. Provinzialrecht der Ostseegouvernements, dritter Theil, Liv-, Est- und Curländisches Privatrecht, zusammengestellt auf Befehl des Herrn und Kaisers Alexander des II. [Baltic Provincial Law Code, third Part, Private law of Livonia, Estonia and Courland, compiled by the order of Emperor Alexander II.] St. Petersburg, 1864.

Case Law

1. Judgement of the Constitutional Court of Latvia of 12 November 2020 in case No. 2019-33-01 "Par Darba likuma 155. panta pirmās daļas atbilstību Latvijas Republikas Satversmes 110. panta pirmajam teikumam" ["On the conformity of Art. 155 First Paragraph Labour Law with Art. 110 First Sentence of the Constitution of the Republic of Latvia"]. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Spriedums-3.pdf [last viewed 03.02.2021].

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Restriction of Competition After Termination of Employment Relationships

Dr. iur. **Annija Kārkliņa**

Faculty of Law, University of Latvia
Associate Professor at the Department of State Law
E-mail: *Annija.Karklina@lu.lv*

The article analyses a legal instrument of restriction on competition after termination of employment relationships. The Labour Law of the Republic of Latvia (hereinafter – Labour Law) governs the restriction on professional activity under Articles 84 and 85. The article views the goal of restriction on competition, agreement forms, validity preconditions, including notions of professional activity and adequate compensation, term of restrictions, applicability preconditions, legal framework of responsibility where the restriction has been violated and reinforcements of liability. The article also outlines parties' rights to unilateral withdrawal from an agreement to restrict competition. with the applied research methods include analytic method (by analysing the legislation and case law), comparative method (comparing regulation of competition restriction in different Member States of the European Union), and an insight was provided into development of regulation of restriction on competition by virtue of historical method.

Keywords: restriction on competition, non-competition clause, employment relationships, employer, employee, termination of employment relationships, term for restriction on competition, adequate monthly compensation, field of activity, unilateral withdrawal from an agreement to restrict competition.

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Introduction

In free market economy when there is often fierce competition between merchants and other employers, any employer finds the necessity for legal means to protecting their economic activities more pressing. An agreement to restrict competition after termination of employment relationships is one of legal instruments of a merchant to achieve that goal.

Like in many other countries, the Labour Law of Latvia since its adoption and coming into force on 1 June 2002[1], regulates the restriction on competition after termination of employment relationships and it has seen several changes over time. The most recent amendments affecting this instrument were made to the Darba likums [Labour Law] in 2017.[2] Also the case law has gone through changes over time in context of restriction on competition and currently there is no common understanding of all aspects of application of the restrictions on competition.

Over last years, the restrictions on competition were met more frequently in actual life. Most often agreements to restrict competition are signed with employees who work in sales, nevertheless several last years the number of non-competition clauses in technology and construction sector has grown globally.[3]

Over time an understanding of application of this instrument has changed, for example, in German law the restriction on competition was once attributed only to so-called white-collar workers (especially those working in commerce), however, the Federal Labour Court of Germany in its judgment of 1990 decided to attribute it also to any employee, including common workers[4]. Just like in vast majority of countries, the restriction on competition in Latvia pertains to any employee regardless of their position, age or profession.

By disclosing information about company's strategy, cooperation partners, know-how and commercial secrets to employer's rivals and taking advantage of specific knowledge obtained at the former employer, the employee may cause great harm to his former employer.

Quite recently, the State Control of the Republic of Latvia audited the restriction on competition in the public sector and arrived at a conclusion which it announced publicly, namely, that in most cases such agreements were not signed to prevent competition to the employer's business in the public sector but rather to solve problems with employees unwilling to terminate employment relationships or – quite the contrary – to demonstrate particularly favourable attitude to some

[1] Labour Law (20.06.2001). Available: https://likumi.lv/ta/en/en/id/26019-labour-law [last viewed 25.03.2021].

[2] Grozījumi Darba likumā [Amendments to the Labour Law] (27.07.2017). Available: https://likumi.lv/ta/id/292584-grozijumi-darba-likuma [last viewed 25.03.2021].

[3] See, for example, Apple Exec Hired from IBM Ordered to Stop Work. Available: http://www.pcmag.com/article2/ 0,2817,2334163,00.asp [last viewed 22.03.2021].

[4] *Weiss, M., Schmidt, M.* Labour Law and Industrial Relations in Germany. Wolters Kluwer, 2007, p. 147.

employee. Respectively, the conclusion states that the employers from the public sector have not evaluated an objective need to enter in agreement on professional activity restrictions with a particular employee and there are no defined criteria which would be evaluated when determining the conditions of restrictions on professional activity of the employee, for example, the scope of remuneration to be paid, the period of restriction on professional activity.[5] So, the State Control has come up with a proposal for the Cabinet of Ministers to elaborate a single regulation binding on all public sector employers operating in field of commerce and entering in agreements to restrict professional activity with their employers.

Henceforth, the article will analyse the goal, form and applicability preconditions and liability aspects and possibility for parties to withdraw from the agreed restriction on competition.

1. Restriction on Competition After Termination of Employment Relationships – Notion, Goal and Applicability Preconditions

1.1. Notion of Restriction on Competition and Procedure of Entering into Agreement

Article 84 of the Labour Law says that restriction on competition is an agreement between the employee and employer to restrict employee's professional activity after termination of employment relationships. Restriction on competition is based on employer's wish to protect themselves from activities of a former employee who may start competing with employer's business, besides the employee receives the agreed remuneration for entire period of restrictions. Article 84 of the Labour Law, which intends that the employer and employee can agree on restriction on professional activity, actually restricts the fundamental rights of a person specified in Article 106 of the Constitution of the Republic of Latvia – right to freely choose their employment and workplace according to their abilities and qualifications.[6] Article 116 of the Constitution says the fundamental rights may be subject to restrictions in circumstances provided for by law if their goal is legitimate. Article 84 of the Labour Law allows both parties – employer and employee – to agree on restrictions on employee's professional activity after termination of employment relationships if the agreement meets the statutory preconditions.

Instrument of restriction on competition does not give a ready-to-use mechanism for the employer to safeguard from the competition as such, and instead it allows determining restrictions which are reasonably necessary to protect employer's legitimate interests.[7]

Such agreements can be entered into by any employer with any of his employees considered as holders of essential information, as well as employer in the public

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[5] Cik pamatoti no valsts līdzekļiem tiek izmaksātas kompensācijas par profesionālās darbības ierobežojumu [How justified is compensation for restrictions on professional activity paid from state funds]? (23.03.2021). Available: https://www.lrvk.gov.lv/lv/covid-19/cik-pamatoti-no-valsts-lidzekliem-tiek-izmaksatas-kompensacijas-par-profesionalas-darbibas-ierobezojumu [last viewed 23.03.2021].

[6] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [last viewed 25.03.2021].

[7] *Bevitt, A., La Tanya, J.* U.S. and E.U. Non-Competition Agreements Compared and Contrasted. Available: http://documents.jdsupra.com/d5bb690a-135c-4a53-b61e-0740d11d8002.pdf [last viewed 25.03.2021].

sector, which is State, the main task of which in business is to serve the public interests.[8]

Paragraph 4 of Article 84 of the Labour Law states that an agreement to restrict competition must be executed in a written form and describe its type, scope, place, time and amount of compensation to be paid to employee. A requirement to execute agreement in a written form is set forth also in legislation of other countries.[9] The Labour Law does not stipulate, when an agreement to restrict competition should be signed. Data shows that agreement to restrict competition after termination of employment relationships is signed as a separate agreement, following termination of the employment contract – the former employer in this case evaluates the level of knowledge, know-how and skills obtained and then decides how important it is to keep the employee away from immediate competitors by means of an agreement and what interest risks the employer might face.

However, the parties just as well may include the agreement on competition restriction in the employment contract (for example, immediately after entering into the employment contract or later when making amendments to it). It depends on the choice of both contractual parties and this possibility is also accepted in the case law.[10]

Of course, if the agreement on restriction on competition is signed at the moment of termination of employment relationships, the employees are often aware of the value of their new knowledge in such situation and therefore they can bargain for a larger compensation in exchange for compliance with the restriction on competition clause, as opposed to a situation where an agreement on competition restriction is signed with an employee who has just entered into employment relationship.

It must be noted that where the restriction on competition has been included in the employment contract, it is deemed to be a separate agreement subject to private law.[11] The Supreme Court of Estonia, when examining the case of restriction on competition, has pointed out that agreement on competition restriction is not a part of the employment contract but rather a separate agreement subject to private law.[12]

Since the agreement on competition restriction largely restricts employee's fundamental rights, any country defines strict criteria in their legislation for such agreement to be valid. Paragraph 2 of Article 84 of the Labour Law stipulates that an agreement made between the employee and employer on the restriction on

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[8] Cik pamatoti … [How justified …]?

[9] For example, a document drawn up in accordance with the first section of paragraph 74 of the Commercial Code of the Federal Republic of Germany must be handed over to the employee at the conclusion of the employment contract. In the event of a dispute, it is up to the employer to prove the conclusion of such an agreement. See the judgment of the Supreme Labour Court of the Federal Republic of Germany of 5 September 1995 in case No. 9 AZR 718/93.

[10] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 26. novembra spriedums lietā Nr. SKC-424/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 26 November 2008 in case No. SKC-424/2008]. In: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008 [Judgments and decisions of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia 2008]. Rīga: Latvijas Tiesnešu mācību centrs, 2009, pp. 465–474.

[11] Ibid.

[12] Agreement on Non-Competition is not Part of Employment Contract. Available: http://www.labourlawnetwork.eu/ national_labour_law_latest_country_reports/national_court_rulings/court_decisions/prm/64/v__detail/id__2927/category__10/index.html [last viewed 23.03.2021].

employee's professional activity after termination of employment relationships is permissible merely where the said agreement meets the following indications:

1) its goal is to protect the employer from employee's professional activity which may compete with the employer's business (given the protected information in possession of the employee);
2) term of restriction on competition is up to two years starting from termination of employment contract;
3) regarding the entire period of competition restriction, it obliges the employer to pay the employee adequate monthly compensation for compliance with the restrictions on competition for entire period of such restrictions.

Moreover, paragraph 2 of Article 84 of the Labour Law lays down one more imperative demand which must be fulfilled to make the agreement on competition restriction valid, i.e. – a restriction on competition may apply only to the area of activity performed by the employee during the employment relationships.[13] The fundamental principle which must be observed when entering into an agreement on competition restriction is that there should be a reasonable balance between the legal interests of former employer and employee. Henceforth, the content of each precondition, understanding and application issues will be discussed in greater detail.

1.2. Goal of the Restriction on Competition

Clause 1 of paragraph 1 of Article 84 of the Labour Law explicitly states that the goal of restriction on competition is to protect the employer from employee's professional activity which may compete with the employer's business, given the protected information in possession of the employee.

Before amendments to the Labour Law in 2017 it contained no indication as to whether the restriction on competition applied also to employee's own business and prohibition to poach clients and employees of the former employer. Amendments to the Labour Law of 2017 supplemented Article 84 with paragraph 5, stating that "an agreement on the restriction on competition may apply to different types of restriction on competition, including permanent competitive economic activity of the employee, employment of the employee with another employer, not poaching of clients or employees of the former employer." Admittedly, before these amendments were adopted, the case law of Latvia already had an answer that the restriction on competition after termination of employment relationships was aimed at protecting employer's interests to safeguard against a new rival who can pursue professional activities after termination of their employment contract either in a capacity of an employee in a company from the same industry or founding his or her own company in the same industry.[14] Thus, a notion *professional activity*

[13] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2009. gada 11.marta spriedums lietā Nr. SKC-99/2009 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 11 March 2009 in case No. SKC-99/2009]. In: Tiesu prakse lietās par individuālajiem darba strīdiem [Case law in cases of individual labour disputes], 2010/2011. Available: http://at.gov.lv/files/uploads/files/docs/2011/individualie%20darba%20stridi.pdf [last viewed 19.02.2021].

[14] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 26. novembra spriedums lietā. Nr. SKC-424/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 26 November 2008 in case No. SKC-424/2008]. In: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008 [Judgments and decisions of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia 2008], pp. 465–474.

allows restricting former employee not only by prohibiting to work for a competing company (as an employee) but also running own business in a competing field, including providing services or professional consultations as self-employed person.

A restriction aimed at preventing family members of the former employee competing with the employer, as sometimes observed in practice, should be viewed critically. Not only such restriction is not binding on third parties, but such liability is not valid, since it does not comply with Article 1413 of the Civil Law, given that the former employee may not lawfully influence the will of other persons. At the same time, taking advantage of family members to bypass restrictions, which would be possible through a fiduciary deal, would be a violation of restriction on competition. A trustee in a fiduciary deal on his or her own behalf, however, serving the interests of the person authorising them, obtains or uses certain right because the authorising person either does not or cannot obtain or exercise this right[15]. Therefore, when actual violation of restriction on competition by agency of a trustee is identified, there is a ground to believe the employee has violated the agreement.

A novelty in amendments of 2017 is that they *expressis verbis* stipulate that restriction on competition may apply also to the type of competition restriction such as prohibition of poaching a customer or a former employee of the employer. A prohibition to poach the customers of the former employee is not a topic widely elaborated upon in the legal doctrine of Latvia, however, foreign doctrine attributes non-poaching obligation only to active employer's customers during the period of competition restriction, but not to former customers.[16] For example, in Denmark it has been specified that non-poaching obligation applies to customers who have received any service from the employee in 18 months' period before the employee terminated the employment relationship with the employer.[17] Meanwhile, non-poaching obligation concerning *employees* prohibit a former employee to make any offerings, suggestions or convince the employees of former employer to leave their current workplace.[18] In the context of poaching, it is sometimes difficult to understand whether the former employee has been "poached" or it was a voluntary act and decision of a customer or employee respectively. As the legal literature reasonably states, one must consider that the burden of proof regarding the violation of competition restriction rests upon the employer, and it means that "employer will have an obligation to prove that employer's customers and employees were poached, and it was not a voluntary action or initiative of customers and employees. The Labour Law is not in a position to restrict the wish of customers and employees to cooperate with a preferred company, nevertheless the Labour Law restricts employee's poaching efforts."[19]

Germany, too, in its case has concluded law that an employer has justified business interests if non-compete obligation serves either for protection of business secret or prevents the employee who no longer has employment relationships with the employer to access the customers or suppliers, or prevents or restricts him from

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[15] *Balodis, K.* Ievads civiltiesībās [Introduction to Civil Law]. Rīga: Zvaigzne ABC, 2007, pp. 248–249.

[16] *Campbell, D.* Post-Employment Covenants in Employment Relationships. Alphen aan den Rijn: Kluwer Law International, 2014, p. 293.

[17] *Lagesse, P., Norrbom, M.* Restrictive Covenants in Employment Contracts and Other Mechanisms for Protection of Corporate Confidential Information. Alphen aan den Rijn: Kluwer Law International, 2006, p. 39.

[18] *Holland, J. A., Burnett, S. A.* Employment Law. New York: Oxford University Press, 2008, p. 211.

[19] Darba likums ar komentāriem [Labour Law with Comments]. Rīga: Latvijas Brīvo arodbiedrību savienība, 2020, p. 227.

using special knowledge or personal contacts. A simple interest of the employer in restricting the competition is not sufficient to argue in favour of entering into such agreement.[20]

1.3. Due Date of the Restriction on Competition

Clause 2 of paragraph 1 of Article 84 of the Labour Law states that a term of the restriction on competition may not exceed two years starting from the day of termination of legal employment relationships. As the existing practice demonstrates, the parties in Latvia usually agree on one- or two-years' term for restriction on competition.

Also, laws and regulations of several Member States of the European Union, similarly to the Labour Law of Latvia, lay down two-years' term for restriction on competition (for example, Lithuania[21], Germany[22], Hungary[23], Slovenia[24]). The maximum term in Estonia[25] and Belgium[26] is 1 year, while in Ireland and Finland[27] the term of the restriction on competition may not exceed 6 months.

The Labour Law sets 2 years as the maximum term for all employees, nevertheless, several countries have chosen to differentiate the longest competition restriction term depending on the employee's position. For example, qualified specialists in Spain may be subject to the maximum restriction on competition of 2 years, while the term of restriction on competition of an unqualified worker who had access to the business secret of former employer may not exceed 6 months.[28] In Romania, this period is 2 years for leading positions and 6 months for other workers. Meanwhile, the maximum term of general restriction on competition is 2 years, but in exceptional cases, if the employee's job duties are related to highly sensitive information concerning competition area or relationships of trust, the term of such restrictions may be even 3 years.[29] Italy stands out among other countries with a long permissible term of restriction on competition, where employees who used to be in top positions can be subject to even 5 years of non-competition term,

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[20] Judgment of the Federal Supreme Labour Court of the Federal Republic of Germany of 1 August 1995 in case No. 9 AZR 884/93.

[21] Lietuvos Respublikos darbo kodeksas [Labour Code of the Republic of Lithuania], Art. 38. Available: https://e-seimas.lrs.lt/ [last viewed 31.03.2021].

[22] *Weiss, M., Schmidt, M.* Labour Law …, p. 147.

[23] On the Labour Code of Hungary. Available: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_186075.pdf [last viewed 31.03.2021].

[24] *Novak, J.* Prohibition of Competition and Non-Competition Clauses in Labour Contracts. Slovenia. XIVth Meeting of European Labour Court Judges 4 September 2006. Available: https://www.ilo.org/wcmsp5/groups/public/@ed_ dialogue/@dialogue/documents/meetingdocument/wcms_159970.pdf [last viewed 31.03.2021].

[25] Employment Contracts Act, Art. 24. Available: https://www.riigiteataja.ee/en/eli/520062016003/consolide [last viewed 31.03.2021].

[26] *Storck, C.* Non-Competition Clauses in Labour Contracts. Belgium. XIVth Meeting of European Labour Court Judges, 4 September 2006. Available: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/ dialogue/documents/meeting document/wcms_159959.pdf [last viewed 31.10.2020].

[27] Employment Contracts Act. Sect. 5. Available: https://finlex.fi/en/laki/kaannokset/2001/en20010055.pdf [last viewed 31.03.2021].

[28] *Valverde, A. M., Salmerón, B. R., Luque, L., García, F. F.* Non-Competition Clauses in Labour Contracts. XIVth Meeting of European Labour Court Judges 4 September 2006. Available: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/ wcms_159971.pdf [last viewed 19.03.2021].

[29] *Gomes Vieira, J. M., de Oliveira Carvalho, C.* Labour Law in Portugal. Kluwer Law International, 2011, p. 110. Portuguese Labour code. Available: http://www.cite.gov.pt/pt/legis/CodTrab_L1_004.html#L004S9 [last viewed 19.03.2021]

while it may not exceed 3 years for other employees.[30] Austria has an interesting approach to competition restriction. Professional activity cannot be restricted for more than one year, nevertheless, the employer is entitled to enter into such agreement with a person whose monthly income exceeds the defined threshold which is determined by the Austrian Federal Ministry of Labour, Social Affairs, Health and Consumer Protection on annual basis.[31]

Approach to maximum term chosen by Latvia is generally considered reasonable because, on the one hand, it can provide sufficient protection of employer's interests (in contrary to a rather short term of 6 months) and, on the other hand, if an employee were subject to a term exceeding 2 years and he would not work in his or her speciality, he could face a risk of losing the qualification entailing loss of competitiveness in the labour market in future. Judgements of several countries' courts imposing life-long restrictions on competition must be marked as unique.[32]

Upon expiry of the term under the agreement, the employee can freely use their professional skills also against the former employer by working at a competing economic operator or launching one's own business in the same field.

1.4. Adequate Compensation for Restriction on Competition

Payment of compensation for the entire period of restriction on competition is mandatory to keep the restriction on competition valid. The primary goal of compensation is to compensate for employee's restricted career development opportunities and providing him or her with means of subsistence.[33]

The Labour Law of Latvia does not provide fixed criteria for the amount of remuneration (compensation) to be paid to employees for restriction of competition after termination of employment relationships. Clause 3 of paragraph 1 of Article 84 of the Labour Law states that an agreement between the employee and employer on restriction on employee's professional activity is permissible only where the mentioned agreement obliges the employer to pay adequate compensation to the employee for compliance with the restriction on competition for the entire period of such restriction. "Adequate compensation" is an ambiguous notion or general clause in law, which must be given content in each particular case.

The amount of adequate compensation varies from case to case and no rigid boundaries can be drawn to judge the adequacy of the compensation. It can be affected by term of the restriction on competition, or the position assumed by employee, field of activity, market situation and similar factors.[34]

Since the Labour Law does not stipulate the amount of minimum compensation to be paid out, the lack of such regulation has been frequently criticised. Some authors have tried to define the notion of "adequate compensation", for example,

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[30] *Mammone, G.* Non-Competition Clauses in Labour Contracts. Italy. XIVth Meeting of European Labour Court Judges, 4 September 2006. Available: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--dialogue/documents/meeting document/wcms_159966.pdf [last viewed 19.03.2021].

[31] *Kuras, G.* Non-Competition Clauses in Labour Contracts. Austria. XIVth Meeting of European Labour Court Judges, 4 September 2006. Available: https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meeting document/wcms_159958.pdf [last viewed 19.03.2021].

[32] Note. Laws in such countries do not stipulate the maximum term of restriction on competition and such admissibility was examined by courts. See *Selwyn, N. M.* Selwyn's Law of Employment. 14th edition. Oxford: Oxford University Press, 2006, p. 484.

[33] *Rācenājs, K.* Ierobežojumi pēc darba tiesisko attiecību izbeigšanās [Restrictions after termination of employment]. *Jurista Vārds*, No. 39(492), 25.09.2007.

[34] Darba likums ar komentāriem [Labour Law with comments], p. 225.

a specialist in the labour law and lawyer I. Gailums pointed out that it would be fair if monthly compensation reached 60–90% of employee's average salary.[35]

Unlike the flexible regulation in Latvia, which gives the parties a rather extensive private autonomy in setting the compensation amount, many countries have laid down certain limits of minimum compensation in their laws and regulations. For example, compensation in France must be at least 30% of previous salary, in Lithuania – 40% of employee's average salary[36], compensation in Romania must be at least 1/4 of current salary, and in Hungary – at least 1/3 of employee' previous salary[37]. Compensation in Germany[38], Belgium[39] and Denmark[40] must equal at least one half of the current salary.

At the first glance, it may seem that the Labour Law of Latvia would also benefit from determining the minimum threshold of such compensation, but at the same time a notion "adequate payment" stated in the Labour Law gives parties some flexibility and allows choosing a mutually advantageous compensation. For example, if the restriction is rather narrow and limits employee's possibility to work for one particular competitor of the former employer, the amount of compensation could be lower than 1/3 of current salary, like the case often is in other countries.

The compensation stipulated in the agreement can be formulated as certain amount or expressed as percentage of current employee's salary, payment for work, average salary etc. And the scope of monthly compensations might as well differ, for instance, one could agree that 400 euro are paid monthly for the first half-year and 300 euro are paid for the rest of period. If the agreement to restrict competition is made upon establishing the employment relationship or during it, it is preferable to express compensation in percentage from the salary rather than as a fixed sum which could be far from *adequate compensation* concept on the moment of termination the employment relationships considering a possible inflation.

Laws and regulations of many other countries show that the compensation must be reasonable or adequate. Since a restriction on competition does not translate to prohibition on employee to work but rather a restriction on certain field of activity, the compensation must not replace all earnings a person received so far. The Labour Law does not specify a list of criteria to be used for identifying adequacy – it must be considered individually in each case.

As already mentioned, the parties may integrate an agreement to restrict competition, including the scope of the remuneration to be paid, already in the employment contract. However, it may take long before the parties terminate the employment relationships and there is a possibility that the compensation agreed

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[35] *Gailums, I.* Darba likums. Komentāri. Tiesu prakse [Labour Law. Commentaries. Case Law]. 2nd Book. Rīga: Gailuma juridiskā biznesa biroja izdevniecība, 2003, p. 154.

[36] Lietuvos Respublikos darbo kodeksas [Labour Code of the Republic of Lithuania], Art. 38(3). Available: https://e-seimas.lrs.lt/ [last viewed 12.03.2021].

[37] On the Labour Code of Hungary. Available: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms186075.pdf [last viewed 12.03.2021].

[38] Judgment of the Federal Supreme Labour Court of the Federal Republic of Germany of 22 October 2008 in case No. 10 AZR 360/08; *Spinner, G.* Kommentar zum Paragraph 611a des Bürgerliches Gesetzbuches. In: *Henssler, M., Krüger, W.* (Red.). Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 5. Schuldrecht. Besonderer Teil II. §§ 535–630h. 8. Aufl. München: C. H. Beck, 2020, § 611a, Rn. 1148.

[39] Clifford Chance. Employment and Benefits in the European Union. London: Clifford Chance LLP, 2007, p. 12.

[40] International Business Publications. Denmark Investment and Business Guide. Volume 1. Strategic and Practical Information. Washington: International Business Publications. USA, 2015, p. 130.

is no longer adequate for the updated market salary at the moment of employment termination. Thus, in order to assess rationality and fairness of compensation, one should look at the situation when the restrictions are actually imposed rather than once agreed on in the contract.

The current case law does not permit to draw general objective conclusions about the amounts of adequate compensation. It can be concluded from the case law that the range of compensations in Latvia is rather impressive, at the same time, the type and scope of restrictions stated in these agreements are essentially different[41]. For example, laws and regulations of Lithuania did not have a comprehensive rules on restriction on competition and hence the amount of compensation to be paid before the new (applicable) Labour Code was adopted in 2017; nevertheless, in 2013, the Supreme Court of Lithuania, examining a case, also assessed the adequacy of compensation in the context of scope of restrictions and decided that the compensation amounting to 9% of the employee's previous salary, given the restrictions imposed on this employee, was too low and therefore did not meet the principle of honesty and fairness.[42]

There is an opinion found in the legal literature that if a minute compensation is offered for restriction on competition, i.e., 10% of average salary, the employee will not have resources to achieve that, and court declares such agreement as invalid due to unfair conditions.[43] When deciding on the amount of adequate payment, each case must be viewed individually. The court should look both on period bound for restriction on compensation and position assumed by the employee, employee's education and previous experience, field of activity and general situation in the labour market.

Before adoption of the amendments in 2017, the Labour Law did not govern the moment of payment of the compensation, i.e., it merely stipulated that compensation shall be paid monthly and it shall be paid for entire period of restriction. Back then, the Senate of the Supreme Court, when examining the procedure of compensation for restriction on competition, had ruled that such compensation can be paid out both after termination of the employment relationships and in advance, before termination of employment relationships, and this choice should be agreed by the parties alone.[44] Amendments of 2017 specified clause 3 of paragraph 1 of Article 84 stated that the compensation shall be paid

[41] For example, in the judgment of Sigulda court of 14 February 2007 in case No. C35045806 (not published) the amount of compensation is set at LVL 40; In the judgment of the Riga City Zemgale Suburb Court of 6 March 2008 in the case No. C31127906 (not published) the amount of remuneration is set at LVL 250; In the judgment of the Riga District Court of 18 December 2009 in case No. C33287709 (not published) the amount was determined LVL 580.13 for the first three months, then in the amount of LVL 348.08 for 9 months and in the amount of LVL 116.03 for the last twelve months. For example, in a case, the Kurzeme Regional Court has acknowledged that the compensation paid to an employee of LVL 25 for a restriction of competition and later LVL 70 per month is not appropriate and fair. (See Judgment of 9 January 2008 of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia in case No. SKC-6.)

[42] *Viešūnaite, V.* How to Conclude a Valid Lithuanian Non-Competition Agreement. Available: http://triniti. ee/en/archives/4420 [last viewed 12.03.2021].

[43] *Gailums, I.* Darba likums [Labour Law], p. 155.

[44] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 26. novembra spriedums lietā Nr. SKC-424/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 26 November 2008 in case No. SKC-424/2008]. In: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008 [Judgments and decisions of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia 2008], pp. 465–474.

monthly "following the termination of employment relationships", meaning that the law prohibited paying the compensation in advance, during the employment relationships.

Other countries do not have a uniform regulation of the moment of the compensation payment, for example, a compensation for compliance with non-compete obligation in Italy can be paid also during the period of employment relationships,[45] nevertheless, in majority of countries, the compensation is paid after termination of the employment relationships[46], for example, in Germany it is stated that such compensation is to be paid every month for the period of restrictions.[47]

Even though parties enjoy a rather extensive freedom of choice when it comes to the content of agreement to restrict competition, the payment of compensation should not be bound to certain circumstances, stating that the compensation is paid only where the former employee is proved to be working for employer's rival and in similar events. Here, Articles 1551 and 1558 of the Civil Law (hereinafter referred to as "CL") on suspensive condition will not apply.[48]

Issue on the amount of compensation in Latvian case law is rather poorly debated, however, the Supreme Court in its judgement of 2007 analysed some possible criteria of adequate compensations. The Supreme Court pointed out linking the amount of agreed compensation to employee's education, skills and possibilities is not reasonable without identifying the ways the education and skills were a precondition to assuming given position. It does not matter if the employee, having education and set of skills, could do other kind of job too, when assessing compliance of compensation for the restriction on competition with requirements put forth in said legal provision, if the employee chose to work in that position and consented to the compensation under agreement. Given the circumstances established by the district court, i.e., that after ending the employment relationships with the employer for whom he worked as a car seller, the employee started working for other employees with job duties also related to car selling, the court based on unsubstantiated criteria – compensation for restriction on competition – for deciding this issue. At the same time, the proposed criteria regarding the salary offered by the rival contradicts the statutory goal of competition restriction – to protect employer from professional activity of employee which may compete with employer's business (clause 1 of paragraph 1 of the Labour Law) – and therefore it is not applicable to interpretation of clause 3 of paragraph 1 of Article 84. Thus, by proposing wrong criteria for deciding an issue on whether the remuneration under agreement is to be admitted as fair, the court misinterpreted clause 3 of paragraph 1 of Article 84 of the Labour Law.[49]

In the context of compensation amount a judgement of 2019 by the Civil Court Panel of Riga Regional Court draws attention.[50] The merits of this case were that

[45] *Mammone, G.* Non-Competition Clauses …

[46] *Storck, C.* Non-Competition Clauses …

[47] *Spinner, G.* Kommentar zum Paragraph 611a des Bürgerliches Gesetzbuches. , § 611a, Rn. 1148.

[48] See, e.g., the judgment of the Riga District Court of 17 December 2013 in case No. C33334313 (not published and has not entered into force due to the concluded settlement).

[49] Latvijas Republikas Augstākās tiesas Civillietu departamenta 2007. gada 29. augusta spriedums lietā Nr. SKC-560/2007 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 29 August 2007 in case No. SKC-560/2007] (not published).

[50] Rīgas apgabaltiesas Civillietu kolēģijas 2019. gada 15. augusta spriedums lietā Nr. C32179317. [Judgment of the Chamber of Civil Cases of the Riga Regional Court of 15 April 2019 in case No. C32179317]. Available: https://manas.tiesas.lv/ [last viewed 01.04.2021].

the parties entered an employment contract in 2012, whereby the employer hired the employee as a car technician with a stipulated salary of 284.57 euro per month, and this amount was increased to 375 euro per month with later amendments. By entering into the employment contract, the parties had agreed that in order to prevent competing with the employer's business, the employee was not entitled to pursue professional activity or work for another employer in a way that created competition to former employer's business in the territory of Latvia, Lithuania and Estonia for two years after termination of employment relationships. The employer agreed to initially pay for such restriction on competition a monthly compensation of 14.23 euro, increasing that amount later to 15 euro monthly. The employment contract stipulated the penalty for violation the non-competing obligation equals to 24 monthly salaries.[51] The employer found out that the employee had started employment relationships with another employer specialising in car maintenance (thus creating a competition to the company of the former employer) within two years after termination of employment relationship, therefore, the first filed a case in the court against the former employee demanding the return of all monthly compensations paid plus a contractual penalty, as stated in the employment contract. The initial amount of the contractual penalty calculated by the employer was 9,000 euro, however, it was recalculated in compliance with Articles 1 and 1717 of the Civil Law, and an action was brought to the court demanding payment of contractual penalty of 3 000 euro. The employee, in his turn, responded with a counter-action, requesting that the relevant clauses in the employment contract are declared invalid. When examining this dispute in a court of second instance, the court rejected employee's argument that monthly compensation of 15 euro for compliance with non-competition obligation was not adequate. The Regional Court stated:

> *claimant's objections were declared on the moment he was demanded to return the compensation and pay contractual penalty, given that the employee had violated the restriction on competition.* [..] *During validity period of the employment contract and also on the moment of signing the amendments, the employee did not raise any objections regarding the restriction on competition or amount of compensation under that agreement. Thereby the employee expressed his consent to the restriction on compensation, compensation payment and its amount as offered by the employer.*

Concerning the amount of the contractual penalty, the court concluded that it was not adequate and decided to recover a contractual penalty of 750 euro from the former employee.[52]

1.5. Notion of the Field of Activity

As noted above, paragraph 2 of Article 84 of the Labour Law states that competition restriction may apply only to the field of activity whereof the employee was hired during the employment relationships. The employer is not entitled to impose overly wide restriction on competition, it must be commensurable and serve the interests of both parties.[53]

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[51] Rīgas apgabaltiesas Civillietu kolēģijas 2019. gada 15. augusta spriedums lietā Nr. C32179317. [Judgment of the Chamber of Civil Cases of the Riga Regional Court of 15 April 2019 in case No. C32179317], p. 1. Available: https://manas.tiesas.lv/ [last viewed 01.04.2021].

[52] Ibid., pp. 4–5.

[53] *Miller, R. L., Jentz, G. A.* Fundamentals of Business Law: Excerpted Cases. 2nd edition. Mason: South-Western Cengage Learning, 2009, p. 202.

The Senate of the Supreme Court has admitted that specifying the fields of activity subject to restriction in the agreement is not a mandatory prerequisite for its validity because the mentioned legal provision does not demand the competing field or industry subject to restriction where the former employee is not entitled to work after termination of employment relationships be included in the agreement since it is already provided for by the law.[54] In this way, even if the agreement to restrict competition fails to list the fields of activity where the employee may not operate after termination of employment relationships in greater detail, paragraph 2 of Article 84 of the Labour Law states that the restriction of professional activity of the employee applies merely to the field where employer operates, besides taking into account the position and job duties of the employee. For example, if an agreement on competition restrictions was signed by a food technologist who previously worked in the meat processing sector, there would be no grounds to restrict his right to work in the confectionery sector.

The Supreme Court in its judgement of 9 January 2008 in case No. SKC-6 shared the conclusion of lower instance courts that a restriction on competition imposed on a secretary, who has worked for a car sales company which generally prohibits working in any company operating in the field of car or spare part and accessory sales, maintenance, repair, rent or lease, being an employee of such company and providing professional consultations to a company or entrepreneur related to any of these lines of direction, to be incommensurate and unreasonable.[55]

1.6. Type and Scope of Restriction on Competition

In compliance with paragraph 4 of Article 84 of the Labour Law, type and amount of compensation for competition formulated in a written form is a prerequisite of agreement's validity.

Sometimes notions *type* and *scope* of restriction have caused confusion because the practice has seen cases where parties refer to an argument that contract does not contain one of these elements – either type or scope, – and have tried to insist on invalidity of such agreement. For example, the Supreme Court in its judgement, arguing against the appellant who insisted that there were no type and scope of restriction on competition provided in the agreement, gave definitions to notions "type" and "scope", explaining that in context of this case, *type* of restriction is – not to enter in employment relationships with other light vehicle sales companies, and scope – at least not to work as the seller in other light and off-road vehicle sales companies.[56]

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[54] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 26. novembra spriedums lietā Nr. SKC-424/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 26 November 2008 in case No. SKC-424/2008]. In: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008 [Judgments and decisions of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia 2008], pp. 465–474.

[55] Latvijas Republikas Augstākās tiesas Senāta 2008. gada 9. janvāra spriedums lietā Nr. SKC-6/2008 [Judgement of 9 January 2008 of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia in case No. SKC-6/2008] (not published).

[56] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 26. novembra spriedums lietā Nr. SKC-424/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 26 November 2008 in case No. SKC-424/2008]. In: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008 [Judgments and decisions of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia 2008], pp. 465–474.

Amendments to the Labour Law of 2017, adding paragraph 5 to Article 84, brings some clarity on what the types of restriction on competition are. Paragraph 5 of Article 84 of the Labour Law lists the main types of restrictions on competition, i.e., prohibition to work for competitors of former employer, prohibition to launch own business which competes with former employer, as well as prohibition to poach customers and employees of the former employer, however, this list of types of restrictions is not exhaustive.

1.7. Understanding the Place of Restriction on Competition

Similarly to the field of activity, type and scope of the restriction on competition, also the place of restriction on competition (territorial scale) is directly associated with employer's economic activity. In order to evaluate validity of the place of restriction on competition, each case must be examined separately, i.e., what is the territory where employer conducts his business and employs the staff.

The territory subject to restriction can be a village, town or city, county, state or even a group of countries. For example, in international companies which operate in a number of countries, agreement often imposes restriction on competition both in Latvia and other countries where the company operates, and such practice is supportable. When defining the territory, one must stick to reasonable criteria, for example, it would be fair to impose a territorial restriction only where the former employer already runs business in that territory or clearly intends to launch business there shortly; however, there are no grounds for prohibition to enter into employment relationships in countries where the employer does not plan to operate.

Latvian case law in one particular case has also examined commensurability of territorial restriction and the court ruled in that case that a restriction is commensurable for Latvia, whereas incommensurable for Lithuania and Estonia, and therefore the last ones were declared invalid.[57]

2. Consequences from Restriction on Competition Failing to Meet the Statutory Preconditions

Paragraph 3 of Article 84 of the Labour Law states that an agreement to restrict competition is not valid to an extent it is deemed to be an unfair restriction of future professional activity of the employee given the type, scope, place and time of competition restriction and compensation to be paid out to the employee.

The Supreme Court has decided that "said legal provision links declaring the agreement invalid to a limitation – to an extent the defined type, scope, place and time and also compensation amount are found unfair."[58] Therefore, for instance, if an agreement specifies excessively large territory subject to the restriction on competition it does not mean that agreement on competition restriction will lose force entirely, but rather just that particular provision which is considered to be unfair restriction of employee's future professional activity. The Supreme Court in its judgment demonstrated the so-called "blue pencil rule"[59], namely, that paragraph

[57] Latvijas Republikas Augstākās tiesas Senāta 2007. gada 29. augusta spriedums lietā Nr. SKC-560/2007 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 29 August 2007 in case No. SKC-560/2007] (not published).

[58] Ibid.

[59] More about "*blue pencil rule*" see *Pivateau, G. T.* Putting the Blue Pencil down: An Argument for Specificity in Noncompete Agreements. *Nebraska Law Review*, Vol. 84, No. 3, 2008. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007599 [last viewed 12.03.2021].

4 of Article 84 of the Labour Law entitles the court to declare an agreement to restrict competition after termination of employment relationships invalid only in section which is deemed to be an unfair restriction of future professional activity of the employee. In this case it was concluded that conditions restricting the employee's possibility to work in Lithuania and Estonia were incommensurate, yet they were adequate for Latvia, and therefore there were no grounds for invalidating the entire agreement. The court retains provisions which in given circumstances are not considered an unfair restriction of future professional development of the employee and declares provisions which are unfair in given circumstances invalid, therefore as if "rewriting" the very agreement.[60]

The so-called "blue pencil rule" entitles the courts either to (1) cross out provisions from the agreement which are declared by the court as unfair restrictions of employee's further professional development, leaving in force only those with statutory compliance, or (2) actually amend the agreement entered into by the employer and employee and include new provisions serving the parties' interests.[61] National regulations of each country concerning application of the blue pencil rule differ in that majority of countries have given the court a right to cross out unfair conditions and leave others intact.

For example, German courts apply the blue pencil rule and where the conditions of agreement are too wide and ambiguous or where employee's rights are excessively restricted, they "rewrite" conditions of agreement signed by the parties, or to be more specific – exclude provisions which are non-compliant in court's view[62]. Court rights in the U.S. State of Texas in terms of editing the competition restrictions are even ampler, i.e., not only the court may delete clauses, but also supplement the agreement with new ones, bringing parties' interests to balance.[63] Meanwhile, Italy employs a contrary principle which does not entitle a court to modify an agreement signed between employer and employee. Italian courts, referring to the private nature of such agreement, have decided that a court is not in a position to amend or change the provisions contained therein. The court may only evaluate whether the mentioned agreement complies with legal provisions and is valid, or alternatively restricts employee's rights and therefore is to be declared invalid.[64]

Even though the Supreme Court of the Republic of Latvia has recognised admissibility of the blue pencil rule in its practice, the Labour Law fails to provide a clear answer about the scope of applicability of that rule. The author believes that Latvian legal system should accept court's authority to declare invalid and delete conditions of an agreement which are incommensurable and too restrictive on one party, however, the court should not be allowed to actually amend the agreement

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[60] Tiesu prakse lietās par individuālajiem darba strīdiem [Case law on individual labour disputes].

[61] *Pivateau, G. T.* Putting …

[62] *Eylert, M.* Non-Competition Clauses in Labour Contracts. Germany XIVth Meeting of European Labour Court Judges 4 September 2006. Available: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meeting document/wcms_159962.pdf [last viewed 12.03.2021]. See also: *Spinner, G.* Kommentar zum Paragraph 611a des Bürgerliches Gesetzbuches., § 611a, Rn. 965; Judgment of the Federal Supreme Court of the Federal Republic of Germany of 18 February 2016 in case No. III ZR 126/15, para. 37.

[63] United States District Court, S. D. Texas, Houston Division. January 12, 2009. *TransPerfect Translations, Inc. v. Leslie.* Available: https://www.courtlistener.com/opinion/1902491/transperfect-translations-inc-v-leslie/ [last viewed 02.04.2021]; *Osis, G.* Konkurences ierobežojums pēc darba tiesisko attiecību izbeigšanās [Restriction of competition after termination of employment relations]. Rīga: Latvijas Universitāte, 2019, pp. 22–23.

[64] *Mammone, G.* Non-Competition Clauses …

entered into by and between the employer and employee and add new provisions. The court already performs its duty by declaring the incommensurate conditions of the agreement invalid – thus preventing conditions which deteriorate the legal situation of the employee or employer.

By applying paragraph 3 of Article 84 of the Labour Law, the court evaluates and gives content to notion "unfair restriction of professional activity". The court may not translate it wider, and it must scrutinise each criterion separately, and if it declares one of the agreement's provisions to be an unfair restriction of further professional development of the employee, the agreement to restrict competition must be declared invalid in relevant points.[65]

If the parties failed to comply with provisions of paragraph 4 of Article 84, namely, that the agreement on restriction on competition must be prepared in a written form, and the parties were found to agree on competition restrictions verbally and then violate these provisions (i.e. employer pays compensation, besides the employee complies with the agreed restriction on competition), then failure to comply with the written form should not automatically render the competition restrictions invalid (see Article 1488 of CL)[66].

3. Responsibility for Violation of the Restriction on Competition and Reinforcement of Liability

Sometimes in practice there are situations where one of parties does not want to fulfil their liabilities after signing an agreement to restrict competition, for example, a former employer no longer pays the agreed monthly compensation, or alternatively, the second most frequent case, when an employee, in contrary to the agreement, does not comply with the type or scope of competition restrictions and enters new legal relationships.

If the employer has violated conditions of the agreement, i.e., does not pay a compensation – it does not entitle the employee to violate provisions of the agreement by unilaterally withdrawing from it, unless such right is explicitly stipulated. In this case, Article 1588 of CL applies, and it states that one party may not withdraw from the agreement without a consent of other party even if the latter fails to perform it and because that party does not perform it. In this situation, the employee must put Article 1589 of CL into action, i.e., the employee is entitled to demand performance of agreement, that is to say – payment of compensation. The employee is also entitled to request recovery of interest set by law on the basis of Article 1765 of CL. The employee is likewise entitled to request cancelling of entire agreement on the basis of Article 1663 of CL.

On the other hand, if the employee has violated non-competition obligations, the employer has several means of civil protection to protect their rights, i.e.,

1) a right to oblige to perform the agreement (i.e., not to engage in competing activities, Article 1589 of CL);
2) to recover loss from employee (Article 1779 of CL);
3) to recover the agreed contractual penalty (Article 1716 of CL);
4) reclaim the competition compensation paid out for the period when the employee violated the agreement (Article 2389 of CL);

[65] Tiesu prakse lietās par individuālajiem darba strīdiem [Case law on individual labour disputes].

[66] Civillikums [The Civil Law] (28.01.1937). Available: https://likumi.lv/ta/en/en/id/225418-the-civil-law [last viewed 11.03.2021].

5) to recover interest set by law (Article 1765 of CL);
6) to request annulment of the agreement (Article 1663 of CL);
7) to refer to default on obligations as a reason for withholding further payments to the employee due to violation of prohibition to compete (Article 1591).

The first of mechanisms – the right to oblige the former employee to perform what was agreed may be tardy and inefficient, for example, the employer might learn rather late that the employee violates the provisions of the agreement and given the long duration of examination of cases in courts, it may result in lost basis of the claim and enforcement of the claim may turn out impossible (especially if restriction on competition is short-term).

Regarding the compensation for damage, it might be difficult to prove the loss, as the employee must prove the scope of loss which is hard to do in real life.

The most efficient mechanism for protecting the interests of a former employer is reinforcement of liabilities with contractual penalty. The employee, for the purpose of protecting his legal interests, can find it useful to include contractual penalty in agreement to restrict competition – then it would suffice to merely establish the fact of violation on employee's part to create a basis for demanding the employee to pay the contractual penalty according to Article 1716 of CL as for full default on obligations.

Also, legal doctrine of Germany has admitted that it is often not enough to request refraining from an activity and claim for damages to keep the employee from violating the non-compete obligation (because due to its complicated structure they may lack effectiveness), the obligation of employee to comply with competition restriction can be reinforced with a contractual penalty (integrating it in general transaction provisions, too).[67]

The case law regarding the reinforcement of liability in area of restrictions on competition has changed over the years. Until 2008, an opinion existed both in the literature and case law that the Labour Law does not offer contractual penalty as the reinforcement of liability, and Article 6 of the Labour Law invalidates provisions of an employment contract which, in contrary to the legislative acts, deteriorate employee's situation.[68] The Supreme Court with its judgement of 4 June 2008 in case No. SKC-377 changed the long-existing case law regarding including a contractual penalty for violation of professional activity restriction in the employment contract.[69] In the aforementioned judgement, the Supreme Court has arrived at a conclusion that it follows from Article 84 of the Labour Law that agreement to restrict competition does not affect the legal situation of the employee during employment relationships, but it applies to time period after discontinuation of employment relationships – agreement on competition restriction comes in force when the employment contract is no longer in force and concurrently – when a person has lost the status of employee.[70] Considering the aforementioned, the

[67] *Spinner, G.* Kommentar zum Paragraph 611a des Bürgerliches Gesetzbuches, § 611a, Rn. 1155.

[68] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 9. janvāra spriedums lietā Nr. SKC-6/2008 [Judgement of 9 January 2008 of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia in case No. SKC-6/2008] (not published).

[69] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 4. jūnija spriedums lietā Nr. SKC-377/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 4 June 2008 in case No. SKC-377/2008]. Available: http://www.at.gov.lv/ info/archive/department1/hronologiskaseciba/2008/ [last viewed 23.03.2021].

[70] Ibid.

Supreme Court concluded that, interpreting clauses 28 and 84 of the Labour Law as to their essence and content, agreement on restriction on competition must be recognised as an independent agreement,[71] and contractual penalty can be added as a measure of reinforcement of liability. The Supreme Court in its judgement ruled that under the circumstances where the parties have consented without deceit, fraud or duress to the agreement with stipulated restrictions on professional activity after termination of employment relationships and by signing that agreement expressed their will to fulfil the liability, it is only reasonable to stipulate another measure to reinforce the liability.[72] The court has argued the reasonableness of contractual penalty by stating that in a situation where agreement to restrict competition is declared legal, and it can be found that former employee has violated it, however, no civil sanctions are applicable, Article 84 of the Labour Law becomes merely a declarative provision and business interests of the employer remain unprotected. In this situation, the mentioned provision would actually lose its meaning. Departing from a presumption that inclusion of Article 84 in the Labour Law has allowed the legislator to operate with a particular intention, it must be admitted that it has reasonably allowed application of measures that reinforce liability. Considering the aforesaid, there are no grounds to believe that a contractual penalty cannot be a reinforcement of liability in agreement to restrict competition.[73] For example, in Estonian Law on Employment Contracts it is stated *expressis verbis* that the parties are entitled to introduce contractual penalty in agreement to restrict competition.[74]

By including a contractual penalty, the employer must take into account that the contractual penalty must be commensurate with the provisions of competition restriction, the amount of compensation among other things. The Supreme Court has concluded that by recognising the restriction on competition as legal, the court has no grounds to declare that contractual penalty in this case cannot be a reinforcement of liability, however, the court could evaluate commensurability

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71 Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2009. gada 11. marta spriedums lietā Nr. SKC-99/2009 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 11 March 2009 in case No. SKC-99/2009]. In: Tiesu prakse lietās par individuālajiem darba strīdiem [Case law in cases of individual labour disputes], p. 39.

72 Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 26. novembra spriedums lietā Nr. SKC-424/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 26 November 2008 in case No. SKC-424/2008]. In: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008 [Judgments and decisions of the Department of Civil Cases of the Senate of 2008], pp. 465–474.

73 Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 4. jūnija spriedums lietā Nr. SKC-377/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 4 June 2008 in case No. SKC-377/2008]. Available: http://www.at.gov.lv/ info/archive/department1/hronologiskaseciba/2008/ [last viewed 23.03.2021]; Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 26. novembra spriedums lietā Nr. SKC-424/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 26 November 2008 in case No. SKC-424/2008]. In: Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta spriedumi un lēmumi 2008 [Judgments and decisions of the Department of Civil Cases of the Senate of 2008], pp. 465–474; Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2009. gada 11. marta spriedums lietā Nr. SKC-99/2009 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 11 March 2009 in case No. SKC-99/2009]. In: Tiesu prakse lietās par individuālajiem darba strīdiem [Case law in cases of individual labour disputes].

74 Employment Contracts Acts, Art. 26. Available: https://www.riigiteataja.ee/en/eli/520062016003/consolide [last viewed 02.04.2021].

of the contractual penalty with provisions of competition restriction.[75] It must be admitted that a contractual penalty may be included and deemed valid only provided that restrictions on professional activity are recognised as reasonable and lawful, and if the scope of contractual penalty complies with Article 1717 of CL that a contractual penalty must be commensurate and comply with fair business practice.

An obligation to pay a contractual penalty will be binding on the employee if the employer can prove the fact of violation of competition restriction (that is to say, the employer must not prove the resulting loss). As demonstrated by the analysis of Latvian case law, where an employee has violated a restriction on competition, former employers most often address the court with a request to reimburse the compensation paid for compliance with competition restrictions and contractual penalty and interest set by law, as well.

In several countries, in order to protect employer's interest in case of violation of restriction on competition, a special measure is employed – a provisional regulation which is, in fact, a court decision whereby the former employee is bound to an obligation to discontinue the competing business. Such claims are given noticeably short term of examination and therefore the former employer is efficiently protected before the violation of the employee has managed to greatly harm reasonable interests of the former employer.[76] However, while this provisional regulation is not provided for in Latvian laws and regulations, the contractual penalty is deemed to be the most efficient mechanism to protect interests of the former employer.

Interesting and rather beneficial from the perspective of employee's interests is, for example, the regulation existing in Netherlands, according to which an employee who wishes to start employment relationships or run a business that could potentially lead to violation of competition restriction may bring an action to the court in advance (*a priori*) and request to provide an evaluation in a form of a decision about compliance of this activity with provisions of the agreement.[77] Therefore, this regulation helps employees to avoid potential obligation to compensate for losses or pay contractual penalty to former employer in future.

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[75] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2008. gada 4. jūnija spriedums lietā Nr. SKC-377/2008 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 4 June 2008 in case No. SKC-377/2008]. Available: http://www.at.gov.lv/ info/archive/department1/hronologiskaseciba/2008/ [last viewed 23.03.2021]; Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2009. gada 11. marta spriedums lietā Nr. SKC-99/2009 [Judgement of the Department of Civil Cases of the Senate of the Supreme Court of the Republic of Latvia of 11 March 2009 in case No. SKC-99/2009]. In: Tiesu prakse lietās par individuālajiem darba strīdiem [Case law in cases of individual labour disputes], p. 39.

[76] *Azanda, I., Kravale, S.* Konkurences ierobežojumi darbiniekam, kapitālsabiedrības amatpersonai un dalībniekam pēc tiesisko attiecību izbeigšanās: Darba likuma un Konkurences likuma regulējums [Restrictions of competition for an employee, an official of a capital company and a participant after the termination of legal relations: Regulation of the Labor Law and the Competition Law]. In: Zinātniskie raksti 2012 [Scientific Papers 2012]. Rīga: RSU, 2013, p. 86.

[77] *Lagesse, P., Norrbom, M.* Restrictive Covenants …, p. 181.

4. Unilateral Withdrawal from the Restriction on Competition

4.1. Employer's Rights to Unilaterally Withdraw from the Restriction on Competition

Employer's rights to unilaterally withdraw from the restriction on competition are based on loss of his legal interest. The competition becomes senseless without a legal interest in preventing undesirable competition and therefore the employer may free himself from an obligation to pay compensation, at the same time allowing the employee to choose next workplace at his or her own consideration.

An issue on employer's rights to unilateral withdrawal from the agreement to restrict competition led to different opinions in the doctrine and case law, so in 2017 amendments were made to paragraph 1 of Article 85 of the Labour Law and currently this provision states that "If an employer gives a notice of termination, the employer may unilaterally withdraw from an agreement on the restriction on competition only prior to giving the notice of termination or concurrently with it, but in other cases of terminating employment relationships – prior to the termination of the employment contract." That way, the clause differentiates time until which an employer enjoys these rights depending on the type of termination of employment relationships. If the employer gives notice of termination to the employer at own initiative, he may inform the employee on withdrawing from the agreement to restrict competition only before the notice or on the moment of submission. Meanwhile, *in other cases* the employer must notify on withdrawal from the agreement to restrict competition before termination of the employment contract. As follows from the documentation substantiating amendments to the draft law, *other cases* are usually understood to be mainly mutual agreement of parties and notice given by the employee.[78] Thus, also in cases where an employee gives a notice, the employer could withdraw from the agreement for the entire period of notice until the moment the employment relationships are actually ended. Once the employment relationships between the employer and employee are terminated, the restriction on competition could be ended only upon mutual agreement of the parties.

4.2. Employee's Rights to Unilaterally Withdraw from the Restriction on Competition

Employee's rights to unilaterally withdraw from the agreement to restrict competition are much narrower than those of employer. They are governed by paragraph 3 of Article 85. It states that an employee is entitled to unilaterally withdraw from the restriction on competition only if the notice is given *due to important reason* (i.e., paragraph 5 of the Labour Law provides for the notice given by the employee). Notion "important reason" included in paragraph 5 of Article 100 of the Labour Law is a general clause which designates a reason preventing an employee from continuing employment relationships due to ethical and fairness considerations.[79] Pursuant to paragraph 5 of Article 100 of the Labour Law, the employee gives a notice of

[78] Likumprojekta "Grozījumi Darba likumā" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Preliminary Impact Assessment Report of the Draft Law "Amendments to the Labour Law" (Annotation)], No. 968, p. 12. Available: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/A13521DACF3B0A70C2258154002231CC?OpenDocument [last viewed 02.04.2021].

[79] *Jonikāns, V.* Darba likumā ietverto ģenerālklauzulu aizpildīšana [Completion of general clauses included in the Labor Law]. *Latvijas Republikas Augstākās Tiesas Biļetens*, No. 6, April, 2013.

termination if his subjective evaluation of given situation and circumstances leads him to a conclusion whereof he discontinues employment relationship due to ethical and moral considerations. In fact, such decision made by the employee essentially punishes the employer for his unethical, unjustifiable or even illegal conduct.[80]

Therefore, in compliance with paragraph 3 of Article 85 of the Labour Law, an employer may rely on the fact that the employee will be entitled to withdraw from the restriction on competition solely due to important reason. Besides, this reason essentially depends on employer's conduct. The employee, in his turn, is given an opportunity to free himself from an obligation to comply with the restriction on professional activity in relation to an employer who has compromised ethical and moral considerations. The employee must exercise his right to withdraw from the agreement on competition restrictions within one month of the day of notice, and he must submit such written notice to the employer. Nevertheless, a similar regulation of employee's rights to withdraw from the restriction on competition where the employment relationships were terminated due to conduct of the employer, exists also in Germany[81], Finland[82] and other countries.

For a comparison, it must be stated that in the neighbouring countries, Lithuania and Estonia, regulation of rights to unilaterally withdraw from the agreed restriction on competition has been elaborated more thoroughly. For example, a premise of Lithuanian Labour Code that an employee is entitled to unilaterally withdraw from the non-competition agreement if the employer has delayed payment of non-competition payments in whole or in part for more than two months, should be praised[83].

Of course, even though it is not written in the Labour Law, the parties are entitled to enter in mutual agreement on cancellation of competition restrictions at any time.

Summary

1. An agreement to restrict competition, even if it is already integrated in the employment contract, is a separate agreement. The agreement enters into force as soon as the employment contract loses its force and the parties have lost their respective status of employer and employee. Unlike the legal employment relationships, it is possible to apply also a reinforcement of liability – contractual penalty – in performing this agreement.
2. At times, some suggestions in Latvian legal literature include a regulation in Article 84 of the Labour Law on the minimum amount of compensation which is to be paid during the competition restriction period. However, since

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[80] Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 2015. gada 20. janvāra spriedums lietā nr. SKC-1793/2015 [Judgment of the Department of Civil Cases of the Supreme Court of the Republic of Latvia of 20 January 2015 in case No. SKC-1793/2015], para. 11. Available: http://www.at.gov.lv/downloadlawfile/2918 [last viewed 28.03.2021].

[81] *Thüsing, G.* Kommentar zum §§ 1–104a des Handelsgesetzbuch. In: *Drescher, I., Fleischer, H., Schmidt, K.* (Hrsg.). Münchener Kommentar zum Handelsgesetzbuch. Band 1. Erstes Buch. Handelsstand. §§ 1–104a. 5. Auflage. München: C. H. Beck, 2021, § 75, Rn. 3.

[82] Employment Contracts Act, Sect. 5. Available: https://www.ilo.org/dyn/natlex/natlex4.detail%3Fp_lang%3Den%26p_isn%3D58905%26p_classification%3D12.01 [last viewed 19.03.2021].

[83] Lietuvos Respublikos darbo kodeksas [Labour Code of the Republic of Lithuania]. Art 38(5). Available: https://eseimas.lrs.lt/portal/legalAct/lt/TAD/da9eea30a61211e8aa33fe8f0fea665f?positionInSearchResults=0&searchModelUUID=6a53d828-eda2-4945-a9fb-6ce37316f0cf%20f [last viewed 19.03.2021].

the parties in Latvia can agree on very diverse restrictions on competition, including a very narrow restriction on competition (in terms of scope or place), not always there is a reason to pay the compensation amount which is stated by laws and regulations of other countries (for example, a rather common regulation on one third or half of the previous salary). Therefore, in order not to restrict possibilities of the parties to agree on a narrow restriction on competition in terms of scope, it is preferable to retain the existing regulation of the Labour Law, which states that compensation must be "adequate", and this notion should be given content in each individual case.

3. When determining the place of restriction on competition, one should follow reasonable criteria. For example, it would be reasonable to agree on wide territorial restrictions (attributing it to foreign countries), if the employer already runs business on that territory or plans to launch it there soon.
4. Paragraph 3 of Article 84 of the Labour Law states that "agreement to restrict competition is not valid to an extent it is deemed to be an unfair restriction of professional activity of the employee [..] considering the compensation to be paid out to employee." Considering that parties may integrate agreement to restrict competition already in the employment contract, it may, however, take long before the parties terminate the employment relationships and there is a possibility that the compensation agreed is no longer adequate for the updated market salary on the moment of termination of employment. Therefore, fairness of compensation for restriction on competition should be evaluated as at the time these restrictions are applied (i.e., when terminating employment relationships) rather than the situation at the moment of incorporating this agreement in the employment contract.
5. If the agreement to restrict competition is made upon establishing the employment relationship or during it, it is preferable to express compensation in percentage from the salary rather than a certain (fixed) sum which could be far from *adequate compensation* concept on the moment of termination the employment relationships considering a possible inflation.
6. Each country has its own regulation of restriction on competition with unique features, nevertheless, it can be concluded that in Latvia the restriction on competition is regulated in accordance with the ideas of a democratic state and elements of employment freedom integrated in the constitution. Amendments to the Labour Law of 2017 have improved legal framework of restriction on competition in a number of aspects and can be evaluated positively, however, there are several elements related to this instrument of law which could, possibly, be solved by Latvian courts or legislator, and examples from other countries may give useful insights in this regard.

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Antitrust Rules and Competition Violations. The Evolution of Consumer Protection

Dr. **Antonio Capasso**
Political Science Department, University of Naples Federico II
E-mail: *capassoant@hotmail.it*

According to the order of the Court of Verona of 01.10.2018, No. 3763, a prohibited agreement pursuant to Art. 2, Law No. 287/1990, can also be harmful to consumer or entrepreneur, who has not taken part in it. In order to recognize an interest in invoking the protection referred to in Art. 33, para. 2, Law No. 287/1990, it is not sufficient to allege the nullity of the agreement itself but it is also necessary to specify the consequence that this failure has produced regarding the right to an effective choice between a plurality of competing products. This paper intends to investigate the institutions of the omnibus guarantee and its consequent nullity for violation of the discipline that governs agreements restricting competition. It also provides an analysis of the remedies and safeguards available to consumers who have remained extraneous to the competitive agreement, and who have entered into a subsequent contract of the latter.

Keyword: competition, antitrust discipline, consumer protection, prohibition of restrictive agreements, nullity, subsequent contracts.

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Introduction

In the light of the lessons of the Supreme Court in Joint Sections of 2005, the current article aims to analyse the evolution of the protection of consumers harmed by agreements restricting the freedom of competition, the tools available to them, as well as the probative duties of the latter, necessary to assert their rights in court.

This paper, starting from the case decided by the court of Verona in 2018, underlines how the ruling of the Supreme Court of 2005, enabled to highlight

the circumstance that the Law No. 287/1990[1] moved in two directions: on the one hand, towards entrepreneurs, on the other – hand towards consumers. In particular, both in doctrine[2] and in jurisprudence[3] it was noted that this law was aimed at protecting not only the position of the entrepreneur, but also that of the market operators, thus also including consumers.

In light of this, according to the approach adopted by the Supreme Court, every individual entrepreneur or consumer having a significant procedural interest, would be entitled to take legal action, in the face of an alleged or found violation of the antitrust provisions.

Therefore, when there is an unlawful functioning of the market, the consumer i salso entitled to propose the action aimed at obtaining the declaration of nullity of anticompetitive commercial practices. The judges also specify that the consumer, in addition to bringing the action aimed at ascertaining the nullity, can also propose the compensation action in order to obtain compensation for the damages suffered as a result of such practices.

The Supreme Court, therefore, admitting full protection in favour of the consumer, recognized the compensation of the latter's interest in "not seeing the competition distorted"[4], however, it specified that with renard to the allegation of the nullity of the agreement, it is also necessary for the latter to specify the consequence that this failure has produced on its right to an effective choice between a plurality of competing products.

With the order of 2018, the Court of Verona[5], specifically dealt with the relationship between the institutions of the omnibus guarantee and the restrictive agreements on competition. A guarantee had been stipulated in accordance with the guidelines prepared by the Italian Banking Association in 2003, according

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1 Law "Norme per la tutela della concorrenza e del mercato" [Standard for the protection of competition and the market], No. 287 (10.10.1990) (Gazzetta Ufficiale No. 240, 13.10.1990). Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato [last viewed 13.07.2021].

2 *Alessi, R., Cannizzaro, E. C., Bozza, E.* Codice della concorrenza: norme italiane e comunitarie per la tutela della concorrenza e del mercato [Competition Code: Italian and EU regulations for the protection of competition and the market]. Torino, Giappichelli, 2008; see also *De Vita, M.* Il diritto della concorrenza nella giurisprudenza. Torino, Giappichelli, 2009.

3 Corte d Appello, Napoli, sez. I civile, sentenza 19/10/2007, according to which, the legitimacy to act pursuant to Art. 33, Law No. 287/90 must be recognized not only on behalf of the entrepreneur but also of the consumer. This action must be considered practicable by all those market subjects who have an interest in maintaining its competitive character to the point of being able to attach a specific prejudice resulting from the disruption or reduction of this character. The consumer, therefore, as the final purchaser of the product offered by the market, has the right to take action for damages if, faced with a restrictive agreement, his right to choose between multiple competing products is circumvented. In the present case, the consumer had complained about the existence of an agreement restricting the freedom of competition put in place by numerous insurance companies, including the defendant company, aimed at increasing the costs of the policies, procuring them an unfair profit to the detriment of the contractors. The Naples Court of Appeal rejected the proposed application because it considered that the actual damage suffered as a result of the anti-competitive agreement was not proven by the plaintiff.

4 Cass., Sezioni Unite, 4 febbraio 2005, sentenza No. 2207. Available: https://st.ilsole24ore.com/art/SoleOnLine4/Speciali/2006/documenti_lunedi/02gennaio2006/SEN_04_02_2005_%202207.pdf?cmd%3Dart [last viewed 15.07.2021].

5 Ordinary Court of Verona, Third Civil Section**,** Judge Dr. Massimo Vaccari, Ordinance of 01.10.2018, No. 3763, Available: https://www.expartecreditoris.it/wp-content/uploads/2018/10/ord.-Trib-Verona-01.10.2018_pdf.pdf. [last viewed 15.07.2021].

to a model that the Bank of Italy, (provision No. 55 of May 2, 2005), considered contrary to the prohibition of anti-competitive agreements of Art. 2, para. 2, lett. a), of Law No. 287/1990.

The guarantors, who had opposed the injunction issued pursuant to the guarantee contract, acted as partners of a limited liability company (Ltd.), in favour of which they had lent the guarantee and, therefore, as consumers, users of the competitive system distorted by the prohibited agreement.

In support of their opposition, they also deduced the extinction of the guarantee pursuant to Articles 1956 and 1957 of Italian Civil Code since the BPM would have been guilty of failing to prevent the increase in debt exposure.

The court noted the generic prospectus with respect to the interest in enforcing the invalidity of the guarantee, in light of what was decided by the Supreme Court of Cassation in Joint Sections in sentence No. 2207/2005.

It was considered that the plaintiffs did not clarify by virtue of which mechanism the verified nullity of the restrictive understanding of the competition would have determined the invalidity of the single contracts, nor even by what type of nullity these would have been affected. The same invocation of the most recent ruling by the Court of Cassation No. 29810/2017[6] was not relevant, according to the court, having examined the matter only incidentally.

1. Regulation of the Omnibus Guarantee and Its Nullity Concerning Violation of the Antitrust Discipline

The omnibus guarantee, also known as the bank guarantee, or general guarantee (the adjective general is preferred to the omnibus by some, based on the argument that the bank guarantee can never be *omnibus debitis*[7]), or "guarantee without limit maximum guarantee of any operation", is a contract created in banking practice and regulated by uniform banking regulations prepared by the ABI (Italian Bankers' Association)[8].

It takes its name from the most characteristic and most famous clause that characterizes it, the omnibus one, or extension clause[9], which extends the content of the guarantor's commitment to all present and future obligations of the principal

[6] Cass. Civ., sez. I, 12 Dicembre 2017, No. 29810. Available: http://mobile.ilcaso.it/sentenze/ultime/18676#gsc.tab=0 [last viewed 18.07.2021].

[7] *Ravazzoni, A.* Sulla c.d. polizza fideiussoria, [On the so-called surety policy]. *Foro it*., 1957; Id., item Fideiussione, in Dig. disc. priv., Civil Division, VIII, Turin, 1992, 254 pp.

[8] Schema ABI: condizioni generali di contratto per la fideiussione a garanzia delle operazioni bancarie – measure No. 14251/2003 [ABI scheme: general contractual conditions for the surety guaranteeing banking operations – measure No. 14251/2003]. This scheme is characterized by the omnibus clause, by virtue of which the guarantor provides a guarentees to the debtor of a bank for all present and future obligations assumed towards a bank. It is made up of 13 articles, which define: the subject of the guarantee (Art. 1), the obligations of the guarantor (Articles 2, 3, 4, 6, 7, 8 and 10), the obligations of the bank (Art. 5), the faculties of the bank (Articles 9, 11 and 12), the clauses not applicable to guarantors who act as consumers pursuant to Art. 1469 bis, para. 2, of the Italian Civil Code and provide guarantees in favor of subjects having the same quality (Art. 13). Available: https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/59570E8C503E753BC1256FFC0045223C/$File/p14251.pdf [last viewed 20.06.2021].

[9] In a contractual practice, the extension can refer to all the obligations of the principal debtor deriving from banking operations carried out with the creditor bank, or even to all the obligations of principal debtor, even not deriving from strictly banking operations. The extension, as well as objective, can be subjective, in the sense that the guarantor is responsible not only for the obligations of the principal debtor, but also for those of his assignees; furthermore, the extension can be subjective in the sense

debtor towards the bank, in the past without indication of maximum value, and without time limits. The omnibus clause can therefore have greater or lesser amplitude, depending on whether or not the maximum value of the guarantor's commitment is indicated, and the expiry date of its bond; depending on whether or not its commitment refers only to the obligations of the principal debtor arising from banking transactions, and whether the type of banking operations giving rise to obligations is specified or not. In the most recent practice, a number of guarantee models have been introduced, containing a different extension of the guarantor's commitment. The most significant change is that an omnibus bank guarantee form was introduced with an indication of the maximum amount for which the guarantee is given.

The Bank of Italy with the provision No. 55 of 2 May 2005[10], had considered the guarantees, stipulated in accordance with the contract draft prepared by the ABI in 2003[11], in contrast with the prohibition of competitive agreements pursuant to Art. 2, co. 2, lett. a), of Law No. 287/1990, with the consequent nullity of the same[12].

Recently, courts have finally opened a front of particular interest with regard to the judgment of validity of the omnibus guarantee contracts stipulated in compliance with the 2003 ABI model. The problem arose of the fate of the guaranteeagreements reproducing the model deemed anti-competitive stipulated before the provision of the Bank of Italy[13]. The story originates from the provision of

of the transmission of the guarantor's obligation to his heirs and assignees, jointly and severally, in derogation of the civil law principle, which excludes solidarity between the debtor's coheirs.

[10] Bank of Italy, measure No. 55 del 2 maggio 2005. ABI – Condizioni generali di contratto per la Fideiussione a garanzia delle operazioni bancarie [ABI – General contractual conditions for the surety guaranteeing banking operations]. Available: https://www.bancaditalia.it/compiti/vigilanza/avvisi-pub/tutela-concorrenza/provvedimenti/prov_55.pdf [last viewed 13.06.2021].

[11] On the point see *Sparano E.,* "Diritto della banca e del mercato finanziario" [Bank and financial market law] Vol. XV, No. 4, 2001.

[12] Treviso Court Section III, judgement No. 1632/2018, which addresses the problem of the clauses referred to in Articles 2, 6 and 8 of the standard guarantee scheme, drawn up by ABI in October 2002. These are the articles relating to the so-called "reviviscence" clause, or the clause that requires the guarantor to hold the bank harmless from events subsequent to the fulfillment by virtue of which the bank found itself having to return the payment received (the most recurrent, the declaration of ineffectiveness of the payment pursuant to Art. 67 LF), of the clause derogating from Art. 1957 of the Italian Civil Code and the clause that extends the guarantee also to the obligations of restitution of the debtor deriving from the invalidity of the basic legale relationship. As part of a special enforcement proceeding promoted by the Bank of Italy pursuant to Art. 2 and 14 of Law No. 287/1990 and aimed at ascertaining whether the provisions of the aforementioned negotiation method could take on anti-competitive characteristics, the opinion of 22 August 2003 of the AGCM was acquired. The anti-competitive nature of the clauses was in particular identified in the attitude of the clauses in question, rather than guaranteeing access to credit (a function recognized and deemed to be adequately pursued also by the "first request" payment clause), to impose liability on the gurantor of the negative consequences deriving from non-compliance with the bank's due diligence obligations, or from the invalidity or ineffectiveness of the principal obligation and of the acts in settlement of the same. At the end of the administrative procedure, the Bank of Italy issued provision No. 55 of 2005, ascertaining that Articles 2, 6 and 8 of the contractual basis, prepared by the ABI for the bank operations guarantee (omnibus guarantee) contained provisions which, if applied uniformly, were in conflict with Art. 2, para. 2, letter a), of Law No. 287/90 and sending the ABI to disseminate new contractual basis to the banking system, as amended by the aforementioned provisions. Available: https://www.expartecreditoris.it/wp-content/uploads/2018/09/tb-treviso-dott.-cambi.pdf

[13] Before being disclosed to associated banks, by letter received on 7 March 2003, the ABI communicated the contractual basis pursuant to Art. 13 of the Law No. 287/90, considering that it did not constitute a violation of the provisions of Art. 2 of the aforementioned law. In April and May 2003, the Bank of Italy invited the ABI to eliminate some provisions that were critical from a competitive point of view from the negotiation schedules. By letter received on 11 July 2003, the ABI sent a new version of

the Bank of Italy No. 55 of 2 May 2005 made by the Supervisory Authority by virtue of its function as Authority for competition between credit institutions pursuant to Law No. 287 of 1990, Articles 14 and 20[14], (in force until the transfer of powers to the AGCM, with the Law No. 262 of 2005[15], starting from 12 January 2016), concerning the possible contrast of the omnibus guarantee scheme prepared by the ABI with Art. 2 of Law No. 287 of 1990.

The Bank of Italy's preliminary investigation focused on the clauses of the ABI Scheme "which could have anti-competitive effects after a general adoption by the banks, lacking a balanced reconciliation of the interests of the parties". Specifically, the Authority had focused on the provisions that placed on the guarantor obligations not provided for by the regulatory system of the surety, as an exception to the regulation itself. The Bank of Italy had considered the aforementioned clauses relevant since, being included in the ABI Scheme, could have a diffusion that could lead to a standardization of the offer on the national territory, excluding the aforementioned "reconciliation of the interests of the parties".

2. The Prohibition of Restrictive Agreements

Competition laws carry many prohibitions, but not as many remedies. They govern the interventions of the authorities (or public enforcement). But only in two cases do they indicate the consequences of the violation of antitrust rules in relations between private individuals (or private enforcement): the nullity of agreements and the nullity of the acts of concentration.

This is the case of the so-called "downstream contracts". Those contracts, abstractly legitimate – because otherwise nothing would stand in the way of concluding them in those terms – are instruments of a violation of the free market, as through them the companies participating in an agreement or holders of a dominant position implement in relations with third parties their anti-competitive purposes. Contracts whose 'vice' is therefore a reflection of something upstream.

Given the reflex character of the vice, a mention of the warnings present in the law regarding precise definition of upstream is preliminary to the discourse. The first case, expressly regulated, is that of agreements.

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the contractual basis. In order to ascertain whether the notified contractual scheme could constitute an anticompetitive restricting agreement, the Bank of Italy – also considering the guidelines of the *Autorità garante della concorrenza e del mercato*, expressed in the opinion of 22 August 2003 – opened on 8 November 2003 the measure of inquiry by Articles 2 and 14 of the law No. 287/90. 6. On 1 September 2004 a request for information was sent to some banks, aimed at ascertaining whether the contractual clauses used by them for the omnibus guarantee differed from those contained in the scheme prepared by the ABI. The replies from the banks were received during the same month. On 1 September 2004, the ABI sent a statement of defense to the Institute, followed on 20 September by a request for extension of the procedure, motivated in relation to the need to carry out further information on the legal status of the omnibus guarantee and on the role of it in banking practice; a second defense was sent by the ABI on 28 December 2004. On 9 March 2005 the ABI had access to the procedural file. On 25 March 2005, the final statement of the ABI was received.

[14] Law No. 287 of 1990, Articles 14 and 20. Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato [last viewed 20.08.2021].

[15] Legge 28 dicembre 2005, No. 262 "Disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari" [Provisions for the protection of savings and discipline financial markets]. *Gazzetta Ufficiale* No. 301 del 28 dicembre 2005, Supplemento ordinario No. 208. Available: https://www.gazzettaufficiale.it/eli/gu/2005/12/28/301/so/208/sg/pdf [last viewed 12.08.2021].

Such are the agreements, or the concerted practices, or the resolutions of bodies that group companies, which have the object or effect of "preventing, restricting or distorting the game of competition". Such object or effect is prohibited, and these cartel agreements or practices are therefore illegal. Textual consequence of the prohibition is the "nullity" of the agreement. Invalidity ill referable to those understandings that are mere "practices", and not agreements or resolutions, but which in any case express the prohibition of the distortion of competition, whether or not the way to perpetrate it is negotiated. The agreements that the use defines as exploitation, but also those of sharing, as an alternative to those of exclusion, achieve their anti-competitive purpose through the stipulation with third parties of contracts of instrumental content to the agreement. The ruling declaring the agreement null and void removes its legal effects – the constraint on the autonomy of the participants – but does not in itself remove its material or economic effects, such as contracts concluded with third parties in implementation of the agreement.

With respect to which a different and autonomous judicial request is required.

The second case is the abuse of a dominant position, no matter how acquired. This abuse is also prohibited and therefore illegal. The abuse is also mainly perpetrated through the stipulation with third parties of instrumental content contracts. That being an expression of it – because they are direct exercise of the dominant position and precisely tools for the concrete restriction of competition, and therefore "abuses" – are also affected by the prohibition.

On closer inspection, the first case approaches the second: the agreement would not be able to be significantly restrictive and then prohibited if the companies participating in the cartel did not acquire, by understanding each other, a position of power in the market that would allow them to impose own conditions to third parties. And imposing them, restricting competition, is an exercise – obviously abusive as it is precisely restrictive – of the position constituted by the cartel, therefore included in the prohibition[16].

EU[17] and national legislation provide a general definition of prohibited agreements and a list of the operations considered to be included in the prohibition. Both legislators do not limit themselves to prohibiting formal contractual agreements but also refer to concerted practices and therefore to those behaviors knowingly common to several companies and to decisions and resolutions of business associations and others like these[18].

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[16] *Gentili*, *A.* La nullità dei "contratti a valle" come pratica concordata anticoncorrenziale (Il caso delle fideiussioni ABI), [The nullity of "downstream contracts" as an anti-competitive concerted practice (The case of ABI sureties)], Giustizia Civile, fasc.4, 1 aprile 2019, p. 675.

[17] Art. 81, para. 1 of the EC Treaty, prohibits all agreements between undertakings and concerted practices "which may affect trade between Member States and which have the object or effect of preventing, restricting or distorting internal competition. of the common market". An "understanding" is defined as an agreement between companies aimed at limiting or eliminating competition between competing companies, in order to increase prices and profits without producing objective compensatory advantages.
Also the Art. 81.1 prohibits not only agreements by which competing companies in the same market limit their competition with each other (horizontal agreements, such as common agreements for the fixing of prices, sharing of markets, limitation of production, etc.) but also those cd vertical, through which companies that are at different stages of the production or distribution of a product restrict competition between one of them and third parties (for example exclusive procurement, exclusive distribution, selective distribution, price resale, twinning, franchising, etc.).

[18] *Buonocore, V.* L'impresa, in Trattato di diritto commerciale [The company, in the Commercial Law Treaty]. Torino, 2002.

Both disciplines require that the restrictive agreements of competition are prohibited but provide for the possibility of derogations or exemptions if the agreement is justified in the perspective of economic progress and goes in favor of consumers. However, the operation of these exceptions is different in the two systems. For the Italian legislator the restrictive agreements are considered in themselves prohibited, unless they are authorized by the Authority for competition and the market[19], while the European legislator provides for the system of the legal exception, that is the rule for which the restrictive agreements that comply with the criteria set for the derogation are in themselves lawful regardless of a prior decision to do so (except for the existence of the burden of proof on the company with regard to the existence of such conditions).

In both jurisdictions the violation of the prohibition results in the invalidity of the agreements even if this type of sanction can be ineffective because of the agreements, even if invalid, can be voluntarily performed by the parties or may be de facto behavior such as the concerted practices, for which the sanction of invalidity is not significant[20]. Therefore, the European regulation provides that the Commission can impose fines or periodic penalty payments on the companies and the Italian legislation provides for the authority to apply administrative sanctions calculated on the turnover of the companies involved.

The concerted practices, which refer to the conscious parallelism[21] of companies that standardize their behavior on the market, are particularly important; however, there is a tendency to point out that such conduct, in order to integrate an agreement, must be accompanied by factual elements that "qualify" it as the result of an informed choice of companies (for example, evidence of information exchanges[22]).

Both the Italian and the Community standard contain a list of examples, not mandatory, of agreements considered anti-competitive. The "black list" includes both horizontal agreements, that is among companies that operate at the same

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[19] *Calamia, A. M.* La nuova disciplina della concorrenza nel diritto comunitario [The new competition rules in Community law]. Milano, Giuffrè, 2004.

[20] *Risso, F.* Le intese anticoncorrenziali: prova, sanzioni e autorizzazioni in deroga [Anti-competitive agreements: evidence, sanctions and authorizations in derogation]. Foro Amministrativo: Consiglio di Stato, 2008.

[21] Antitrust Authority, 11/06/2013, No. 24405 according to whom some pipelines built in the sector of liner shipping to and from Sardinia which resulted in a significant increase in ticket prices are the result of an understanding, in the form of a concerted practice, which finds no alternative justification except in the concertation between the shipping companies that ferried on the same routes during the summer season 2011 with the effect of causing an alteration of the competitive process in the passenger transport market on the Civitavecchia-Olbia, Genoa-Olbia and Genoa-Porto Torres routes. Antitrust Authority, 23/04/2013, No. 24327: in the legal assistance professional service market, some evaluation practices, resolutions and regulations, adopted by many Bar Councils regarding enrollment in the special section of the Community lawyers established therein (in this case, Chieti, Rome, Milan, Latina, Civitavecchia, Tivoli, Velletri, Tempio Pausania, Modena, Matera, Taranto and Sassari), have entered into anticompetitive restrictive agreements by imposing, for example in different ways, significantly onerous conditions held by professionals interested in the recognition in Italy of the title of lawyer obtained abroad, whose registration is subject to the passing of the mandatory "test" by the applicants, with the effect of discouraging Community lawyers from establishing and exercising their professional activity in Italy.

[22] *Guglielmetti, G.* Le nozioni di impresa e di intesa [The notions of business and understanding]. In: *Ghidini, G., Libonati, B., Marchetti, P.* (eds.), Concorrenza e mercato. Rassegna degli orientamenti dell'Autorità Garante, [Competition and the market. Review of the guidelines of the Guarantor Authority], Milano, 1995, 19.

economic level, and vertical agreements, for example those between manufacturer and retailer.

The typical hypotheses concern:

- agreements on purchase prices, sales prices or contractual conditions;
- agreements that limit market access;
- market sharing agreements;
- agreements that violate equal treatment;
- agreements imposing additional services not linked to the subject of the contract.

The agreements are not prohibited in general, but only when they consistently prevent, restrict or falsify the game of competition within the national (or Community) market or one of its "relevant parts"[23]. This the concept of a relevant market appears, which takes the form of a general parameter in light of which to assess the existence of an effective injury to competition.

3. The Consumer Compensation in the Light of Sentence No. 2207/2005 of the Joint Sessions of the Supreme Court and Its Jurisprudential Evolution

The main junction of the Verona Court Ordinance is the reference to the well-known sentence of the Supreme Court in Joint Sections No. 2207/2005, concerning the legitimization of the request for compensation of the damages of the consumer who remained extraneous to the anti-competitive agreement, and who has stipulated a contract constituting the consequence of the latter.

According to the Judges of Piazza Cavour, the "Antitrust" Law No. 287/1990 provides rules to protect the freedom of competition having as recipients not only the entrepreneurs, but also the other subjects of the market, or anyone who has an interest, processually relevant, to the preservation of its competitive character to the point of being able to allege a specific consequent prejudice caused by the prohibited agreement. Taking this into account, on the one hand, that, as a result of an agreement restricting the freedom of competition, the consumer, the final purchaser of the product, sees his right to an effective choice between competing products impaired, and, on the other hand, that the consequent contract[24] constitutes the consequence of the prohibited agreement, which is essential for achieving and implementing its effects.

Therefore, since the violation of interests recognized as relevant by the legal system integrates, at least potentially, the un fair damage *ex* Art. 2043 cc[25], the final

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[23] In the judgement of June 4, 2009, case No. C-8/08, T-Mobile Netherlands, the Supreme Court of UE, addressed the issue concerning the necessary number of contacts to talk about the agreement, concluding that "the number among the concerned operators is not so much relevant, as the fact of ascertaining whether the contact, or the contacts that have taken place, have allowed them to take into account the information exchanged with competitors to determine their behavior on the market and to knowingly replace practical cooperation between them for the risks of competition". Within the same, it is also affirmed the principle according to which even the single contact, if regarded as causing damage, can be considered as an agreement.

[24] *Longobucco, F.* Violazione di norme antitrust e disciplina dei rimedi nella contrattazione "a valle", [Violation of antitrust rules and discipline of remedies in "downstream" bargaining], Edizioni Scientifiche Italiane, 2009.

[25] Art. 2043 Civil Code: Compensation for unlawful acts. "Any intentional or negligent act, which causes unjust damage to others, obliges the person who committed the act to compensate the damage". Civil code, Book 4, "Of the obligations", ix "Of illicit facts".

consumer, who suffers damage from a contract that does not admit alternatives due to the collusion, has at his disposal, even if he is not part of a competitive relationship with the entrepreneurs who are the authors of the collusion, the action of ascertaining the invalidity of the agreement and compensation for damage pursuant to Art. 33 of the Law No. 287 of 1990[26], action whose knowledge is referred to by the latter rule to the jurisdiction of the competent Court for the territory where the specialized section is established (referred to in Art. 1 of Legislative Decree of 26 June 2003, No. 168[27], and subsequent modifications[28]).

In this ruling, the Joined Sessions of the Supreme Court, faced first and foremost, the problem of the nature and purpose of the law antitrust emphasizing as the same – to be read moreover which is the implementation of the Art. 41 of the Constitution[29] – its object was the protection of the competitive structure of the market.

Secondly, they dealt with the existence, for the consumer, of the right to act pursuant to Art. 33 of the Law No. 287 of 1990 ("[..]The action of the consumer tending to the elimination of the prejudicial consequences deriving from an agreement restricting competition pursuant to Art. 2, para. 2 of Law No. 287 of 1990, assuming the ascertainment of the nullity of the agreement itself, still implies the allegation of an illicit fact in the structure of which the psychological element of intent or guilt is inherent, so that, regardless of the formal denomination conferred, it must be qualified as a compensatory action and not a restitution, with the consequence that it becomes relevant to establish whether this action can be carried out pursuant to Art. 33, para. 2 of Law No. 287 of 1990 [..]").

With this innovative decision, the Joined Sessions distanced themselves from the previous Supreme Court sentence of December 9, 2002, No. 17475[30] – which

[26] Art. 33 of the Law No. 287 of 1990: "Jurisdiction": 1. Judicial protection before the administrative judge is governed by the administrative process code. 2. Actions for nullity and compensation for damage, as well as appeals aimed at obtaining urgent measures in relation to the violation of the provisions referred to in titles from I to IV are promoted before the competent court for the territory in which the section is established specialized referred to in Art. 1 of Legislative Decree 26 June 2003, No. 168, and subsequent amendments. Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato

[27] Art. 1 of Legislative Decree 26 June 2003, No. 168 "Establishment of specialized sections on business matters": "They are established in the courts and appellate courts of Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice sections specialized in the field of company, without additional charges for the state budget or increases in staffing resources". Available: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003;168

[28] In the present case, after the imposition by the Antitrust Authority of numerous insurance companies of a sanction for participating in an anticompetitive restricting agreement, the consumer had sued before the lay magistrate, its insurance company, requesting reimbursement of a part (20%) of the premium paid for a motor liability insurance policy, assuming that the amount of the premium had been abusively influenced by the participation of the insurance company in the prohibited agreement.

[29] Art. 41 of Italian Constitution: "Private economic initiative is free. It cannot take place in conflict with social utility or in a way that could damage security, freedom, human dignity".

[30] With sentence No. 17475 of 27 June / 9 December 2002, the Supreme Court of Cassation, with reference to the action brought against the Insurance Companies condemned by the Competition and Market Authority with provision No. 8546 of 28 July 2000 for illegitimate establishment of a cartel to the detriment of its customers, stated that the aforementioned request: a) must be qualified as an ordinary liability action subject to the ordinary criteria of jurisdiction provided for by the code of civil procedure (value and territory), and not those of the action pursuant to Art. 33, para. 2 of Law No. 287/90, which provide for the exclusive knowledge of the Court of Appeal in a single degree of merit; b) can be proposed to the individual Insurance Company, without the need to extend the same to other Insurance Companies condemned by the Guarantor Authority, but not to ISVAP

had excluded the legitimization of the consumer to the aforementioned actions on the assumption that the antitrust law was intended essentially to regulate relations between entrepreneurs.

In the subsequent pronouncement of legitimacy on the subject (Cass. Civ., 28 October 2005, No. 21081)[31], while reiterating the principle dictated by the Joined Sessions in matters of legitimacy to act, the real procedural difficulty in which the consumer who decides to take legal action pursuant to Art. 33, Law No. 287 of 1990 may incur, was examined. Beginning with the identification of the subjective element of the person committing the infraction, the quantification of the damage, the burden of proof[32]: problems that have not been fully addressed in the aforementioned decisions and remain an unknown factor which only the application practice will be able to cope[33]. Thus, for example, on the burden of proof, in a more recent judgment of merit, it was stated that "the consumer who promotes the compensation action pursuant to Art. 33, Law No. 287/90, [..], cannot exempt from the burden of proving to have suffered an actual prejudice as a result of the anticompetitive act, in homage to the general principle sanctioned by the Art. 2697 of the Civil Code, according to which those who want to assert a right in court must prove the facts that constitute their basis"[34].

In other decisions (eg Court of Cassation, 13 July 2005, No. 14176; Court of Cassation, 26 August 2005, No. 17398[35]), the Court expressed the clear opinion of maintaining the substantial system described, insisting on the burden of proof charged to the plaintiff who wants to prove his damage. Therefore, the need to produce the ascertainment of the anticompetitive agreement, from which the judge will be able with legal criteria to ascertain the existence of the element that guarantees the possibility of obtaining compensation for damage, that is the existence of the "causal link", not always easy to demonstrate.

The Supreme Court recently returned to the question (with sentence No. 29810 of 12.12.2017)[36] and reiterating that "faced with an agreement restricting the freedom

(lacking passive legitimacy). Available: http://www.ordineavvocatifrosinone.it/sites/default/files/uploaded/2003%20Sentenza%20n.%2017475%20del%2027-06-2002%20Cassazione.pdf [last viewed 03.08.2021].

[31] Cass. Civ., 28 October 2005, No. 21081. Available: https://www.webgiuridico.it/sentenze2015/21081-2015.htm [last viewed 03.08.2021].

[32] It is true, however, that the combined chambers of 2006 had considered that: "Consumer's action aimed at eliminating the prejudicial consequences deriving from a competitive restricting agreement pursuant to Art. 2 para. 2 of Law No. 287 of 1990, presupposing the ascertainment of the nullity of the agreement itself, still implies the allegation of an illicit fact in the structure of which the psychological element of willfulness or guilt is inherent, so that, regardless of the denomination formal conferral, must be qualified as a compensation and non-restitution action".

[33] *Poncibò, C.* Profili di risarcibilità del danno per violazione della normativa antitrust [Damage compensation profiles for violation of antitrust legislation]. Giust. Civ., 2006.

[34] Naples Court of Appeal, Civil Decision. 19 October 2007. Available: https://www.altalex.com/documents/news/2008/09/24/concorrenza-e-risarcimento-sulla-legittimazione-ad-agire-del-consumatore [last viewed 04.08.2021].

[35] Court of Cassation, 13 July 2005, No. 14176. Available: https://renatodisa.com/corte-di-cassazione-sezione-vi-ordinanza-8-luglio-2015-n-14176-la-presunzione-di-distribuzione-ai-soci-degli-utili-non-contabilizzati-puo-operare-a-condizione-che-la-ristrettissima-base-sociale-o/ [last viewed 05.08.2021]; Court of Cassation, 26 August 26 2005, No. 17398. Available: https://www.altalex.com/documents/news/2006/09/15/le-azioni-individuali-dei-consumatori-nel-diritto-antitrust-italiano [last viewed 05.08.2021].

[36] Court of Cassation sentence No. 29810 of 12.12.2017, according to which "They are not excluded from the verification of nullity pursuant to Art. 2, co. 3, Law 287/1990, contracts that constitute "downstream" application of an anti-competitive agreement prohibited by Art. 2 Law 287/1990 for

of competition, the consumer, the final purchaser of the product offered by the market, sees debased (if not trampled on) its right to an effective choice between competing products and, on the other, that the subsequent contract constitutes the consequence of the prohibited agreement, essential to achieving and implementing its effects", established that between the subsequent contracts[37] or shops of the illegal agreements (previously concluded), also include the contracts stipulated before the ascertainment of the agreement by the Authority, provided that the agreement is prior to the disputed store, concerning the regulation of anticompetitive acts all the subsequent events that create distortive effects on competition.

The question of law addressed in this ruling (very similar to that of the Court of Verona in question), concerns a subsequent contract (in this case, a guarantee agreement that accesses a bank account contract), and in particular its nullity for violation of Art. 2 of the Law No. 287 of 1990[38], by virtue of the same provision of the Bank of Italy, which occurred upon stipulation of the guarantee agreement[39]. In particular, according to the Supreme Court the nullity of which is discussed and which would be affected the guarantee agreement derives from the violation of the mandatory rule, pursuant to Art. 1418, para. 1[40], of the Italian Civil Code and, in particular, of the regulation deemed to be of an economic public nature contained in Art. 2, para. 2, lett. a) of the Law No. 287 of 1990.

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the sole fact of having been stipulated prior to the recognition of the unlawfulness of the agreement by the Guarantor Authority".

37 With regard to the protection of competition, the concept of negotiation link is also widespread in other European legal systems. In Germany, there is talk of instrumental acts of the anti-competitive agreement (*Ausführungsvertrage*) when these are put in place according to a model of "external competition" to anti-competitive behavior. Following the recognition of the recourse of the negotiating link, the principle of simul stabunt simul cadent will be applicable, according to which, following the declaration of invalidity of the agreement, the same fate will also be reserved for contracts stipulated in execution of this.

38 Art. 2 of the Law No. 287 of 1990, "Agreements restricting the freedom of competition". 1. Agreements and/or concerted practices between companies as well as resolutions, even if adopted pursuant to statutory or regulatory provisions, of consortia, business associations and other similar bodies are considered to be understood. 2. Agreements between companies which have the object or effect of preventing, restricting or significantly distorting competition within the national market or in a significant part of it are prohibited, including through activities consisting in:
a) directly or indirectly fix the purchase or sale prices or other contractual conditions;
b) prevent or limit production, market outlets or accesses, investments, technical development or technological progress;
c) share markets or sources of supply;
d) apply, in commercial relations with other contracting parties, objectively different conditions for equivalent services, so as to determine unjustified competitive disadvantages for them;
e) make the conclusion of contracts subject to the acceptance by the other contracting parties of supplementary services which, by their nature or according to commercial usage, have no relationship with the object of the contracts themselves. Available: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato.
3. Prohibited agreements are void for all purposes.

39 *Belli, C.* Contratto a "valle" in violazione di intese vietate dalla Legge Antitrust [Downstream contract in violation of agreements prohibited by the Antitrust Law]. *GiustiziaCivile.com,* 25 maggio 2018. See also *D'Orsi, S.* Nullità dell'intesa e contratto "a valle" nel diritto antitrust [Nullity of the understanding and "downstream" contract in antitrust law]. *Giurisprudenza Commerciale,* fasc. 3, 2019, p. 575.

40 Art. 1418, para. 1 of Civil Code "Causes of nullity of the contract". 1.The contract is void when it is contrary to mandatory rules, except that the law provides otherwise. 2.The lack of one of the requirements produces nullity of the contract indicated by Art. 1325, the unlawfulness of the cause, the unlawfulness of thevreasons in the case indicated by Art. 1345 and the lack in the object of the requirements established by Art. 1346. 3. The contract is also null and void in the other cases established by the law.

As stated above, the order of the Verona court also ruled on the invalidity of the guarantee issued by the opponents as members of the beneficiary company; however the Verona judge overrode their application, since even if consumers, they would not have deduced anything on the point, failing to the indications of the Joined Sessions of 2005 according to which "it is not enough that the consumer attaches the nullity of the agreement, but it is also necessary that specifies the consequence that this failure has produced on its right to an effective choice between a plurality of competing products".

The nullity of the agreement would not be comparable for the peaceful opinion of most of the doctrine[41] to the "nullity of protection" of the consumer, wanting here the legislator to immediately protect the general interest in the freedom of competition set forth in Art. 41 of the Constitution and the relevant Community principles.

So, just the Art 2 co. 2 lett. a) of the Law No. 287/1990, moving in a clear "pro-competitive" perspective, would be in fact violated every time the subsequent contract stipulates, for banking practice, the uniform application by the banks of clauses that involve a clear increase in the positions of the guarantors by virtue of an agreement, previously stipulatedbetween the banks themselves and prohibited pursuant to the aforementioned law.

Summary

This study reaches the following conclusions:

1. According to sentence No. 2207/2005 of the United Sections of the Supreme Court, the "Antitrust" Law of 1990 concerns not only entrepreneurs, but also all the other market players, who have a procedurally relevant interest in its competitiveness and who can demonstrate to having suffered injury as a result of restrictive agreements;
2. The procedural tools available to the final consumer are the action to ascertain the nullity of the restrictive agreement and that of compensation for damage pursuant to Art. 33 of the law No. 287 of 1990, an action whose knowledge is left by the latter provision to the competence of the court pertaining to the territory in which the specialized section is established;
3. Recent case (Cass. Civ. Sent. No. 29810/2017) has established that "subsequent contract" of illicit agreements (concluded "upstream") also include contracts stipulated prior to the assessment of agreement by the Authority, provided that the agreement is prior to the contested transaction, concerning the discipline on anti-competitive acts all subsequent events that distort competition. In the present case, according to the Supreme Court, the nullity from which the surety contract would be affected derives from the violation of the mandatory rule, pursuant to Art. 1418, para. 1, of the Italian Civil Code

[41] *Allegri, V.* Nuove esigenze di trasparenza del rapporto banca-impresa nell'ottica della tutela del contraente debole [New transparency requirements of the bank-company relationship with a view to protecting the weak contractor]. Banca borsa, 1987, I, 49 e*t seq.*; *Alpa, P. G.* Illecito e danno antitrust: Casi e materiali [Tort and antitrust damage: Cases and materials]. Turin, 2016, 2 pp. and 155 pp; *Amadio, G., Macario F.,* (eds.), VV. Diritto civile. Norme, questioni, concetti [Civil right. Norms, issues, concepts]. Parte I, Bologna, 2014, p. 578; *Catricala', A., Gabrielli, E.* I contratti della concorrenza [Competition contracts]. Turin, 2011, 82 pp.

and, in particular, of the provision deemed to be of economic public order contained in Art. 2, para. 2, lett. a) of the Law No. 287 of 1990;

4. Finally, the order of the Court of Verona of 1 October 2018 also pronounces on the nullity of the guarentee issued by the opponents as shareholders of the beneficiary company; however, the Veronese judge overrides their request, since even if consumers, they would not have deduced anything on the point, failing to comply with the indications of the United Sections of 2005 according to which: "it is not enough for the consumer to allege the nullity of the agreement, he must also specify the consequence that this flaw has produced to his right to an effective choice between a plurality of competing products".

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Functionality Problems of Collegial Government Institutions During the COVID-19 Pandemic and Solutions for the Future

Dr. iur. **Ringolds Balodis**
Faculty of Law, University of Latvia
Professor at the Department of State Law
E-mail: *ringolds.balodis@lu.lv*

Dr. iur. **Edvīns Danovskis**
Faculty of Law, University of Latvia
Docent at the Department of State Law
E-mail: *edvins.danovskis@lu.lv*

This article analyses the ways for ensuring continuity of operation of the state collegial decision-making authorities – the *Saeima* [the Parliament of the Republic of Latvia], the Cabinet and the local government councils during Covid-19 pandemic. The work of the parliament, the government and local government in the emergency situation is examined, mainly focusing on the initiated form of remote work. Notably, in this respect, Latvia's experience is unique since the *Saeima's* e-platform is one of the first instances in the world where the parliament fully operated in the virtual environment. The article also analyses the role of the Cabinet as the crisis management centre during the emergency situation, focusing also on accessibility and other problematic issues in the remote proceedings of the local government councils and committees. The article concludes that successful solutions were found for the parliament's work in the virtual environment within the existing legal framework. In the emergency situation, the local government councils and their structural units also had to try the forms of remote work. Additionally, the authors of the article have tried to provide assessment to determine which digital solutions employed during the pandemic should be used in post-crisis situations.

Keywords: remote decision making, crisis management, COVID-19.

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Introduction

The COVID-19 pandemic, which arrived in 2020, has brought challenges in many areas, *inter alia*, in the work of public institutions. Considerations regarding epidemiological safety have influenced the work of constitutional institutions, testing the regulation of the *Satversme* [Constitution] of the Republic of Latvia (hereafter – the *Satversme*), as well as causing obstacles to the customary functioning of public administration. The effects of the pandemic are not only obstacles and burdens but also the opportunities provided by the solutions created to overcome these obstacles and burdens. A good example is the *Saeima* sitting, held on 21 December 2020, when, for the first time in the *Saeima*'s history, a vote was held approving the Constitutional Court's Justice by ballot papers at a remote sitting by the *Saeima*. Previously, voting by ballot papers was held on site: each member of the *Saeima* received the ballot paper, filled it out and queued to place the ballot paper into the ballot box, the vote counting required several re-countings of the ballot papers and entering the information into the minutes, and each round of voting took at least 40 minutes. In contrast, each round of voting by ballot papers on 21 December 2020 required slightly more than a minute, ensuring immediate presentation of the results.[1] This *ad hoc* solution was very effective; it probably will be retained in the future because the return to the cumbersome and time-consuming voting by printed ballot papers actually is no longer desirable.

Clearly, the experience accumulated by state institutions during the pandemic should be assessed and some solutions should be retained in the post-pandemic stage. This article has been prepared within the framework of national research programme "Towards the Post-Pandemic Recovery: Economic, Political and Legal Framework for Preservation of Latvia's Growth Potential and Increasing Competitiveness (reCOVery-LV)" to analyse the experience accumulated during the emergency situation of spring 2020 in the functioning of constitutional bodies and public administration from the legal aspect and to develop recommendations for improving the legal framework established for the functioning of these institutions.

In the part of the research that is presented in this article, the use of the legal and technical solutions for ensuring continuity in the functioning of collegial decision-making authorities – the *Saeima*, the Cabinet and local government councils – and their long-term use in post-pandemic conditions is examined. The aim is to develop sustainable improvements of the constitutional legal framework for effective management of emergency situations. In reviewing the functioning of the constitutional bodies of the State of Latvia in this emergency situation, publicly

[1] See video recording of the extraordinary sitting of the *Saeima* on 21 December 2020. Available: https://cdn.tiesraides.lv/saeima.lv/20201221135701_saeima.lv.1_0_0 [last viewed 08.03.2021].

accessible information primarily has been used; however, some members of the *Saeima* also have been interviewed. In cooperation with the magazine "Dienas bizness" and the Legal Science Research Institute, a discussion of the former prime ministers on expanding the prime minister's authority during the emergency situation was held.[2] The data necessary for the research on the experience and opinions of local government deputies regarding the forms of remote work were obtained through a survey of members of local government councils, conducted in cooperation with the research centre SKDS.

1. Ensuring the *Saeima's* Decision-Making Capacity During Covid-19 Pandemic

The Latvian parliament is a collegial institution, consisting of one hundred members, who have been elected in general, equal and direct elections, and by secret ballot based on proportional representation. In fulfilling their duties of office, members of the parliament exercise their authority in the name of and for the people of Latvia. Unlike other institutions of public administration, the *Saeima*, as the central constitutional institution of the state[3], enjoys great internal autonomy with respect to organisation of its work;[4] however, it has to abide by the procedure for adopting legal norms,[5] including values in the *Satversme* and general legal principles;[6], it also must review the compliance of legal norms included in draft laws with legal norms of higher legal force, *inter alia*, the European Union law provisions.[7] Moreover, the *Saeima* must comply with the Rules of Procedure of the *Saeima*[8], which, unlike in many other countries, is not an internal parliamentary document but a law.

With the proclamation of an emergency situation in the spring of 2020, the customary rhythm of the *Saeima's* work was suspended. In March 2020, the number of persons infected with the virus causing COVID-19 in Latvia gradually increased; the situation elsewhere in the world and in Europe already had become critical.[9] The *Saeima* was looking desperately for a way to ensure the sittings of the legislator in the conditions of pandemic.

Looking back at the first six months of the emergency situation, the initial confusion of the *Saeima* can be observed when it did not convene the weekly Thursday sitting of the *Saeima* on 12 March 2020. Undoubtedly, this was linked to the government's decision to proclaim an emergency situation in the state. The *Saeima* convened on Friday, 13 March, an extraordinary sitting to approve, pursuant to law, the Cabinet's order on the emergency situation. At the same time, the *Saeima* Press Service announced that the Parliament was transiting to an

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2 Ekspremjeri pēc TZPI iniciatīvas rīkotajā pasākumā diskutē par premjera pilnvarām [Ex-prime ministers reflect on powers of prime minister in the event held by the TZPI]. Available: https://tzpi.lu.lv/2020/12/23/ekspremjeri-pec-tzpi-iniciativas-rikotaja-pasakuma-diskute-par-premjera-pilnvaram/ [last viewed 08.03.2021].

3 The Constitutional Court's Judgement of 11 December 2020 in case No. 2020-26-0106, para. 14.

4 Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima [Commentary of the Constitution of the Republic of Latvia. Chapter II. *Saeima*]. Rīga: Latvijas Vēstnesis, 2020, pp. 59, 80, 344–429.

5 The Constitutional Court's Judgement of 24 October 2019 in case No. 2018-23-03, para. 14.

6 The Constitutional Court's Judgement of 23 April 2019 in case No. 2018-12-01, para. 24.1.

7 The Constitutional Court's Judgement of 7 June 2019 in case No. 2018-15-01, para. 13.2.

8 Saeimas kārtības rullis [Rules of Procedure of the Saeima] (28.07.1994). Available: https://likumi.lv/ta/id/57517-saeimas-kartibas-rullis [last viewed 03.04.2021].

9 See The Constitutional Court's Judgement of 19 December 2011 in case No. 2011-03-01, para. 22.2.1.

emergency regime, which would be manifested as the suspension of activities until 16 April and convening for extraordinary sittings only if necessary. The committees, as stated in the announcement, would continue working, convening for sittings to address the most pressing issues.[10] The *Saeima* tried, together with lawyers and IT specialists, to find the best solution in the unusual circumstances for re-orienting to totally remote work. However, because at the end of March one member of the *Saeima* was diagnosed with COVID-19 disease,[11] both the government and the parliament had to self-isolate for a fortnight. The *Satversme* of Latvia does not have the tool of delegated legislation; therefore, at the end of April, the Presidium and the administration of the *Saeima* found a developer of a technological solution, who undertook to create an Internet platform for remote work that would be suitable for the legislature. The *Saeima*, continuing to abide by the rules of distancing and other epidemiological requirements, convened partially on site. Joint meetings of the *Saeima* were still held in the *Saeima*'s premises, with members in separate rooms. Extraordinary sittings of the *Saeima* were held on 2, 3, 16 April as well as on 4, 7, 14, 19, 21 May; moreover, sometimes even two or three extraordinary sittings were held on the same day (for example, on 3 April, 14 May, etc.). To decrease the risk of COVID-19 spreading, visitors and mass media representatives were not given access to the *Saeima* building during the sittings and could follow the sittings only remotely.[12] Basing its decision on the request by several members of the *Saeima*, recommendations by the Centre for Disease Prevention and Control and the opinion by the *Saeima* Legal Bureau[13], the Presidium of the *Saeima* began organising the *Saeima's* sittings remotely on *e-Saeima* platform (website https://e.saeima.lv). The opposition's objections and requests to continue on-site sittings were dismissed.[14] Despite technical problems, *e-Saeima* platform stood the test and was constantly technologically improved, paying special attention to the functionality of

[10] Saeima ārkārtējās situācijas laikā strādās ārkārtas režīmā [*Saeima* shall work in the emergency regime during the state of emergency]. Available: https://www.saeima.lv/lv/aktualitates/saeimas-zinas/28817-saeima-arkartejas-situacijas-laika-stradas-arkartas-rezima [last viewed 01.01.2021].

[11] Members and employees of the *Saeima*, who since 1 March 2020 have been in direct contact (closer than 2 metres and longer than 15 minutes) with deputy Kalniņš or have been in lasting contact in one room with deputy Kalniņš (e.g., participating in sittings), must self-isolate for 14 days (home quarantine), counting from the day of the last contact. All other persons who have lately been in contact with the patient are invited to self-isolate (see Saeimas deputātu, darbinieku un parlamenta apmeklētāju ievērībai saistībā ar parlamentā konstatēto COVID-19 saslimšanas gadījumu [Attention to the members, employees and visitors of the *Saeima* regarding the case of COVID-19 in the *Saeima*]. Available: https://www.saeima.lv/lv/aktualitates/saeimas-zinas/28835-saeimas-deputatu-darbinieku-un-parlamenta-apmekletaju-ieveribai-saistiba-ar-parlamenta-konstateto-covid-19-saslimsanas-gadijumu [last viewed 01.01.2021]).

[12] Mediju pārstāvji Saeimas sēdei varēs sekot attālināti (tiešraidē) [Representatives of the media to observe the sitting of the *Saeima* remotely] (01.04.2020). Available: https://www.saeima.lv/lv/aktualitates/saeimas-zinas/28846-mediju-parstavji-saeimas-sedei-vares-sekot-attalinati-tiesraide [last viewed 01.01.2021].

[13] Saeimas Prezidijs lēmis turpināt noturēt parlamenta sēdes platformā e-Saeima [The Presidium of the *Saeima* has decided to continue sittings of the *Saeima* in the platform *e-Saeima*]. Available: https://www.saeima.lv/lv/aktualitates/saeimas-zinas/29016-saeimas-prezidijs-lemis-turpinat-noturet-parlamenta-sedes-platforma-e-saeima [last viewed 01.01.2021].

[14] Latvijas Republikas 13. Saeimas 2020. gada 26. maija ārkārtas sēdes stenogramma [Transcript of the sitting of the *Saeima* of 26 May, 2020]. Available: https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/062DCE23FB7ECE52C2258589003EFA15?OpenDocument [last viewed 01.01.2021].

voting and debate management. The technological solution, using ballot papers[15] to approve the Constitutional Court's Justice on 21 December 2020, can be regarded as a significant improvement to the *Saeima's* work. However, the deficiencies in the remote parliamentary sittings need to be pointed out. Despite the effective technological solution, it is rather difficult for the politicians to communicate in the remote regime, which hinders effective decision- making (for instance, the Constitutional Court's Justice was not elected) and any communication takes much more time. The same applies to the government's sittings.

The *Saeima* closed its spring session of 2020 on 19 June, although it had to convene for a couple of remote extraordinary sittings during the summer. When the autumn session was resumed, the *Saeima* returned to on-site sittings of the committees and the *Saeima* joint meetings, which were announced as emergency sittings (on 3, 10, 17 and 24 September). Journalists were allowed to be present in the *Saeima*'s chamber together with the *Saeima* Members.[16] However, on 1 October, "in view of the current epidemiological situation, the Presidium of the *Saeima* decided to continue reviewing the agenda of the *Saeima's* extraordinary sitting of 24 September on 1 October remotely on *e-Saeima* platform"[17] (during the emergency situation, such examination of the agenda of extraordinary sittings for several days was customary), and sittings were still being held in this format at the time this article was prepared. In total, during the autumn session of 2020, Members of the *Saeima* convened for 42 extraordinary sittings[18] on the remote platform *e-Saeima*, being able to review and to adopt in the final reading 16 new laws and amendments to 110 laws in total. One hundred and twenty-six draft laws were transferred to committees for examination. In working with the submitted draft laws and examining these in the second and the third reading, 2042 proposals were reviewed by the *Saeima*. Without contesting the legitimacy of the *Saeima*'s decisions while working remotely, the large number of laws adopted during the emergency situation, as well as the sizeable statistics lead to reflections on the quality of the parliamentary work, because, even if the video technology works perfectly, the video conferencing regime used in the parliamentary sittings are not the same as on-site sittings, just as remote court hearings significantly hinder comprehensive examination of evidence.[19] By using *e-Saeima* platform, the possibilities for the deputies to exchange opinions during a video sitting are very limited. In this respect, the remote sittings of the Latvian parliament differ from the on-site sittings. A parliamentary

[15] Previously one round of voting took more than half an hour because the ballot papers had to be received, placed into the ballot box and counted, whereas with e-*Saeima* it took only a couple of minutes.

[16] 3. septembrī sasaukta Saeimas ārkārtas sēde; mediju pārstāvji tai varēs sekot līdzi klātienē [*Saeima* sitting has been convened on 3 September; representatives of the media may observe it in presence]. Available: https://www.saeima.lv/lv/aktualitates/saeimas-zinas/29122-3-septembri-sasaukta-saeimas-arkartas-sede-mediju-parstavji-tai-vares-sekot-lidzi-klatiene [last viewed 01.01.2021].

[17] Par Saeimas sēžu norisi un mediju iespējām 1. oktobrī [On proceedings of the sittings of the *Saeima* and participance of the media in 1 October]. Available: https://www.saeima.lv/lv/aktualitates/saeimas-zinas/29201-par-saeimas-sezu-norisi-un-mediju-iespejam-1-oktobri [last viewed 01.01.2021].

[18] Saeima rudens sesijā pieņēmusi 126 likumus [*Saeima* has adopted 126 laws during the autumn session]. Available: https://www.saeima.lv/lv/aktualitates/saeimas-zinas/29421-saeima-rudens-sesija-pienemusi-126-likumus [last viewed 01.01.2021].

[19] *Tralmaka, I.* Attālinātās tiesas sēdes: aizstāvības tiesību pilnvērtīgai nodrošināšanai ar video vien nepietiek [Remotely held court proceedings: video is not enough for complete use of defence rights]. Available: https://www.cilvektiesibas.info/raksti/attalinatas-tiesas-sedes-aizstavibas-tiesibu-pilnvertigai-nodrosinasanai-ar-video-vien-nepietiek [last viewed 01.01.2021].

sitting is not only a discussion of technical matters, it is a national-level political discussion. Communication during the parliamentary sittings between the deputies (the possibility to discuss operatively issues related to legislation and politics), particularly before the sittings and during the breaks, is more complicated in virtual sittings, which does not facilitate the political process since the possibilities of confrontations – and of possible compromises – decrease. During the remote *Saeima* sittings, the possibilities of discreet consultations are limited. Thus, polarisation of opinions increases, which, in turn, decreases the political dialogue.

At the same time, it must be recognised that the remote committee sittings in the remote regime could be a good means of communication in an ordinary situation when significant discussions or differences in opinions are not expected. However, in those sittings, where the issues to be examined require serious scrutiny and intense discussions are expected, the remote regime is an additional challenge for adopting qualitative and well-considered decisions. It needs to be noted that the significant increase in the time of discussions is a side-effect of remote sittings.[20] a striking example is the adoption of the budget at remote *Saeima* sittings in November 2020. In 2021, the budget was adopted in 29 hours over three days, reaching a record of a kind; in 2017, in contrast, the budget was adopted in one sitting, lasting 20 hours. With differences between the sittings of the *Saeima* and its committees diminishing, the effectiveness of committees as "the work horse of the legislative assembly" decreases.

At the same time, e-platform ensures all rights of the Members of the *Saeima*, referred to in the Rules of the Procedure of the *Saeima*, as well as the legislative procedure that complies with the *Satversme* and the Rules of Procedure of the *Saeima*.[21] The Constitutional Court, having reviewed the adoption of the law on the administrative territorial reform on the e-platform, recognised that neither the *Satversme* nor the Rules of Procedure of the *Saeima* restricted the possibilities of the *Saeima* to adopt laws remotely in emergency situations, as long as the rights guaranteed in the *Satversme* and the Rules of Procedure of the *Saeima* were safeguarded and as long as the procedural order for holding the *Saeima* sittings on the platform *e-Saeima* was defined and was known to all Members of the *Saeima*.[22]

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[20] When speaking about the remote *Saeima* sittings, of course, one should differentiate between the cases when the new *e-Saeima* system experiences technical difficulties and the situation when the chairperson of the sitting switches off the speaker from the video regime when the speaker, animated, continues talking about matters unrelated to the item for the discussion. During on-site sittings, such situations are usually resolved by convincing the speaker to keep within the framework of the issue. However, during a video conference, the chairperson of the sitting may interrupt the speaker instantly. It has to be noted that during the remote sittings the deputies are more relaxed and less nervous during the debates than during on-site sittings because, during the remote sittings they are not visually seen as it is during on-site sittings. However, there are also some side-effects, because the customary solemn mood of the *Saeima* sittings is replaced by the atmosphere of video conferences when sometimes what is said during the debates is overshadowed by background and interferences in communication, e.g., acoustic echo, changing tonality of the sound when speakers change, delayed speech or picture due to the Internet connection. Some members of the *Saeima* also point to the impossibility of interjections from the floor and other possibilities of on-site sittings. Various places where the speakers are located also distract attention, as well as ignoring dress-code due to remote communication. Sometimes deputies choose to not switch on the video regime during the committee sittings, etc.

[21] See also *Rodiņa, A., Lībiņa-Egnere, I.* The Latvian Parliament and the COVID-19 Pandemic. *E-Saeima*, one of the first parliaments in the world ready to work in fully remote mode. Available: https://www.robert-schuman.eu/en/doc/ouvrages/FRS_Parliament_Latvia.pdf [last viewed 03.04.2021].

[22] The Constitutional Court's Judgement of 12 March 2021 in case No. 2020-37-0106, para. 24.2.1.

However, in order to have transparent and sustainable functioning of the e-platform on other occasions, when it is necessary to use this form, it is advisable to enshrine the basic principles of using the e-platform in the Rules of Procedure of the *Saeima*. The solution, found by the *Saeima* for using the e-platform, is to be viewed as a unique example of creating, within a short period of time and investing little resources, a technical and legal solution for ensuring full functioning of the *Saeima* in emergency conditions.

Replacing regular sittings by extraordinary sittings is a separate issue. Regular sittings have not been held in the *Saeima* since 12 March 2020, but the agenda of the sitting of 5 March 2020, which was split into parts, was not reviewed by September. The Presidium of the *Saeima* continues convening only extraordinary sittings. This procedure for holding sittings can influence the way the draft decisions or draft laws, submitted by the deputies, are examined at the *Saeima* sitting.[23] It is possible to add to the agenda of the regular sitting, by submitting amendments to the agenda, approved by the Presidium, and the *Saeima* may approve of these changes and examine the submitted draft laws or draft decisions in urgent procedure at the same sitting if the majority of the *Saeima* is not against it. The agenda of extraordinary sittings, however, cannot be amended (the fourth part of Article 38 of the Rules of Procedure of the *Saeima*). This means that, currently, urgent matters can be resolved only by the Presidium of the *Saeima* convening an extraordinary sitting of the *Saeima* either *ad hoc* or upon the request by the President, the Prime Minister or not less than one-third of Members of the *Saeima* (Article 20 of the *Satversme*). If members of the *Saeima* do not collect 34 signatures, it remains to be hoped that the submitted draft law will be operatively examined at the next sitting of the Presidium and will be included on the agenda of the extraordinary sitting.

In the context of remote *Saeima* sittings and related decisions by the Presidium of the *Saeima*, in the long term, the issues of the legal nature of regulatory enactments that regulate the work of the *Saeima*, particularly the legal nature of legal acts issued by the Presidium of the *Saeima*, should be analysed. The Constitutional Court has recognised that "pursuant to the *Satversme*, the Presidium may not be an institution that issues generally binding (external) regulatory enactments. [..] However, the Presidium's acts that affect the deputies may not be considered as being internal regulatory enactments in the traditional understanding thereof."[24] Examination of the regulation on the *Saeima's* procedures leads to the conclusion that the Rules of Procedure of the *Saeima* regulate only part of the *Saeima's* procedures and only part of the procedures (i.e., the ones defined in the

[23] One can agree with some Members of the *Saeima*, who hold that a certain risk exists that, in preparing the agenda for remote sittings, the rights of individual deputies to submit a draft law in accordance with the Rules of Procedure of the *Saeima* are impeded. If the need for an extraordinary sitting is dictated by *e-Saeima*, where it is impossible to amend the agenda, entered into the system, then, in such a case, an urgent solution should be offered that would allow all deputies to exercise their rights. Since the Presidium of the *Saeima* is able to announce operatively an extraordinary sitting, the possibility should be envisaged for submitting draft laws and draft decisions within reasonable time, so that they would be operatively reviewed on the same day, e.g., the documents submitted by 9:00 on Thursday should be examined during the second extraordinary sitting, which the Presidium would convene, by gathering during one of the breaks. This would ensure the possibility to offer urgent solutions to various problems, in particular, when the *Saeima* has to respond operatively to the Cabinet's work during the emergency situation. It is not right that the procedure for convening sittings is determined by the lack of a technical solution since this affects the deputy's right to legislate.

[24] The Constitutional Court's Judgement of 22 February 2002 in case No. 2001-06-03, para. 1.2. of the Findings.

Rules of Procedure of the *Saeima)* are accessible to anyone following the functioning of the *Saeima*. For example, *e-Saeima* is a platform created by the emergency situation and the work with it is regulated by the decision by the Presidium of 22 May 2020 and an annex to it.[25] It, *inter alia,* specifies the organisation of election by ballot papers in e-system. At on-site sittings of the *Saeima*, this procedure is regulated by the procedure approved by the Presidium's decision of 15 September 2003 "On the Procedure of Organising Secret Ballot in the *Saeima* with Ballot Papers". This regulation is only partially accessible to the public.[26] Part of the procedure is recognised as being internal while another is seen as a regulation of a law and accessible to all; however, both parts are of equal importance in the *Saeima*'s work and the legislative process.

The other example is linked to the *Saeima*'s committees. As is well-known, each member of the *Saeima* must be involved in at least one standing committee of the *Saeima* in which members of the *Saeima* (6–14 members) work, and these committees play a significant role in the legislative procedure.[27] At the same time, the number of these committees in the *Saeima* and their names are defined in the Rules of Procedure of the *Saeima*[28]; the establishment of the committees, however, is defined by the *Saeima* Regulation on Establishing Standing Committees, which have been approved by the *Saeima*'s declaration.[29] Currently, it is difficult to talk about consistency since the procedures and arrangements of the *Saeima* have not been established, by assessing the hierarchy of regulatory enactments but by taking into account the level of details in the required legislation, the needs of the

[25] Currently, the remote sittings are regulated equally by the decision of 22 May 2020 by the Presidium of the *Saeima* "On Approving the Procedure of Holding Remote Sittings of the *Saeima*", which, moreover, was amended by the decision of 26 October 2020, the annex to which specifies this procedure, and the Rules of Procedure of the *Saeima*.

[26] Initially, the decision of 2003, as all others, was published in the official journal (Saeimas Prezidija 2003. gada 15. septembra lēmums "Par kārtību, kādā Saeimā organizējama aizklātā balsošana ar vēlēšanu zīmēm" [Decision of the Presidium of the *Saeima* of 15 September, 2003 "On procedure of secret ballot" *Latvijas Vēstnesis*, No. 132(2897), 25.09.2003. Available: https://www.vestnesis.lv/ta/id/79273 [03.04.2021] Whereas the amendments that were adopted on 28 May 2015 are not publicly accessible. Decisions by the Presidium of the *Saeima* currently are accessible only to the Members and employees of the *Saeima* because they have the status of internal regulatory enactments, which, in accordance with the order by the Director of the *Saeima's* Chancery of 16 January 2014 No. 12/1-1-r/1-11/14 "On informing Members of the *Saeim*a and employees of the *Saeima's* Chancery and other structural units on internal regulatory enactments", they are available in the section of the Intranet "Register of Internal Documents and Forms", and access to it is only and solely to those who are linked to the *Saeima*, i.e., deputies and their assistants, as well as employees.

[27] The Constitutional Court has pointed to the major role of committees in the process of legislation, see The Constitutional Court's Judgement of 19 October 2011 in case No. 2010-72-0106, para. 18.4; of 3 February 2012 in case No. 2011-11-01, para. 11.2; of 6 March 2019 in case No. 2018-11-01, para. 18.1, and of 19 October 2017 in case No. 2016-14-01, para. 25.2.

[28] Pursuant to the first part of Article 149 of the Rules of Procedure of the *Saeima*, the following standing committees function in the *Saeima*: Foreign Affairs Committee; Budget and Finance (Taxation) Committee; Legal Affairs Committee; Human Rights and Public Affairs Committee; Education, Culture and Science Committee; Defence, Internal Affairs and Corruption Prevention Committee; Public Administration and Local Government Committee; Economic, Agricultural, Environmental and Regional Policy Committee; Social and Employment Matters Committee; Mandate, Ethics and Submissions Committee; Parliamentary Inquiry Committee; Public Expenditure and Audit Committee; National Security Committee; Citizenship, Migration and Social Cohesion Committee; European Affairs Committee; Sustainable Development Committee.

[29] Saeimas pastāvīgo komisiju izveidošanas noteikumi [Rules of establishment of the permanent commissions of the *Saeima*] (13.11.2018). Available: https://likumi.lv/ta/id/303022-par-saeimas-pastavigo-komisiju-izveidosanas-noteikumiem [last viewed 02.04.2021].

respective moment, the political context and traditions. To ensure the possibilities for using the e-platform, created for the conditions of pandemic, also in normal circumstances, it is advisable to enshrine the basic principles of using this platform also in the Rules of Procedure of the *Saeima*. To envisage broader possibilities for using the e-platform in normal circumstances, it is recommended the *Saeima* consider an amendment to Article 15 of the *Satversme* (see below).

2. The Cabinet as a Crisis Management Institution

The Cabinet of the government is a collegial institution, consisting of ministers approved by the *Saeima* and is headed by the Prime Minister. The government, with the mediation of institutions of public administration subordinated to it, exercises the executive power.[30] The government must enjoy the *Saeima*'s trust, otherwise a new Cabinet is set up. The Cabinet exercises the executive power, which is all those actions by the State that are neither legislation nor administration of justice[31], and the competence of this executive power may be as defined in law (delegated) or is substantially inherent in exercising the executive power.[32] Basically, the government is involved in performing the State's functions within the frameworks of laws, adopted by the *Saeima*, and, if needed, using the form of subordinate legal acts – the Cabinet Regulations. The Cabinet has at its disposal the public administration, which exercises the executive power on a daily basis. The government's actions and authorisation in an emergency situation are defined in the law "On Emergency Situation and State of Exception".

The first emergency situation was declared on 12 March 2020 and it lasted until 10 June.[33] During this period, members of the government, just like the members of the parliament, had to switch to remote work since they had been in contact with an infected member of the *Saeima*. Out of the total of 89 Cabinet's sittings, held in 2020, 16 were held on site, 73 were held remotely. Forty-three of 89 Cabinet's sittings were extraordinary, and 6 were held in the procedure of a survey.

Section 23^1 of the National Security Law[34] provides that, during emergency situations or states of exception, the Crisis Management Council operates under the Prime Minister's leadership (hereafter – the Council),[35] which, in accordance with

[30] Ministru kabineta iekārtas likums [Cabinet Structure Law] (15.05.2008.). Available: https://likumi.lv/ta/en/en/id/175919-cabinet-structure-law [last viewed 01.01.2021].

[31] See The Constitutional Court's Judgement of 16 October 2006 in case No. 2006-05-01, sub-para. 10.2.

[32] *Levits, E.* Ievads Latvijas Republikas Satversmes IV nodaļas komentāriem. Latvijas Republikas Ministru kabineta funkcijas [Introduction to the Chapter IV of the Commentary of the Constitution of the Republic of Latvia. Functions of the Cabinet of Ministers]. In: Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets [Commentary of the Constitution of the Republic of Latvia. Chapter III. State President. Chapter IV. Cabinet of Ministers]. Rīga: Latvijas Vēstnesis, 2017, p. 486.

[33] Par ārkārtējās situācijas izsludināšanu: Ministru prezidenta, veselības ministres rīkojums Nr. 103 [On promulgation of the emergency situation: Decision of the Prime Minister and the Minister of Health No. 103] (12.03.2020). Available: https://likumi.lv/ta/id/313191-par-arkartejas-situacijas-izsludinasanu [last viewed 01.01.2021].

[34] Nacionālās drošības likums [National Security Law] (14.12.2000). Available: https://likumi.lv/ta/id/14011-nacionalas-drosibas-likums [last viewed 01.01.2021].

[35] Ibid. Section 232 (2) Members of the Crisis Management Council are: the Minister for Defence; the Minister for Foreign Affairs; the Minister for Economics; the Minister for Finance; the Minister for the Interior; the Minister for Justice; the Minister for Health; the Minister for Transport, and the Minister for Environmental Protection and Regional Development.

the by-law[36], coordinates civil-military cooperation. The Council is an auxiliary body, which operates alongside the government and is headed by the Prime Minister, and its main task is to ensure coordination. It was obvious during this crisis that Prime Minister Krišjānis Kariņš treated this possibility rather formally and did not use it properly. In the spring of 2020, K. Kariņš established several working groups,[37] and the Minister for Finance, the Minister for Economics and the Deputy Head of the State Fire and Rescue Service were appointed to head these groups. A month after the first emergency situation was revoked, on 10 July 2020, the Prime Minister established one more group – the group for Coordination of Interinstitutional Activities,[38] and the Director of the State Chancery was appointed its head. It can be concluded that the public administration had identified the lessons learned during the emergency situation and COVID-19 pandemic, proven by the informative material "Guidelines on organisation of work, remuneration and client service in institutions of public administration during the emergency situation",[39] intended to provide explanations and recommendations regarding organisation of work, remuneration for work and organisation of client service in institutions of public administration during the emergency situation related to COVID-19 pandemic. To ensure society's participation and provide for the needs of media, the State Chancery ensured in the remote regime the possibility to follow the open part of the Cabinet's sittings via online streaming. Although the conditions caused by the spread of COVID-19 set in quickly and brought many challenges, the public administration operatively found solutions in order not to discontinue the provision of services to inhabitants; services would be ensured either remotely or by strictly observing the precautionary measures. It can be acknowledged that, during the emergency situation, the public administration adjusted operatively to changes. Experts, former prime ministers[40], hold that the Cabinet's authorisation should not be expanded but the existing authorisation should be used (for example, replacing ministers, if necessary) and the comparatively poor dialogue with society should be reflected on.[41] Of course, it also should be admitted that great nervousness is seen in society in connection with the restrictions, imposed by the government, and dissatisfaction is growing, because of this society's response to any attempts at

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[36] Krīzes vadības padomes nolikums: Ministru kabineta noteikumi Nr. 42 [Regulation of the Crisis Management Council: Regulations of the Cabinet of Ministers No. 42] (18.01.2011). Available: https://likumi.lv/ta/id/224553-krizes-vadibas-padomes-nolikums [last viewed 03.04.2021].

[37] Par starpinstitūciju darbības koordinācijas grupu: Ministru prezidenta rīkojums Nr. 2020/1.2.1.-60 [On interinstitutional operation coordination group: Decision of the Cabinet of Ministers No. 2020/1.2.1.-60] (16.03.2020). Available: https://likumi.lv/ta/id/313245-par-starpinstituciju-darbibas-koordinacijas-grupu [last viewed 01.01.2021].

[38] Par starpinstitūciju darbības koordinācijas grupu: Ministru prezidenta rīkojums Nr. 2020/1.2.1.-84 [On coordination group of interinstitutional activity: Decision of the Cabinet of Ministers No. 2020/1.2.1.-84] (10.07.2020). *Latvijas Vēstnesis*, No. 133, 14.07.2020.

[39] Guidelines on organisation of work, remuneration and client service in institutions of public administration during the emergency situation. Available: https://www.mk.gov.lv/lv/aktualitates/ [last viewed 01.01.2021].

[40] Māris Gailis – performed the duties of the prime minister from 15.09.1994 to 21.12.1995; Vilis Krištopans – performed the duties of the prime minister from 26.11.1998 to 16.07.1999; Einars Repše – performed the duties of the prime minister from 07.11.2002 to 09.03.2004; Andris Bērziņš – performed the duties of the prime minister from 05.05.2000 to 07.11.2002; Indulis Emsis – performed the duties of the prime minister from 09.03.2004 to 02.12.2004, Māris Kučinskis – performed the duties of the prime minister from 11.02.2016 to 23.01.2019.

[41] *Ķirsons, M.* Vai Kariņa pilnvaras krīzē ir jāpalielina [Should the powers of Kariņš be expanded]? *Dienas Bizness*, 29.12.2020.

communication by the power is harsher. Not only some individuals but also serious experts are dissatisfied with the crisis management, expressing the opinion that crisis management is ineffective, chaotic and lacking a strategy.[42]

3. The Experience of Using Remote Decision-Making Tools and Perspectives of Use in the Proceedings of the Sittings of the Local Government Councils and Committees

Due to restrictions imposed during the emergency situation, the collegial institutions – the *Saeima*, the Cabinet and the local government councils – had to adjust to the situation and consider forms of remote work. As regards local governments, the possibility to use video conference for the council and committee sittings had been envisaged in the law "On Local Governments"[43] already since 2015.[44] However, this possibility, set out in the law, was applicable only if a deputy or deputies could not participate on-site because of their health condition or a business trip. Moreover, the possibility to use a video conference was available only if the local government had envisaged it in its by-laws (the first and second part of Section 35 of the law "On Local Governments" in the wording prior to 2020). Thus, before the emergency situation was declared, the law provided that the council meetings were held on site but, in an exceptional case, some deputies could participate therein by not being present in the place where the council sitting was held but by using a video conference facility.

3.1. The Legal Regulation Created During the Emergency Situation on Holding Remote Sittings of Local Government Council and Committee Sittings and Assessment of the Application Thereof

To ensure the local government councils' capacity to act during the emergency situation, the following regulation on holding remote council and committee sittings was established in Section 29 of the law "On the Operation of State Authorities During the Emergency Situation Related to the Spread of COVID-19":

(1) The chairperson of a local government council may determine by an order that meetings of the local government council and committees may take place remotely, conforming to the following conditions:
   1) video conferencing is used in the course of a council or committee meeting (a real-time image and sound transmission);
   2) draft decisions of the council and committees, opinions thereon, and informative materials are sent to all members of the council and committee to their electronic mail address or using other means of electronic communication not later than three working days before a regular meeting and not later than three hours before an extraordinary meeting;
   3) it is ensured that individual vote of each member is recorded and reflected in the minutes of a council or committee meeting.

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[42] See statements made by Jānis Sārts, Director of NATO Strategic Communications Centre of Excellence, and Jānis Endziņš, the representative of the Latvian Chamber of Commerce and Industry, at the Ombudsman's conference "Why is it Difficult to Trust the Government's Opinion and Decisions in a Situation of Crisis?". Available: https://www.youtube.com/watch?v=e578ca8l63g&t=1s [last viewed 01.01.2021].

[43] Par pašvaldībām [Law on Local Municipalities] (19.05.1994). Available: https://likumi.lv/ta/id/57255-par-pasvaldibam [last viewed 01.01.2021].

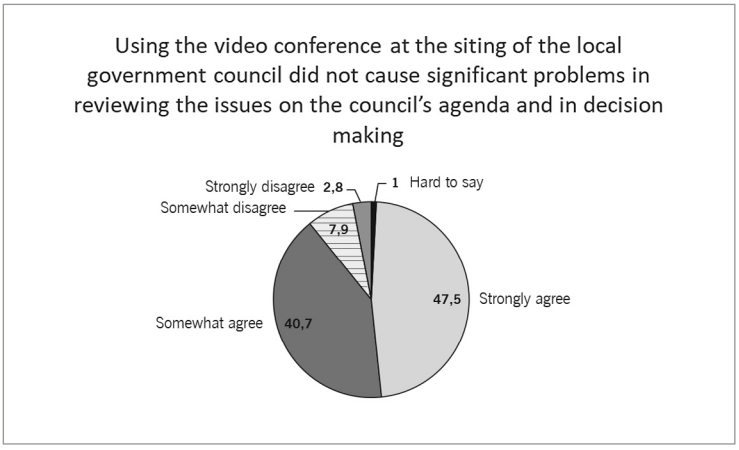
[44] Grozījumi likumā "Par pašvaldībām" [Amendments to the Law "On Local Municipalites"] (08.10.2015). Available: https://likumi.lv/ta/id/277314-grozijumi-likuma-par-pasvaldibam- [last viewed 01.01.2021].

(2) After taking of a decision of a local government council or committee and drawing up the minutes of the meeting in writing, they shall be sent to each member who has participated in the relevant meeting. A member shall confirm his or her vote electronically on the received document.
(3) If the voting referred to in Section 40, paragraph 4 of the law "On Local Governments" is held at a local government council meeting, a ballot paper shall be sent electronically to each member. A member shall send the filled-in paper to the indicated electronic site for counting of the votes and notification of a decision."

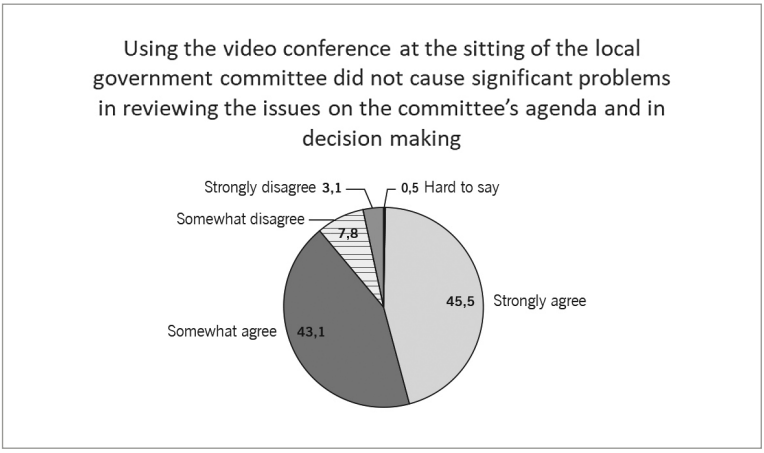
The experience of using this regulation during the emergency situation was studied by using the sociological method in cooperation with the research centre SKDS (SIA SKDS), using an online survey. The survey questionnaires were sent to 1373 local government deputies on 30 October 2020 (to all local government deputies of Latvia whose e-mail address was publicly accessible on the homepage of the local government council). The term for providing responses was 12 November 2020. Eight hundred and sixty respondents participated in the survey.

First of all, it should be underscored that the possibility, envisaged in the law, to hold remote sittings of the local government council or a committee was defined as an option and depended on the opinion of the council's chairperson. However, more than two-thirds of the respondents (70.2%) answered that in local governments, during the emergency situation related to the spread of COVID-19 (i.e., from 12.03.2020 to 10.06.2020), video conferences were used in local government council sittings. A slightly lower number (64.2%) responded that, during the respective period, the committee sittings had been held remotely.

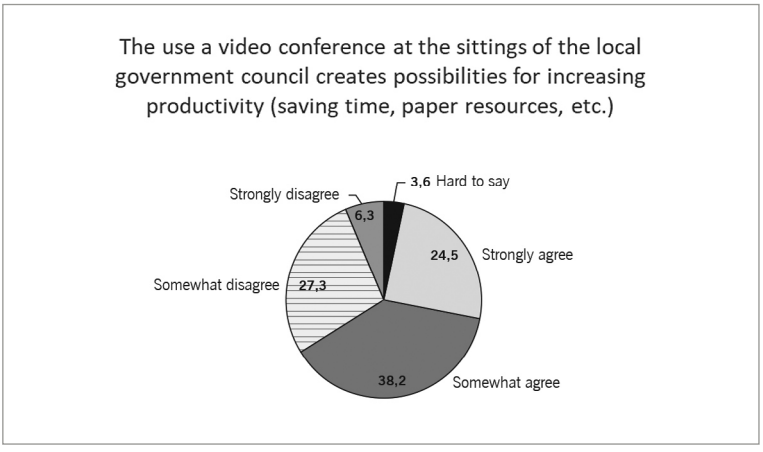
The deputies were asked in the survey whether they agreed to the following statement: "Using the video conference at the siting of the local government council did not cause significant problems in reviewing the issues on the council's agenda and in decision making". Their answers are reflected in the figure:



As can be seen, in total, 88.2% of the deputies are of the opinion that the use of a video conference does not cause significant problems in reviewing issues on the council's agenda. Similar outcome was produced by responses also the statement: "Using the video conference at the sitting of the local government committee did not cause significant problems in reviewing the issues on the committee's agenda and in decision making."



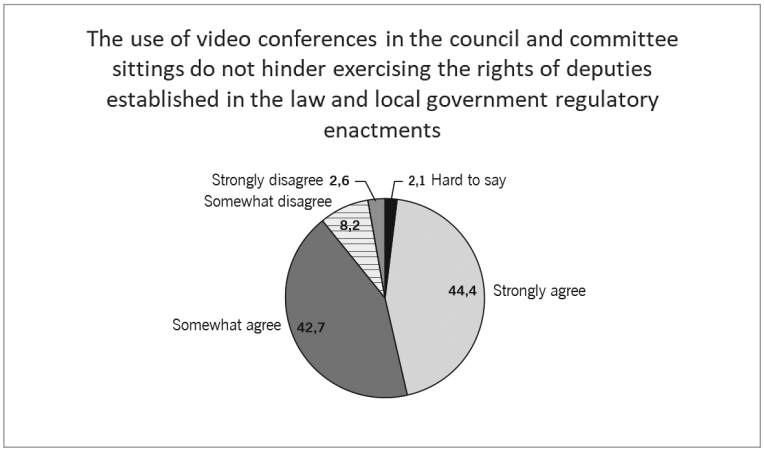
The statement that "The use a video conference at the sittings of the local government council creates possibilities for increasing productivity (saving time, paper resources, etc.)" provided the following responses:



The same statement, only with respect to the committee sittings, had very similar results (strongly agree 24.3%, somewhat agree 38.2%, somewhat disagree 27.9%, strongly disagree 6.9%, hard to say 2.7%). As can be seen, in general, the majority of deputies agree that the use of video conferences provide the possibility to increase productivity; however, almost one-third of deputies do not agree with this statement. It could be explained by rather different approaches to reviewing issues on the agenda as well as technically longer proceedings of the sittings – the need to register each councillor's vote on each item on the agenda. At the same time, these data also show that councillors do not see significant differences in the aspects of using video conferences in the sittings of the council and of committees.

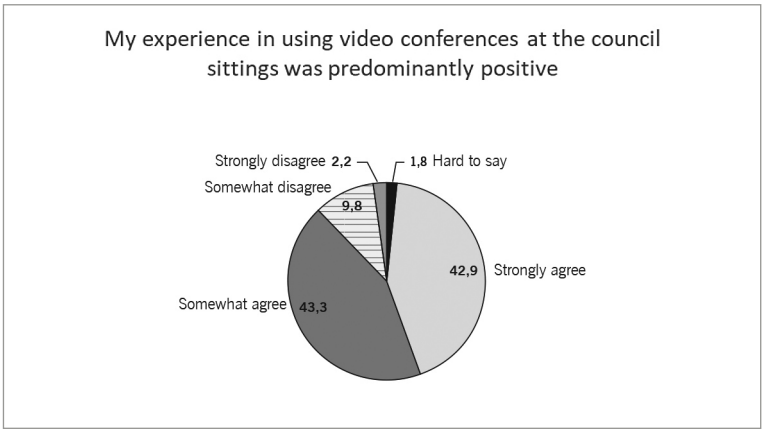
An important aspect, which could influence the scope of using video conferences, is the possibilities for exercising the councillor's rights, established in the law "On the Status of the Deputy of the Republic City Council and Municipality

Council"[45], as well as in local government by-laws. The responses to the statement that "The use of video conferences in the council and committee sittings do not hinder exercising the rights of deputies established in the law and local government regulatory enactments" were, as follows:



This outcome shows that the majority of deputies do not see significant problems in exercising theirs rights in the use of video conferences (for example, asking questions, expressing proposals) if the council or committee sitting was held in the video conference format.

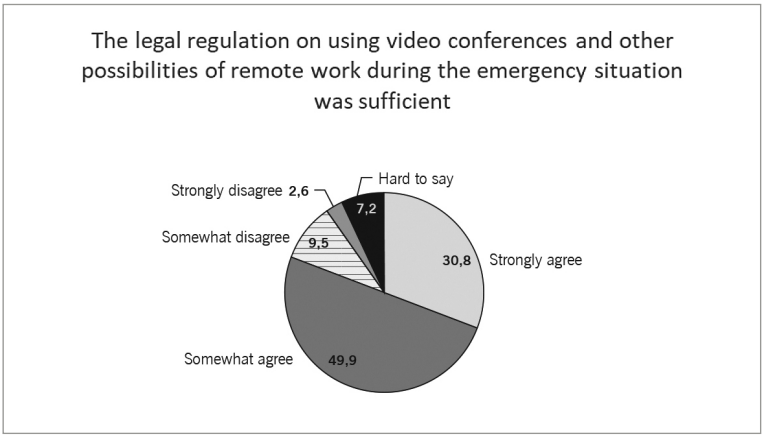
Deputies characterised their experience in using video conferences at the council sittings, predominantly, as positive:



The data are similar also regarding the use of video conferences at the committee sittings (strongly agree 42.9%, somewhat agree 43.3%, somewhat disagree 9.8%, strongly disagree 2.2%, hard to say 1.8%).

The majority of deputies are of the opinion that the legal regulation on holding video conferences had been sufficient.

[45] Republikas pilsētas domes un novada domes deputāta statusa likums [Law on the Status of the Member of the Municipality Council] (17.03.1994). Available: https://likumi.lv/ta/id/58052-republikas-pilsetas-domes-un-novada-domes-deputata-statusa-likums [last viewed 01.01.2021].

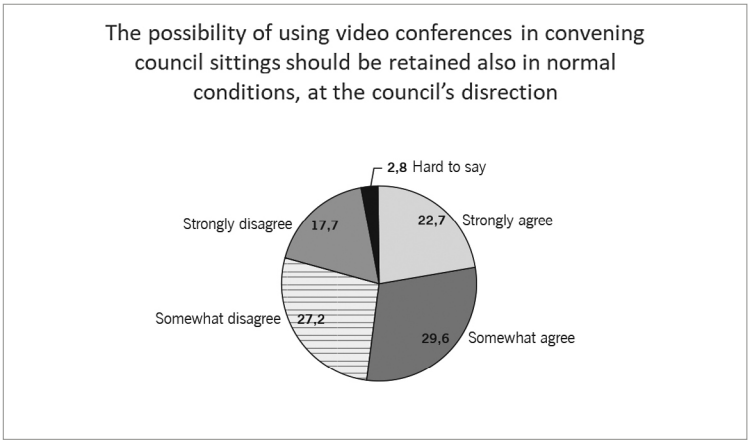


Assessing the survey data in general, the use of video conferences for convening remote council and committee sittings has not caused significant problems either in decision making or in exercising the deputy's rights, and more than 80% describe their experience in using video conferences as positive. No principal problems are found from the legal perspective in using this solution. From the legal point of view, it is important to verify, whether the council (committee) sitting is valid, i.e., to verify, whether the required number of deputies participate in the sitting. The identity of deputies, predominantly, may be checked only visually (similarly to on-site council sittings), if an application with the options of electronic identification is used. The possibility that during a sitting a deputy would try to impersonate someone else is unlikely. Likewise, with respect to voting, it is important to establish only whether and how a deputy votes on the respective draft decision. Technically, the vote can be recorded both orally or by raising hand at a video conference, or by using special applications for voting, etc. Voting by ballot papers on persons is technically more complex, however, the solution for such instances was set out in Section 29 (3) of the law "On the Operation of State Authorities During the Emergency Situation Related to the Spread of COVID-19".

3.2. The Regulation on Holding Council and Committee Sittings as Video Conferences, Introduced After the Emergency Situation, and the Possibilities to Improve It

When the emergency situation ended on 10 June 2020, the regulation on the possibility to hold local government council and committee sittings by using a video conference, established in the law "On the Operation of State Authorities During the Emergency Situation Related to the Spread of COVID-19" became void. Thus, local governments lost the legal possibility of holding sittings in the form of a video conference. However, to ensure the possibility to use a video conference in the future, on 8 October 2020, the *Saeima* introduced amendments to the law "On Local Governments", envisaging the possibility to use video conferences at the sittings of both councils and committees where "an emergency situation has been declared in the respective territory or the State has imposed restrictions on gatherings." Thus, the possibility to hold remote council and committee sittings could be used also after the emergency situation had ended, linking this possibility to the restrictions on gathering imposed by the State. The comparatively successful use of video

conferences during the emergency situation requires considering the possibility of using video conferences also in normal conditions. As the deputy's survey shows, the assessment of this possibility is not clear-cut.



The majority of deputies (52.3%) are of the opinion that the possibility of using a video conference in convening council sittings should be retained also in normal circumstances, at the council's discretion; however, 44.9% somewhat disagree or strongly disagree with it. A similar outcome was obtained with respect to the statement regarding convening committee sittings in the form of a video conference (50.9% somewhat or strongly agree, but 45.8% somewhat disagree or strongly disagree). Deputies' arguments have not been clarified in greater detail in the study. From the practical point of view, the advantage of using video conferences could be possibly decreasing the paper flow (unless electronic document flow has not been already introduced in the local government), as well as saving the deputies' time resources (no need to travel to the site where the sitting is held if the deputy's place of residence or work is not in the populated area where the council sittings are held). This circumstance could become important after 1 July 2021, when the councils elected in the newly established regions will begin their work. Because the majority of regions are larger than before, the distance from a deputy's place of residence or work could be comparatively long, many deputies might find this possibility important. Legally, there are no obstacles to using the same opportunities that are used during on-site sittings during the sittings held via video conferences. The *Saeima*'s experience in convening remote sittings of the *Saeima* and its committees also proves that the course of these sittings is functionally equal to the sittings held on site. It should be underscored that holding the council sittings as video conferences does not impact the transparency in the council's work because the council sittings can be streamed online and, likewise, the obligation, established in Section 37 (1) of the law "On Local Governments", to publish the audio recording on local government's homepage remains in force.

The possible considerations for not promoting the use of video conferences in normal conditions, in turn, could be obstacles of technical nature (for example, accessibility of the Internet or technical equipment) and the coordination needed in making decisions in the work of the council as a political collegial institution (for example, the need to align opinions operatively), which could be difficult in the case of a remote sitting. Likewise, in remote council and committee sittings the summoned persons have to adapt to this format but it can be cumbersome.

Since the prevalence of technologies and smart devices most probably will increase in the future, the use of video conferences to save resources could be practiced not only in connection with restrictions on gathering, imposed by the State, but also in other instances, when it is envisaged by the council. For example, when the issues to be examined by the council or the committee do not require extensive debates (e.g., issuing of an administrative act or other decisions of formal nature) or when there are few items on the agenda, holding a remote sitting in the form of a video conference might seem to be more rational, particularly because the deputies of a regional council reside and work in different parts of the region. Therefore, taking into account the experience accumulated during the pandemic, para. 3 could be added to Section 34 (1) of the law "On Local Governments", worded as follows: "3) it is not expedient to convene an on-site sitting due to the number or nature of the issues to be examined at the council's sitting". A similar rule should be envisaged for committees. This provision would allow the council to decide on whether the convening of remote sittings should be envisaged in by-laws at all and would also give the right to the chairperson of the council and the committee to decide on case-by-case basis on the most appropriate form for the council or the committee sitting.

Summary

1. Within the framework of the existing legal regulation, the bodies of state power, by implementing effective coordination, have ensured continuity in the performance of State's functions and legally adequate crisis management during the COVID-19 pandemic.
2. Pursuant to Section 23^3 of the National Security Law, the Crisis Management Council should coordinate the operational management for overcoming the threat to the state and the drafting of plans of the public administration institutions for overcoming the threat; however, during the emergency situation, the government managed without the Council's assistance, reverting to the traditional communication: the prime minister – the State Chancery – ministries and institutions.
3. The e-platform, developed by the *Saeima*, needs to be highlighted in the comparative context, it ensured the continuity of the *Saeima*'s work and the possibility to exercise constantly the parliamentary control over the Cabinet's activities. The use of this platform could be admissible as an exceptional solution also in normal conditions when convening the *Saeima*'s sitting on site would not be expedient. It would be expedient to enshrine the basic principles of using the e-platform in the Rules of Procedure of the *Saeima*.
4. The holding of remote council and committee sittings, by using the video conference, during the emergency situation has not created substantial problems either in the decision-making process or in exercising the deputy's rights. However, the use of this technology can be improved to speed up the decision-making process.
5. No significant differences are observed in the deputies' attitudes towards using the video conference at the council and the committee meeting.
6. When holding remote council sittings in the video conference regime, it is important to ascertain that the sitting is valid, *inter alia*, by checking the identities of each deputy present, and recording the deputy's will when voting. No significant problems have been identified during the emergency

situation in establishing these legally important circumstances, although the experiences of local governments differ.

7. There are no legal nor practical obstacles to convening, in some cases, remote council and committee sittings in the video conference regime also in normal circumstances. This possibility should be an exception in those instances when it is not expedient to convene an on-site sitting.

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Procedural Autonomy of a Member State: Application of the Principle by Latvian Administrative Courts

Dr. iur. **Jautrīte Briede**
Faculty of Law, University of Latvia Professor at the Department of Public Law
E-mail: *briede@lu.lv*

The article addresses certain issues of principle of national procedural autonomy. The meaning of the principle is briefly explained at the beginning of the article. It is followed by analyses of examples of the application of this principle by Latvian courts after the judgments of Court of Justice of the European Union, as well application of the principle of procedural autonomy by Latvian courts on their own initiative.

Keywords: national procedural autonomy, the principle of effectiveness.

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Introduction

Within the European Union (EU), many articles and even monographs are devoted to the principle of procedural autonomy of a Member State. At the same time, the principle is mentioned in the Latvian legal literature only in general[1], but there are no separate articles or studies on this issue. To fill this gap, the current article will view some aspects of this principle.[2]

[1] For example: *Gailītis, K., Potaičuks, A.* Eiropas Savienības tiesības. I daļa. Institucionālās tiesības [Law of European Union. I Part. Institutional Law]. 2nd supplemented edition. *Gailītis, K., Buka, A., Schewe, C.* (scient. eds.). Rīga: Tiesu namu aģentūra, 2019, pp. 274–275.

[2] Some aspects are also discussed in the report of this author at the 79th International Scientific Conference of the University of Latvia.

The meaning of the principle will be briefly explained at the beginning of the article.

As commentators have pointed out, because the array of procedural rules is vast and diversified throughout administrative, civil and criminal law, it comes as no surprise that the actual scope of procedural autonomy significantly differs from one issue to another.[3] A synthesis of the case law indicates that the qualifications of equivalence and effectiveness, which are the criteria for applying this principle, have become powerful doctrinal tools directing national courts to undertake a case-by-case appraisal of national rules.[4]

Taking this into account, application of the principle of procedural autonomy by the Latvian Supreme Court will be analysed through the prism of findings of the Court of Justice of the European Union (CJEU). The case where the court has applied the principle of effectiveness arising from the principle of procedural autonomy of its own motion will also be considered.

It should also be noted that the reasoning delivered in proceedings before an administrative court quite clearly also applies to references by civil courts.[5] Thus, the findings formulated in this article in connection with examples from administrative law *mutatis mutandis* also apply to civil and criminal procedure.

1. The Meaning of the Principle of Procedural Autonomy

The principle of national procedural autonomy stipulates that the Member States are free to set up their own (procedural) rules (and remedies therein) which govern the enforcement of European Union Law.

However, the CJEU has repeatedly stated: it is apparent from the Court's settled case law that, in the absence of EU rules governing the matter, it is a discretion of each Member State to prescribe detailed rules in respect of administrative and judicial procedures, which cover the probative value of a document, intended to safeguard the rights which individuals derive from EU law, in accordance with the principles of equivalence and effectiveness (see, to that effect, judgments of 16 December 1976, Rewe-Zentralfinanz and Rewe-Zentral, 33/76, EU:C:1976:188, paragraph 5, and of 26 June 2019, Craeynest and Others, C-723/17, EU:C:2019:533, paragraph 54), without undermining the effectiveness of EU.[6]

Consequently, the Member States do not have complete autonomy, since they are (primarily) limited by the principle of effectiveness and the principle of equivalence.[7]

Commentators have drawn attention to the fact that in the early CJEU case law the principle was qualified by two requirements: that conditions laid down by national law should be applied in the same way (equivalence) and that they should not render the exercise of EU rights impossible in practice (practical possibility). Over the time, CJEU began to emphasize stronger notions of adequacy and

[3] *Baghrizahebi, D.* The Current State of National Procedural Autonomy: A Principle in Motion. *3 Inter EU Law East: J. Int'l & Eur. L., Econ. & Market Integrations*, No. 13, 2016, p. 13.

[4] *Craig, P., De Búrca, G.* EU Law. Text, cases, and materials. 3rd edition. Oxford: Oxford University Press, 2003, p. 230.

[5] See *Wallerman, A.* The Impact of EU Law on Civil Procedure. Gothenburg University Publications. *Tidschrijft voor Civiele Rechtspleging*, No. 3, 2013, p. 3. ISSN 0929-8649). Available: https://gup.ub.gu.se/file/206874 [last viewed 31.01.2021].

[6] The Court of Justice of the European Union judgment of 2 April 2020 in case No. C-480/18 *PrivatBank*. para. 73. Available: http://curia.europa.eu/ [last viewed 31.01.2021].

[7] *Baghrizahebi, D.* The Current State …, p. 13.

effectiveness, rather than merely practical possibility, in the domestic enforcement of EU law. The CJEU also sometimes required national courts to make available a particular type of remedy (reparation, interim relief etc.) regardless of whether or not this would be available under national law.[8] Many commentators underscore the fact that it is mainly the principle of effectiveness that is invoked in the CJEU's jurisprudence; equivalence is much less exploited.[9]

Some authors have pointed out that it is clear that a certain tension exists between the principle of primacy and the principle of national procedural autonomy: the obligation to set aside rules of national procedural law is diametrically opposed to the principle of national procedural autonomy. Hence, it is not surprising that the Court of Justice generally opts for one of these two principles as starting point when answering preliminary questions on collisions between EU law and national law. Whereas the principle of primacy has a hierarchical character, the principle of national procedural autonomy leaves more room for assessment, as it does not by definition require that the national rule which hinders the effectiveness of EU law has to be set aside. Although the primacy of EU law over national law is a generally applicable principle, its use only leads to a solution when a direct collision is concerned.[10]

However, this could be disputed, because the principle of procedural autonomy includes the principle of efficiency, they do not conflict with each other, but complement each other.

Legislations of Member States reviewed by the CJEU mostly concern the following aspects: access to a court or tribunal; the scope of judicial review; the right of the defence; time limits and remedies. Commentators have pointed out that, in all of these categories, in spite of procedural autonomy, many national rules were condemned, or, if not, very precise indications were given to the State concerned on the conditions under which its legislation would comply with the EU right to judicial protection.[11] Such a tendency is not represented in Latvian cases.

2. Application of the Principle of Procedural Autonomy by Latvian Courts After the Judgement of CJEU

The CJEU case law database indicates three Latvian cases in which the *principle of procedural autonomy is explicitly mentioned: C-541/14 VM Remonts*[12], C-46/16 *LS Customs Services*[13] and C-480/18 *PivatBank*[14].

In the case *VM Remonts*, the Latvian court asked whether an undertaking may be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services. In the judgement of the CJEU, the

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[8] *Craig, P., De Búrca, G.* EU Law, p. 230.

[9] *Kowalik-Bańczyk, K.* Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings. *Yearbook of Antitrust and Regulatory Studies*, Vol. 5(6), 2012, p. 220.

[10] *Ortlep, R., Verhoeven, M.* The Principle of Primacy versus the Principle of National Procedural Autonomy. *NALL*, juni 2012. DOI: 10.5553/NALL/.000004

[11] *Giubboni, S., Robin-Oliver, S.* Analytical Report 2016. Effective Judicial Protection in the Framework of Directive 2014/54/EU. European Commission. Brussels: FreSsco, 2016, p. 8.

[12] The Court of Justice of the European Union judgment of 21 July 2019 in case No. C-541/14. *VM Remonts.* Available: http://curia.europa.eu/ [last viewed 31.01.2021].

[13] The Court of Justice of the European Union judgment of 9 November 2017 in case No. C-46/16. Available: http://curia.europa.eu/ [last viewed 31.01.2021].

[14] The Court of Justice of the European Union judgment of 2 April 2020 in case No. C-480/18. Available: http://curia.europa.eu/ [last viewed 31.01.2021].

principle of procedural autonomy was mentioned only in passing, indicating that the assessment of evidence and the requisite standard of proof, in the absence of EU rules on the matter, are covered, in principle, by the procedural autonomy of the Member States.

In the other two cases, the principle of procedural autonomy or at least the principle of effectiveness (as a criterion for the application of the above principle) are mentioned to in the operative part of the CJEU judgments.

In the *LS Customs Services* case, the Latvian court, *inter alia*, asked about the significance of the duty to state reasons and the effect of shortcomings in the reasoning of the decision of the customs authority.

As it was pointed out by the Advocate General, the question of the duty to state reasons incumbent on national customs authorities must, however, be distinguished from the question of the legal consequences in national law of an inadequate statement of reasons and thus from the question whether it is possible to remedy defective reasoning in the course of legal proceedings. This question is not regulated by the Customs Code and EU law does not contain general rules elsewhere on the consequences of defective reasoning. It is therefore for the Member States, exercising their procedural autonomy, to regulate the consequences of a failure by the customs authorities to fulfil their duty to state reasons and to determine whether and to what extent it is possible to remedy such a failure in the course of legal proceedings. In doing so, however, the Member States must have regard to the principles of equivalence and effectiveness.[15]

The CJEU, agreeing with the Advocate General's Opinion, stated in the judgment that it was for the Member States, exercising their procedural autonomy, to regulate the consequences of a failure by the customs authorities to fulfil their obligation to state reasons and to determine whether and to what extent such a failure may be remedied in the course of legal proceedings, subject to observance of the principles of equivalence and effectiveness.

Neither that answer nor the judgment as a whole indicates that the principle of effectiveness takes precedence over the obligation to state reasons. There are only indications that the principle of efficiency must also be taken into account.

Nevertheless, in deciding the case after receiving the judgment of the CJEU, the Supreme Court of Latvia did not focus on the analysis of the principle of effectiveness at all. It decided the case solely on the ground of breach of the obligation to state reasons.[16]

It is likely that such an analysis would not change the outcome of the proceedings, but it would be highly desirable to show that the principle of effectiveness is taken into account. In the case, it was clear that the principle of the effectiveness of EU law and the obligation to state reasons[17] were in conflict. In such a case, the conflicting principles must be weighed up and the reasons given why the

[15] Opinion of Advocate General Kokott delivered on 30 March 2017 in case No. C-46/16, para. 84–85. Available: http://curia.europa.eu/ [last viewed 31.01.2021].

[16] Republic of Latvia Supreme Court judgment of 16 June 2018 in case No. SKA-4/2018. Available: www.at.gov.lv [last viewed 20.03.2021].

[17] Statement of reasons is indicated as one of procedural principles of administrative law in Council of Europe Resolution (77)31 on the protection of the individuals in relation to the acts of administrative authorities. (Adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies). Available: https://rm.coe.int/16804dec56 [last viewed 20.03.2021].

particular principle is being preferred.[18] Otherwise, one may think that the court has considered the principle of effectiveness to be irrelevant.

In this respect, the judgment of the Supreme Court of Latvia in the case of *PivatBank* is the opposite: the Latvian Supreme Court referred the question to the CJEU whether in carrying out the supervisory functions or in conducting the complaint procedures provided for in EU law, must the competent authority take account of an arbitration decision settling a dispute between a payment service provider and a payment service user. The CJEU gave the answer that in accordance with the principle of the procedural autonomy of the Member States, the national legislature may give the competent authority the power to take into account the existence and contents of an arbitration ruling settling a dispute, provided that the probative value given to that ruling in those procedures is not liable to undermine the purpose or specific objectives of the procedures, the rights of defence of the persons concerned or the independent exercise of the powers and competencies conferred on that authority, which is a matter for the referring court to ascertain.

Deciding the case after receiving the judgment of the CJEU, the Supreme Court of Latvia carefully analysed whether the principle of effectiveness would be respected if it took into account the arbitration decision. The Senate has argued that arbitration decisions are not subject to the kind of mechanisms that ensure the full effectiveness of EU law (the arbitration decision is not obliged to apply to the CJEU). Consequently, the court cannot be bound by the assessment of the factual and legal circumstances of the case expressed in the arbitration decision, otherwise it would be obliged to rely on the interpretation of the ruling and its provisions, which the issuing authority is not entitled to appeal to the CJEU.[19]

It follows from the motivation of the judgment that the principle of effectiveness has been *the ratio decidendi* in the judgment of the Supreme Court regarding the arbitration decision as evidence in the case.

3. Application of the Principle of Procedural Autonomy by Latvian Courts on Their Own Initiative

The application of EU law is becoming more and more commonplace in Latvian administrative courts. In most cases, procedural issues of application of EU law are not regulated at the level of EU, therefore public authorities and administrative courts apply the provisions of the Administrative Procedure Law[20]. It also means that the courts apply the principle of procedural autonomy, however, usually they do not mention the principle *expressis verbis* in their rulings.

Nevertheless, there is a judgment in which the Supreme Court of Latvia has applied the principle of effectiveness of EU law and referred to the principle of procedural autonomy. That was done because these principles played a substantial role in deciding the case.

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[18] *Iljanova, D.* Tiesību normu un principu kolīzija [Conflict of legal norms and principles]. *Likums un Tiesības*, Vol. 2, No. 8, 2000, p. 251.

[19] Republic of Latvia Supreme Court judgment of 29 January 2021 in case No. SKA-07/2021. Judgment is not available. A press release on the judgement is available: https://lvportals.lv/dienaskartiba/324512-atstaj-speka-finansu-un-kapitala-tirgus-komisijas-lemumu-par-bankai-uzliktu-soda-naudu-2021 [last viewed 31.01.2021].

[20] Administratīvā procesa likums [Administrative Procedure Law]. Available: https://likumi.lv/ta/id/55567-administrativa-procesa-likums [last viewed 20.03.2021].

In the case, the railway undertaking had applied to the administrative court for a safety certificate which would allow it to operate transport services from the boarder station to the national border. The State Railway Technical Inspectorate considered that, in order to avoid safety risks, the applicant should first enter into an agreement with the Belarusian Railways. A situation had arisen because the applicant was denied a certificate until it presented a cooperation agreement with the Belarusian Railways, while Belarusian Railways refused to conclude a cooperation agreement until the applicant was granted a safety certificate allowing access to the railway infrastructure up to the Latvian-Belarusian border.

The Supreme Court concluded that the EU law relevant to the case required active involvement of the state in resolving the issues of cross-border railway traffic organization, but the Latvian legislator had not clearly and precisely regulated this obligation in regulatory enactments. As a result, the applicant was not guaranteed the rights it enjoyed under EU law and this undermined the practical effect of EU law.

Therefore, referring also to the limits of the principle of procedural autonomy, the Supreme Court concluded that the regional court in this case should not confine itself to concluding that the absence of a cooperation agreement with the Belarusian Railways was a factual obstacle to the issuance of a safety certificate. The Supreme Court noted that in order to ensure the effectiveness of EU law, the regional court had to seek a legal remedy to help the applicant to break out of the "vicious circle". The Supreme Court also indicated possible remedies.[21]

Thereby, in this case the principle of effectiveness, which limits the principle of procedural autonomy, has served as the *ratio decedendi* for deciding the case.

Summary

Although the application of the principle of procedural autonomy in Latvian administrative court practice has become commonplace, there are not many court rulings in which the principle is mentioned in the text and where it would have been decisive for deciding the case. There are few judgments where the application of the principle of effectiveness is *the ratio decidendi* of a case.

There are also few cases which have been dealt with after the court has referred preliminary questions to the CJEU and received answers. From these judgments, it can be concluded that the courts do not always pay due attention to the principle of efficiency which should be applied within the procedural autonomy. Where the principle of effectiveness of EU law conflicts with another principle of law, they must be weighed against each other and the choice made between them must be justified in the judgment.

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[21] Republic of Latvia Supreme Court judgment of 19 March 2021 in case No. SKA-389/2021. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 20.03.2021].

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Legal Thinking in the Interwar Latvian Senate

Dr. iur. **Diāna Apse**
Faculty of Law, University of Latvia
Department of Theory and History of Law
Docent
E-mail: *diana.apse@lu.lv*

In this article, the author researches and analyses the legal thinking created by Senators A. Lēbers and M. Čakste, aspects of interdisciplinary interaction of subsidiary sources and branches of law in the interwar Latvian Senate. The findings made by the senators of interwar Latvia (in the capacity of rapporteurs on a case, members of the court's composition) help to explore the historical events and the legal culture of the respective age by reading the primary sources. In the conditions of contemporary legal system, the described cases and legal institutions mostly have similar regulation and could be useful for the development of the case law on the respective matter. Interaction of subsidiary sources, in particular, the used findings of the doctrine build bridges across ages and promote the continuity of uniform case law and understanding of law. The range of resolved legal matters pertained to a broad area of law – branches of law, interdisciplinary aspects of the legal system. The scientific contribution by Senators A. Lēbers and M. Čakste is universal and significant in the context of European and global thinking. Notwithstanding the circumstances, they remained loyal to democratic Latvia.

Keywords: legal system, legal sources, legal science, case law, continuity, legal thinking.

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Introduction

After the independence of the Latvian state was restored, the Latvian legal system reintegrated into the Western circle of law (more specifically – the family of continental European law), returning to the system of sources and subsidiary sources of law, typical of it, in which the court rulings and judges' findings occupy a special place. Scholars of law have repeatedly urged to use the findings of the legal science and case law of the interwar Latvia, in particular, those of the Senate.

The legal system of each state is created by scholars of law, who define the spirit, values and the vector of development of this system. Outstanding lawyers cared for the continuity of this vector, taking a stance against unfair law, unlawful situations, which were incompatible with the basic values of the legal system of a democratic state governed by the rule of law.

Pursuant to Article 16 of the law "On Judicial Power", court judgements have the force of law. This formulation, taken together with the findings of legal science, allows classifying the place of a court' s judgement among the sources of law as even the supreme form of customary law.

All well-reasoned and methodologically correctly created judgements point to the significance of the judge's previous experience in shaping legal thinking and understanding of legal interconnections, underscoring that the legal issues keep recurring and answers have been provided to them already.

Law originates as the outcome of practice. A court's ruling, as a form of customary law, impacts, supplements and even creates law. Simultaneously, all factors, which the judge has involved in the creation, development or adjustment of law and has used to substantiate his reasoning and conclusions, also take a significant place in the diversity of legal sources, constituting the entire legal system.

However, constant case law rather than separate cases is of decisive importance. To ensure that the principle of equality, enshrined in Article 91 of the *Satversme,* is complied with and to prevent different legal effects, a judge, in adjudicating a particular case, must take into consideration also the existing case law on this matter. Assessment of similar cases helps to interpret the applicable legal norms correctly.

In the context of the continuity doctrine, studying the Latvian Senate's judgements and identification of the findings expressed therein, assessing the possibilities of applying them in the contemporary practice, is important for implementing the principle of unity and succession of the legal system in the State of Latvia, restored in 1990/1991. The need for the interpretation of legal norms by the Latvian Senate as the supreme institution of judicial power today is substantiated by the validity of several laws adopted in the interwar period (*inter alia*, the *Satversme* of 1922).[1] Perhaps the article will be more useful from the theoretical vantage point, in particular, in the context of the Latvian history of law and theory of law, an also as a source of reference for students and other interested parties.

[1] For example, Civillikums, Zemesgrāmatu likums, Vekseļu likums [Civil Law, Land Register Law, Bill of Exchange Law] etc.

1. Aspect of Succession in Legal Thinking and Subsidiary Sources of Law

The model for applying the principle of succession in law and case law is the Latvian Senate itself, with many outstanding personalities serving on it, many among them were simultaneously theoreticians and practitioners, making extensive use of findings from subsidiary sources in the reasoning of their judgements. Thus, for example, in examining 1518 judgements of the Administrative Department from the period of 1918–1940 and assessing their impact on law making, special attention should be paid to references to the former case law. They prove that the Senate was influenced by the case law of related legal systems, which could be significant also for the contemporary case law.[2]

However, with respect to the case law, the actual functioning of the succession principle is possible only if the rulings by the Latvian Senate are publicly available and used both by courts and scholars of law in their research.

The research and work implemented by Prof. Dietrich André Loeber greatly contributed to studying the role of the Latvian Senate following the restoration of the state's sovereignty. They prove, *inter alia*, that the quality of the Latvian Senate's rulings was highly esteemed also abroad. Several of them had been translated and popularised among lawyers in other countries. These rulings had a significant impact on the quality of rulings delivered by lower instance courts.

Prior to occupation, Latvia was clearly aware of the importance of unified case law. Judgements by the Assembly of the Latvian Senate, as well as judgements and decisions by the Senate's departments were systematically published.[3] Thanks to D. A. Loeber, a large part of these rulings was re-published in 1997–1998, in 16 volumes, with additional 3 volumes of indices, prepared by the professor,[4] and now they are available at major libraries and judicial institutions.

Currently, a large part of the texts of the Latvian Senate's rulings is available also on the homepage of the Law Research Institute[5] and the homepage of the Supreme Court (Senate)[6], regularly supplemented with rulings that have been used in administering justice.

The current case law proves that the Senate's findings are used both in administering justice and in the development of legal doctrine, *inter alia*, in interpreting those provisions of the Civil Law, which are in force in their original wording of 1937. However, in general, knowledge of the importance of the Latvian Senate's rulings and skills for using them in practice are insufficient among the extensive contemporary community of lawyers. Examples from case law also show that the significance of the former case law continues to be undervalued.

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2 See more: *Apse, D.* Tiesu prakse un Latvijas Senāta Administratīvais departaments (1918–1940) [Judicial practice and the Administrative Department of the Latvian Senate (1918–1940)]. In: Tiesu prakses veidošana. LU Raksti [Development of court practice. LU scientific articles]. Edited by Dr. habil. iur. prof. *Melķisis, E.* Rīga: Latvijas Universitāte, 2001, pp. 68–101.

3 Ibid., p. 10.

4 Latvijas Senāta spriedumi (1918–1940). Faksimilizdevums [Judgments of the Latvian Senate (1918–1940). Facsimile edition]. Rīga: Supreme Court of the Republic of Latvia, Senator August Loeber Foundation, 1997–1998; Rādītāji Latvijas Senāta spriedumu krājumiem [Indicators for the collections of judgments of the Latvian Senate]. Edited by *Loeber, D. A*, Rīga: D. A. Lēbers, 1997.

5 Tiesību zinātņu pētniecības institūts [Law Research Institute]. Available: https://tzpi.lu.lv/pirmais-neatkaribas-laiks/tiesu-prakse/ [last viewed 18.02.2021].

6 Augstākā tiesa. Vēsturiskā judikatūra [Supreme Court. Historical case law]. Available: http://at.gov.lv/lv/judikatura/vesturiska-judikatura-lidz-1940gadam [last viewed 18.02.2021].

Underscoring the importance of legal science in civil law relations both in explaining legal norms and in resolving particular civil law disputes, professor K. Torgāns has noted, *inter alia*: "As is well-known, the foundation of the civil law regulation since 1992 is the reinstated Latvian Civil Law of 1937. It was drawn up by men who knew the traditions of the European legal acts and law. [..] However, in the years that have passed since the reinstatement of the Civil Law, it has become apparent that in contemporary society norms that are defined generally, and legal norms should be like that, in the contractual practice and in courts may be interpreted in a way that the fathers of the Civil Law could not even dream of."[7] Therefore, the historical findings, included in the rulings by the Latvian Senate, have special significance in identifying the genuine content and aim of the provisions of the Civil Law. The value of these findings in the resolution of current legal disputes is proven by the list, found in Annex 5 to the first part of the book "The Bureau of the Latvian Senate's Judgements. Findings of the Latvian Senate on the Application of the Civil Law Provisions (1938–1940)", of those rulings by the Department of Civil Cases of the Supreme Court (Senate), in which the court has referred to particular rulings of the Latvian Senate. In this, the principles of unity of the legal system and succession in law are manifested in reality.

Moral obligation, demanded by law, does not turn into the legal reality on its own. The one who applies the norm, the judge, stands between the moral obligation and the reality. How the abstract "moral obligation" turns into the particular legal reality depends on his professional knowledge and skills, understanding of law and social processes, culture, mental outlook, civil position, and other factors.[8]

A judge and a scholar of law, in developing their reasoning, must have also high level of internal normative ethics and scientific thinking. This is also a matter of the level of legal education.

At the time of forming the Department of Legal Science of the Faculty of Economics and Law of the Higher School of Latvia, the majority of the faculty members had acquired their legal education at the universities of the Russian Empire in Petersburg, Moscow, Dorpat, and Kazan. Some had had in-service training also in West European countries, for example, August Loeber, the first acting dean, who taught introduction to law.

Therefore, in creating the system of theoretical lectures at the Department of Law, the model of former Russian faculties of law was followed, while the model of German and French law faculties was used for the practical seminars.[9]

In moments when the fate of the Latvian state has turned, people of other nationalities, whose motherland is Latvia and who consider themselves as being affiliated with Latvia, have been together with the Latvian people. This has been

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[7] *Torgāns, K.* Tiesību principu, likumu un zinātnes atziņu loma civiltiesisku strīdu risināšanā [The Role of Legal Principles, Laws and Scientific Findings in Resolving Civil Disputes]. *Jurista Vārds*, No. 49, 04.12.2018, p. 13.

[8] *Meļķisis, E.* Attīstības tendences dažos tiesību teorijas un prakses jautājumos. Par precedentu un tiesu prakses veidošanu. Latvijas tiesiskās sistēmas ceļš uz demokrātisku tiesisku valsti. Rakstu krājums [Development tendencies in some issues of legal theory and practice. On the formation of precedents and case law. The path of the Latvian legal system to a democratic state governed by the rule of law. Collection of articles]. Rīga: Tiesu namu aģentūra, 2014, p. 164.

[9] *Dišlers, K., Dunsdorfs, E.* Tautsaimniecības un tiesību zinātņu fakultāte [Faculty of Economics and Law]. In: Latvijas Universitāte divdesmit gados. 1919–1939. I daļa. Vēsturiskas un statistiskas ziņas par Universitāti un tās fakultātēm [University of Latvia in twenty years. 1919–1939. Part I. Historical and statistical information about the University and its faculties]. Rīga: Latvijas Universitāte, 1939, p. 748.

vividly proven by the work done and attitude taken by the Baltic German scholars of law – professor and senator August Loeber and his son professor Dietrich André Loeber.[10] Already since 17 April 1920, soon after the University of Latvia was established, August Loeber was the first non-Latvian faculty member who started lecturing to students of the Department of Law in the official language of the state... Probably, such traditions, such attitude can develop only in a family with ancient and deep roots in the Latvian soil. From the day when independent Latvia was proclaimed, August Loeber became actively involved in building the new state. Being a mature practicing lawyer and a theoretician, he could contribute a lot. A. Loeber, invited by the Minister for Justice, participates in creating the supreme judicial institution of Latvia, i.e., the Senate, and becomes one of the first senators. He served in this office for 20 years (1918–1938). Later he was elected Honorary Judge of the Senate. In 1919, A. Loeber together with future President of Latvia docent J. Čakste, docent K. Puriņš and docent A. Hēdenštrēms established the Law and Economics Faculty (Faculty of Economic and Legal Science) at the University of Latvia and was the acting dean of this faculty. As of 1931, he also was a professor and taught introduction to law and trade law. In 1930, the University of Latvia conferred upon August Loeber the honorary degree *Doctor iuris honoris causa*. In 1935, after reaching the age of 70, Prof. A. Loeber retired from the University, continuing to work only in the Senate.[11]

Later, graduates of the faculty joined the ranks of lecturers. The first one was Pēteris Mucenieks, who graduated from the faculty in 1923 and in 1925 was elected to the position of an assistant[12]. In the coming years, Konstantīns Čakste (Civil Law Department), Lotārs Šulcs (Criminal Law Department), Jānis Vālbergs (Department of Latvian State Law), Voldemārs Kalniņš (Roman Law Department), Pēteris Lejiņš (Criminal Law Department), Beno Ābers (Department of History of Law) and others joined the faculty.[13]

In the Latvian practice of administering justice, the use of previous decisions and judgements by higher instance courts, which had entered into effect, in similar cases traditionally has become a consolidated practice in Latvia. Research of how (subsidiary) sources of law were used in 1938, when the new Civil Law had entered into force, revealed that 324 decisions by the Senate's Departments comprised 169 references to particular previous court decisions. Likewise, case law was extensively used in commentaries on laws, illustrating the diversity in the application of

[10] *Apsītis, R.* Par Latvijas pamatu vīriem. Runas. Raksti. Referāti [About Men at Latvia's Foundations. Speeches. Writings. Reports]. *Latvijas Vēstnesis*, No. 11/12, 16.01.1998. Available: https://www.vestnesis.lv/ta/id/31202 [last viewed 20.02.2021].
"In the autumn of 1939, the Loeber's family, like other German-Baltics, left Latvia at the invitation of the then German government."

[11] "Senator A. Leber was one of the drafters of the Latvian Civil Law of 1937, also a co-author of several other laws. He has made a great contribution to the unification of check and bill of exchange law in the Baltic states. It is also to his credit that in 1938 the same bill of exchange and check law was passed in Latvia, Lithuania and Estonia. A. Leber has written a lot of works on Latvian legal issues. In 1926, he published a 483-page "Report on Commercial Law", which was useful for both students and lawyers-practitioners for many years." Ibid.

[12] Latvijas Universitāte divdesmit gados. 1919–1939. II daļa. Mācības spēku biogrāfijas un bibliogrāfija [University of Latvia in twenty years. 1919–1939. II part. Biographies and bibliography of teaching staff]. Rīga: Latvijas Universitāte, 1939, p. 550.

[13] Latvijas Universitāte divdesmit gados. 1919–1939. I daļa. Vēsturiskas un statistiskas ziņas par Universitāti un tās fakultātēm [University of Latvia in twenty years. 1919–1939. Part I. Historical and statistical information about the University and its faculties]. Rīga: Latvijas Universitāte, 1939, pp. 749–750.

provisions and fostering the development of uniform practice.[14] Judgements also contained numerous references to findings made by local and foreign scholars of law and of the case law with respect to similar legal issues. Thus, the findings made in Latvia's "lawyers' law" (theory and practice) transcended the area of its legal system.

2. Some Aspects in the Interaction Between the Personality and Legal Thinking in the Interwar Latvian Senate

The role of senators' personalities in the development of legal thinking cannot be overestimated. Examination of only a small part of the legal contribution made by Senators A. Loeber and M. Čakste shows that they meticulously outlined the legal issue in connection with the previous legal reasoning in using legal practice and findings from the doctrine, drew attention to legal uncertainty, previous unfair solutions to a legal matter.

Chronological examination of only some judgements allows to establish the full maturity of legal thinking, its saturation with approach of contemporary legal methodology.

There are examples in the case law of the interwar Latvian Senate demonstrating the application of general legal principles, where the reasoning of the judgements comprised references not only to the legal science but also directly to the general legal principles, e.g., judgement of 8 December 1921 by the Department of Civil Cassation of the Latvian Senate in the case of insurance company "Rossija" 1, No. 188 (request made by sworn advocate A. Zēbergs to revoke the decision by the Court Chamber regarding the request by the Insurance Department of the Ministry of the Interior to appoint a curator in charge of the property of the insurance association "Rossija") and not recognising the legality of the Soviet Russia's decree in Latvia (liquidation of insurance associations was not binding) because that would be contrary to Latvia's public order and laws:

"Latvia as a state governed by the rule of law can recognise as lawful and binding only such orders of a foreign state that comply with the general accepted principles of *a legal order*, with which the liquidation, in principle, of all insurance associations is incompatible…".[15]

The manifestations of the impact of the legal theory and case law of Czarist Russia, the use of findings made therein can be explained by the similar legal systems and their affiliation with the West European circle of law – the traditions of Romano-German law. The findings were not taken over mechanically. They were critically examined and meticulously reviewed in the light of the principle of a state governed by the rule of law.

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[14] *Meļķisis, E.* Attīstības tendences dažos tiesību teorijas un prakses jautājumos. Par precedentu un tiesu prakses veidošanu. Latvijas tiesiskās sistēmas ceļš uz demokrātisku tiesisku valsti. Rakstu krājums [Development tendencies in some issues of legal theory and practice. On the formation of precedents and case law. The path of the Latvian legal system to a democratic state governed by the rule of law. Collection of articles]. Rīga: Tiesu namu aģentūra, 2014, p. 161.

[15] Latvijas Senāta Civilā kasācijas departamenta 1921. gada 8. decembra spriedums lietā Nr. 188 [Judgment of the Civil Cassation Department of the Latvian Senate of 8 December 1921 in case No. 188]. In: *Konradi, F., Valters, A.* Izvilkums no Latvijas Senāta Civilā kasācijas departamenta spriedumiem. 1919.–1925. gada jūlijs. II izdevums [Extract from the Judgment of the Department of Civil Cassation of the Latvian Senate. July 1919–1925. Edition II]. Latvian National Archives, Latvian State Historical Archive (hereafter – LNA LSHA), 1535. fonds [fund] (hereafter – f.), p. 142. Available: http://at.gov.lv/lv/tiesu-prakse/vesturiska-judikatura-lidz-1940gadam/senata-civila-kasacijas-departamenta-spriedumi [last viewed 18.02.2021].

Emphasising the content of the basic principles of the rule-of-law state, Jānis Akuraters, poet, educator, rebel of 1905, participant of the Christmas Battles, in the summer of 1920, in his essay highlighted the substance of the State of Latvia (nature of a state governed by the rule of law), its national culture as the foundation and meaning, which was more important than "the supreme parochial philosophy" of provincialism.[16]

"The modern state may not know harsh measures of governance. The content of the modern state may not hold the old yeast. Search for content, content, the blood of freedom fighters and soldiers mixed with the seething spirit filled with dreams, with what gives new inspiration and new findings… The pure form of the Latvian State could bear only the content of culture. The leaders of our State just have to take the best of the best, they are the bearers of their age, filled with its thirst, democratism and glittering findings of the new world. There is no other way, Latvia can be only modern, filled with European humanism and cultural ideas. Nothing from that which has collapsed, from the ideas of Asian slavery may cast shadow upon us."[17]

2.1. Reports by Senator A. Loeber

In examination of separate judgements, the presence of global legal thinking and legal methodology can be found in the reasoning thereof.

Within the framework of one succession law dispute, international law, civil law and the findings made by outstanding scholars of law of their age "meet".

Judgement by the Senate's Department of Civil Cassation of 24 October 1929. Request by Andrejs Rancāns, Meikulis Ludboržs and Antons Veliks, guardians of the property of deceased Taduls Rancāns, regarding revoking the judgement by the Court Chamber on the claim by Jadviga Rancāns regarding the entirety of the estate.

(Case number L. JMģ 418.) The hearing was chaired by Senator K. Ozoliņš, **with Senator A. Loeber** reporting. In view of the fact: 1) that the defendant does not deny that the territory of Zaļmuiža civil parish, where the testator had lived and where the plaintiff lives, falls within the boundaries of Latgale and had been liberated by the Latvian armed forces from the Bolshevik power only in mid-January 2020 and that only afterwards Latvian courts started functioning in the said territory; 2) that, contrary to the defendant's opinion, until that time the said territory had never been considered as a foreign territory; as correctly noted by the Court Chamber and not denied by the defendant, Latvia in its Proclamation of Independence of 18 November 1918 (collection of laws JMy 1.) strictly and categorically establishes and proclaims (para. 1), that Latvia, united within the ethnographic borders (Kurzeme, Vidzeme, etc.) is self-dependent, independent, democratic, republican state; this proclamation has the nature of an international act; by this the separation of Latvia as an independent state from Russia was established

[16] *Akuraters, J.* Latvijas valstssaturs [State content of Latvia]. *Latvijas Vēstnesis*. No. 12, 31.07.1920. "In the Latvian cultural environment *mālēnieši* were positioned as acrimonious weirdos, characterised by claims of lofty style, mixed with outright vulgarisms."

[17] Ibid.

(separation; see. Fiore[18], Le droit international codifié, Paris 1911, 122.); by the act of separation, the territory of the separated, newly established state is *ipso jure* excluded from the composition of the territory of metropolis; 3) that Latvia's act of separation was formally recognised *ex tunc* starting already with the Peace Treaty with Russia of 11 August 1920, para. 2, 3, which establishes and sanctions Latvia's separation from Russia, within the present borders of Latvia, which comprise also Latgale; on 16 December 1920, the Latvian-Russian Peace Treaty was registered in the Secretariat of the League of Nations, by which, pursuant to para. 18, 20 of the Statute of the League of Nations of 26 April 1919, the registered treaty acquires international significance; i.e., separation of the territory of Latvia from Russia as a state; 4) that separation is the moment of origin of the newly established state and its international foundation; therefore, by Latvia's proclamation of independence its separation from the former state of Russia and Latvia's exclusion from the territory of the former Russian state occurred; this thesis is not refuted by some "Martinson's (!) precis"; if the defendant has in mind the book of well-known professor Martens[19], in that case, this globally recognised scholar of international law adheres to the opinion just presented; 5) thus, the matter does not even pertain to the fact that the Latvian armed forces "had conquered" the territory of Latgale but rather that they liberated (freed) it from Bolshevist occupation; by liberating this territory its actual conditions was implemented, which corresponds to the international act of separation, already referred to; a strategic event of liberation does not have the significance of an independent international legal act, which would establish for the region of Latgale the nature of the territory of the Latvian state, as it were, only *ex nunc*; quite to the contrary, it had become the territory of the Latvian State already, *ex tunc*, by the act of separation, referred to before; 6) since Zaļmuiža civil parish is within the territory of Latvia already from 18 November 1918, pursuant to Article 1063 of the Russian Civil Law, the number of years envisaged for submitting the will to the court (the time applicable to a case where the successors are named in the will), is not applicable in the particular case; the question could only be, whether the period of one year (Art. 1063) or 10 years (Art. 1066), counting from the day of the testator's demise; 6) in this respect, if before the expiry of one year (i.e., until 6 January 1920), the region of Zaļmuiža civil parish in Latgale had not yet been actually liberated from the Bolshevist occupational power and therefore it had been impossible to submit the will with the term indicated to the Latgale

[18] Meaning: Fiore Pasquale (1837–1914). Droit international codifié et sa sanction juridique. Paris: A. Pedone, 1911. P. Fiore studied in Urbino, Pisa, and Turin, and after a period of teaching philosophy in Cremona, during which he published "Elementi di diritto pubblico constituzionale e amministrativo" (1862; "Elements of Public Constitutional and Administrative Law"), he was appointed professor of constitutional and international law at Urbino in 1863. He then occupied similar chairs at Pisa, Turin, and finally, from 1881, at Naples.

Although he was a prolific writer on most diverse range of legal topics, Fiore's international reputation rests on his writings on public and private international law. He made a sustainable contribution by realizing the need to divide international law into new categories, in his "Traité de droit pénal international et de l'extradition" (1880; "Treatise on International Criminal Law and the Law of Extradition"), and by meeting the need for a more precise statement of the law in his "Il diritto internazionale codificato e la sua sanzione giuridica" (1890; "International Law Codified and Its Legal Sanction"). See more: Fiore Pasquale. Biography. Available: https://www.britannica.com/biography/Pasquale-Fiore [last viewed 19.02.2021].

[19] I. e., the collection in 15 volumes, published from 1874 to 1909, by professor F. F. Martnes of Russia; international agreements with other countries, in parallel texts in Russian and French (*Recueil des traités et conventions conclus par la Russie*). See more: https://www.britannica.com/topic/Recueil-des-traites-et-conventions-conclus-par-la-Russie [last viewed 19.02.2021].

Regional Court for confirmation, then, according to the clear text of Article 1066 of the Russian Civil Law, the will had to be submitted within 10 years; *tertium non datur* is not understandable, what could be the significance of Article 1066, referred to by the defendant, which deals with the term for contesting the will, whereas in the particular case the matter pertains to the request by the heiress appointed in the will to confirm the will for execution; 7) that the Court Chamber, contrary to the defendant's opinion, had full grounds to refer to the fact that no disputes were found in literature regarding application of Article 1066; the Russian Senate had renounced, long ago, its former primitive view of "the so-called theory of law" (1891, No. 62, judgement in the case of Yappa, etc.) and adopt the opposite view (e.g., in 1907, No. 18 judgement in the case of Company Neft); 8) thus, the Court Chamber has not violated the laws referred to in the defendant's cassation complaint, therefore the cassation complaint is to be dismissed as unfounded, the Senate decides to disregard the cassation complaint by the guardians of deceased Taduls Rancāns' entirety of estate Andrejs Rancāns, Meikuls Ludboržs and Antons Velikans on the basis of Section 793 of the Civil Procedure Law.[20]

Scholar of Law Friedrich Fromhold Martens (1845–1909), referred to in the judgement, was an outstanding personality of his time, born in Pärnu, of Baltic German origin, diplomat of the Russian Empire and specialist of international law, historian of Europe's colonial projects in Asia and Africa. Known by "the Martens' Clause", named after him, which he formulated in 1899 at the Hague Peace Conference. During 1901–1908 was repeatedly nominated for the Nobel Peace Prize, yet did not receive the award. After acquiring the degree of candidate of law, Martens continued master's, graduating in 1869 by defending the scientific work "The Right of Private Property in Wartime". He continued his education in 1870 at the Universities of Vienna, Heidelberg and Leipzig. In 1871, he became a docent at the Department of International Law at Petersburg University, but in 1872 – a professor of public law at Tsarskoye Selo Lyceum. In 1873, Martens defended his doctoral dissertation "On the Office of Consul and Consular Jurisdiction in the East" and was appointed a professor extraordinary at Petersburg University, and in 1876 acquired the post of an ordinary professor. In 1874, he became the special tasks attaché of Alexander Gorchakov, the Chancellor and the Minister for Foreign Affairs of the Russian Empire. In the following years, Professor Martens achieved prominence by his writings, in particular, with the two-volume book "International Law of Civilised Nations", published in 1881 and 1882, which was released in German in 1883 (*Völkerrecht. Das internationale Recht der civilisierten Nationen*). From 1874 until 1909, Martens published a collection in 15 volumes about Russia's

[20] Senāta Civilā kasācijas departamenta 1929. gada spriedumi [Judgments of the Department of Civil Cassation of the Senate of 1929]. *Valdības Vēstneša Pielikums*, No. 160, 21.07.1937, pp. 13–14. Available: http://at.gov.lv/lv/tiesu-prakse/vesturiska-judikatura-lidz-1940gadam/senata-civila-kasacijas-departamenta-spriedumi [last viewed 21.02.2021].
Explanation: In the rulings by the Department of Civil Cassation of the Latvian Senate initially its germanised denomination was used – Private Law, later – Civil Law. In the Senate's rulings, to identify it, Part III of the Collection of Local Laws was not used, but, starting with 1938, – Civil Laws of 1864 (abbreviated – CL of 1864), in difference to the Civil Law of 1937, which was abbreviated as CL (without indicating the year). At the turn of the 1930s, the abbreviation of the former Civil Law of 1864 was "L.c.l.". In this case, the use of small letters is important, because the full transcript of LCL is the Civil Law of Latgale, i.e., the Russian Civil Law, which was in force in Latgale until 1938.

international treaties with other countries, with Russian and French parallel texts (*Recueil des traités et conventions conclus par la Russie*).[21]

Thus, within one judgement, the findings made by scholars of law of different ages meet and interact. The range of questions answered has touched upon an extensive area of law – branches of law, interdisciplinary aspects of the legal system, and systemic interpretation has been used.

Interaction between subsidiary sources in reasoning and resolution of several decisive issues of legal theory is seen also in the judgement of 16 December 1939 No. 1224 Japiņi Case[22], in which the Court Chamber, having established that the farmstead, in the size of 14.354 ha, No. 12–12a (with hip No. 16884) located in B village, Izvalta civil parish, to be divided between the participants in the case, was the estate of the latter, had granted it all *in natura* as not to be divided into actual shares, on the basis of para. 3, section 1324 of LCL, to the widow of the estate-leaver Tekla J., recognising the latter as being the oldest successor. The cassation complaint submitted by the person authorised by Pēteris J., a participant in the case, regarding the Court Chamber's judgment, is not worthy of attention. In it, the submitter of the cassation complaint, referring to the particularities of LCL rules on the succession order of widows and judgments of the Russian Senate No. 71/1224, 79/324 and 05/96, finds that the widow's right to the share of his estate, envisaged in Section 1148 of LCL, is not a succession right and that a widow cannot be deemed to be a heiress in the general meaning, therefore should not even be counted among the heirs envisaged in Section 1324 of LCL (allegedly, included in the part on dividing the estate). Further, the submitter of the cassation complaint, on the basis that 127 p. of 356 civil laws of Latgale Civil Law – 128, there also opponents to the opinion of the legal nature of the widow's share, finds, that there is a dispute regarding this issue. Therefore, in the particular case, on the basis of Section 31 (2) of the Transitional Provisions, CL provisions had to be applied,

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[21] About J. Kross's novel "Professor Martens' Departure", published in 1983 and until now has been translated into 11 languages. The novel was published in Latvia in 2011. See: Estonian Literature Centre. Available: http://www.estlit.ee/elis/?cmd=writer&id=49258 [last viewed 20.02.2021]. The novel by outstanding Estonian writer Jaan Kross (1920–2007) is internationally known. J. Kross studied in Tartu, in 1945 he graduated from the Faculty of Law of the Tartu University and continued working at the university as a faculty member. In 1945–1946, he was a docent at the Department of International Law. In January 1946, young docent Kross was arrested by the officers of the Soviet Commissariat for Internal Affairs (NKVD) and he was deported and sentenced to forced labour to a coal mine in Vorkuta, Komi ASSR).
See also: *Akroids, P.* Departure of Professor Martens. Available: https://satori.lv [last viewed 20.02.2021]. The publishing house "Atēna": "...one morning in June 1909, an Estonian, an outstanding expert of international law and secret councillor to the Czar, Professor Martens, leaves Pärnu for Peterburg. Unawares, yet having the forebodings of death, that this is his last voyage, he looks back at his life – from a pupil at a paupers' school to a politician of international renown and a real candidate for the Nobel Peace Prize, at the same time – also at the history of the end of the 19th c. and the beginning of the 20th c. Mostly, however, he looks into himself, examines his internal conflicts, conscience and, inescapable for a career like his, history of opportunistic relations. The author of this captivating historical novel, describing the life of the famous lawyer in service of the Czar, meticulously examines the tenet that the evil flourishes in places where decent people do nothing...".

[22] Senāta Civillietu kasācijas departamenta spriedumu izvilkumi. Sastādījis Senāta Civillietu kasācijas departamenta priekšsēdētājs senators O. Ozoliņš, senators R. Leitāns [Extracts from the Judgements of the Department of Cassation of Civil Cases of the Senate. Compiled by the Chairman of the Department of Cassation of Civil Cases of the Senate Senator O. Ozoliņš, Senator R. Leitāns]. *Tieslietu Ministrijas Vēstneša Pielikums*. No. 1., 1940. Available: http://at.gov.lv/lv/tiesu-prakse/vesturiska-judikatura-lidz-1940gadam/senata-civila-kasacijas-departamenta-spriedumi [last viewed 20.02.2021].

pursuant to Section 741 of which, a widow, sharing with children, did not have the right to receive land *in natura*. First of all, as regards the issue whether the widow receives the share of estate envisaged in Section 1128 of LCL on the basis of the right to succession and whether the widow should be regarded as an heiress at all, then, contrary to the view expressed in the earlier judgements, referred to in the cassation complaint, in its more recent judgements, the Russian Senate had resolved this issue affirmatively (CCD, judgement 13/92, 14/21, 14/30, etc.). The correctness of this opinion, which has been approved by outstanding Russian scholars of law (see Isachenko "Russkoye grazhdanskoye sudoproizvodstvo", published in 1910, Part II, p. 350; Sinaiskis "Russkoye grazhdanskoye pravo", published in 1917./18, Part I d., p. 264, etc.) and, also, indirectly by the Latvian Senate in its CcD judgement 38/1244, is proven by the fact that Section 1148 and subsequent section of LCL, which provide that the widow is entitled to the part of the estate left, have been included in the part "on succession by law" which includes also a sub-part "On the succession procedure of spouses". Moreover, pursuant to Section 699 of LCL, the right to the respective property is acquired only in ways set out in law, however, in the respective law there is no other way of acquisition, except succession, which would envisage and regulate the acquisition by succession of the share that the widow is entitled to. Thus, a widow, from LCL perspective, generally has to be recognised as an heiress and, hence, there are no grounds whatsoever not to count her among the heirs, participating in the division, envisaged in Section 1324 of LCL, the oldest of whom, on the basis of para. 3 of this section, has a prior claim to receiving the estate, not to be divided into actual shares, *in natura*, understanding the oldest heir in years as such an heir (Judgement by CCD of the Russian Senate No. 78/15, etc.). This opinion, i.e., that the widow, similarly to other heirs, enjoys the priority, envisaged in para. 3 of Section 1324 LCL, to receiving estate *in natura*, only if she is the oldest among heirs, is shared by Isachenko (see.op.cit., p. 350) and Zavadsky (see thesis 7 on Article 1324, 1923 Tytrumov's Commentaries on the Russian Civil Law, edition of 1923). In view of the above, there cannot be rules that, in the opinion of the submitter of the cassation complaint, in the particular instance would require application of CL rules as **subsidiary law**. Quite to the contrary, this is exactly the case, when the current law grants to the respective heir a priority in receiving the estate leaver's estate *in natura*, therefore, pursuant to Section 30 (1) of the Transitional Provisions, Section 741 of CL, referred to by the submitter of the cassation complaint, is not directly applicable.

The method of systemic interpretation, doctrine of sources of law are used in the judgement, and issues of intertemporality of law are dealt with, with extensive references to the case law of the Russian Senate on similar legal issues, and to findings made by scholars of law (Isachenko, Siniaiskis, Zavadsky, Tyutromov).

2.2. Reports by Senator M. Čakste

Senator Mintauts Čakste is an eminent personality in the interwar Latvian Senate. Due to the insufficient number of senators, until 1934, a large backlog of cases had accumulated in the Senate's Department of Civil Cassation. The procedure for drawing up draft Senate's judgements revealed Senator Mintauts Čakste as a very capable lawyer. The Senate always had to keep in mind that lower-instance courts

usually followed its findings, therefore the statements made in a particular case could also influence the case law in other cases.[23]

Examination of the findings by the Latvian Senate on the application of the Civil Law provisions[24] shows that out of 368 judgements in civil cases, M. Čakste has reported and drawn up theses in 76 cases on various issues of civil law, influencing the successive legal doctrine and continuity of case law.

In the judgement of 15 July1938 on Jānis Zunde's ancillary complaint regarding the decision of 1 March 1938 by the Vice-Chairman of the Riga Regional Court on the issue of dismissing his ancillary complaint in the case with Pulcherijs Šeifers regarding 55 lats (Case No 618.), the Senate (Senator M. Čakste reporting) finds that the stamp duty should not be paid by persons, whose right to litigate *in forma pauperis* already had been recognised by the court rather than by persons who only wished to acquire it, also, "certificates of poverty and requests for issuing such are released from the stamp duty."[25] The Senator continues research in the context of another legal act, clarifying "certificates of poverty" and "requests for issuing such", which are unclearly defined in the previous legal act. By using elements of the method of systemic interpretation, the conclusion was reached that the plaintiff had to pay the stamp duty.

The judgement of 28 September 1938 concerned the cassation complaint by sworn advocate P. Berģis, the authorised person of the First Vidzeme Credit Union, regarding the Court Chamber's judgement on Augusts Krauklis' demand to revoke part of the decision by the general meeting in case (Case No 651.)[26]

The method of systemic interpretation was applied to the matter of voting procedure of a general partnership, regulation on the institution of voting in the articles of association of the general partnership was analysed, at the same time noting that the formation of a natural person's will was not linked to any articles of association. Thus, it was concluded that a general partnership, in the case of voting, must comply with the procedure set out in its articles of association, that the general partnership's articles of association envisaged repeated voting only in one instance, – i.e., pursuant to Article 81 of the articles of association, repeated voting was envisaged only in the case of election. Thus, voting on an issue included in the agenda, unless other illegalities had been committed, should take place only once. On principle, repeated voting was inadmissible. The senator explained that the legal effect of the vote was not binding for eternity since, by including the matter in the agenda repeatedly, a new decision could be made, abiding, in conjunction, by Articles 75 and 76 of the articles of association.

In the judgement of 27 October 1938 on the cassation complaint by sworn advocate N. Valters, the authorised representative of Ella Štots, regarding the

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[23] *Čakste, A.* Mintauts Čakste. Publikācijas [Mintauts Čakste. Publications]. Stockholm, 1994, p. 8. "M. Čakste was always carefully prepared for court deliberations and the legal issues to be resolved, and his comments on draft reports were matter-of-fact. He, similarly to Senator Augusts Rumpēters, was a greater formalist than, for example, Teodors Zvejnieks, "the great campaigner for justice", who was the Chairman of the Court Chamber's Civil Department of the time."

[24] Latvijas Senāta Spriedumu birojs. Latvijas Senāta atziņas par Civillikuma normu piemērošanu (1938–1940) [Judgment Bureau of the Senate of Latvia. Statements of the Latvian Senate on the Application of Civil Law Rules (1938–1940)]. Rīga: Tiesu namu aģentūra, 2018, pp. 104–335.

[25] Senāta Civilā kasācijas departamenta 1938. gada spriedumi. Vēsturiskā judikatūra [Department of Civil Cassation of the Senate 1938 judgments. Historical case law]. Available: http://at.gov.lv/lv/judikatura/vesturiska-judikatura-lidz-1940gadam/senata-civila-kasacijas-departamenta-spriedumi [last viewed 19.02.2021].

[26] Ibid.

decision by the Riga Regional Court in case (Case No. 1030), the methods of systemic and teleological interpretation were used.

In determining the social aim of the provision, the senator noted that the Regional Court had not taken into account the aim and had allowed payment of the alimony in several instalments, as the result of which the aim of the provision had not been reached – the mother could not in timely manner cover the expenses related to the child's maintenance, clothing, education and other necessary expenses, because, by dividing the sum into overly small parts, the mother would receive it only in 25 years, when it would no longer be possible to use it for the maintenance and education of the child who received the alimony. Systemically, viewing the legal provision in conjunction with other CPL provisions, it was concluded that the Regional Court had not taken into account Section 186 and Section 196 of the CPL, which had resulted in deficient reasoning.[27]

The range of legal issues to which answers were provided in the cases, on which Senator M. Čakste reported, pertained to an extensive area of law; *inter alia*, a child's right to maintenance, a guardian's commitments in relations with the ward, the concept of legacy, the content of a will, effects of coming into estate, divested possession, written forms of a lawful transaction, unintentional loss, prescription period, a barter contract, a maintenance contract, lease, expiry of a rental contract, application of the provisions of employment and work-performance contracts, the principal's relations, the obligation to settle accounts, and aspects in proving self-enrichment.

Nowadays, the findings made by Mintauts Čakste (as the rapporteur, member of the court's composition) allow studying historical events and the legal culture of the respective age by reading the original sources, including those published in the Collection of Rulings by the Latvian Senate, prepared by the Supreme Court[28]. This collection also contains the findings from the judgement by the Senate's Assembly in the disciplinary case of sworn advocate Voldemārs Zāmuels 8/1939 on 12 October 1939, materials of the case, including V. Zāmuels' explanations. Senator M. Čakste was also a member of the court's composition. In its judgement, the composition of the court decided that principal legal issues could not be examined in the procedure of supervision, because verification of the correctness of decisions by lower-instance courts on their merits, substantially, was the task of the supreme judicial instance only in the cases of the ordinary procedure of appeal. Decisions by the Council of Sworn Advocates in disciplinary cases as final were not subject to appeal and, therefore, could not be appealed against in the procedure of supervision. Permitting the contrary would mean turning the prohibition set out in the law into an empty letter and allowing the plaintiff to circumvent the law directly (the principle of abiding by laws in the name of lawful order). V. Zāmuels' complaint regarding revoking the decision by the Court Chamber was left without effect.[29]

The author chose to examine several judgements in cases that were adjudicated in 1940 with the participation of Senator M. Čakste. The separate opinions of

[27] Senāta Civilā kasācijas departamenta 1939. gada spriedumi. Vēsturiskā judikatūra [Department of Civil Cassation of the Senate 1939 judgments. Historical case law]. Available: http://at.gov.lv/lv/judikatura/vesturiska-judikatura-lidz-1940gadam/senata-civila-kasacijas-departamenta-spriedumi [last viewed 19.02.2021].

[28] Latvijas Senāta nolēmumu atziņas: vēsturiskais mantojums [Lessons learned from decisions of the Latvian Senate: Historical heritage]. Spriedums V. Zāmuela disciplinārlietā [Judgment in the disciplinary case of V. Zāmuels]. Rīga: Latvijas Republikas Augstākā tiesa, 2019.

[29] Ibid., pp. 120–121.

judges are added to some judgements. The separate opinion by M. Čakste and A. Rumpēters was appended to the judgement of 24 January 1940 by the Senate's Assembly, explaining why the Court Chamber's judgement should not be left in force as an additional constructive criticism of the error made by the court of the previous instance in cases of wrong interpretation of provisions, application of wrong judicature, etc.

Additional criticism of the Court Chamber's opinion relating to wrong legal reasoning appeared in M. Čakste's separate opinion in the Assembly's case No. 39/31, in which he underscored that it had been rightly noted in the cassation complaint that the Court Chamber had operated with a negative circumstance, which did not have the force of evidence. The Court Chamber's opinion regarding the existence of novation could not be recognised as having sufficient and legally correct reasoning.[30]

In those judgements, where M. Čakste has been the rapporteur on the case, his legal reasoning is captivating. For example, in a case regarding calculation of the term for cassation complaint in connection with the fact when the person had become informed about the Court Chamber's judgement. It is concluded that the failure to issue summons to the court hearing cannot be the cause either for submitting the planned extraordinary appeal nor for submitting the planned extraordinary cassation in connection with the valid legal regulation. If the summons had not been issued for the court hearing of the first instance, where the judgement had been delivered, such judgement should be appealed against by an appeals complaint.[31] In these cases, references to doctrine (Vladimirs Bukovskis' work) was assessed. This proves that civil law has a more pronounced succession in connection with interactions between practice and legal science.[32]

In the judgement in the Senate's case relating to the aspect in determining the jurisdiction of a case of 14 March 1940, at the open assembly of the Civil Cassation Department it was concluded – if none of the circumstances, which, in accordance with the legal regulation, were decisive for the jurisdiction of the case was present, the plaintiff himself could determine the jurisdiction for the case, using his own discretion.[33]

On 26 September 1940, the Senate's Civil Cassation Department reviewed case No. 763 on the cassation complaint by the authorised representative of the Latvian Evangelic Lutheran Church regarding the decision of 13 June 1940 by the Head of Rīga-Valmiera Land Register Department of the Court Chamber concerning corroboration of immovable property in the name of the Evangelic Lutheran Church, because St. Peter's Evangelic Lutheran German Congregation had dissolved itself. Senators O. Ozoliņš, J. Grots and M. Čakste decided that it could be concluded from Article 48 of the Constitution of the Church that the Church continued to exist and retained its property until a new congregation was established, the

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[30] In this case, the joint existence of the new and the old liability is entirely possible and, even more, the new liability in connection with the issuing of bills of exchange cannot be presumed as being *novation* (note "v" at CL Section 3586, in Bukovskis' edition). Our Senate, likewise, has constantly recognised that the issuing of a bill of exchange is not a payment "*in solutum*", but a postponed payment "*solvendi causa*" (CCD of the Senate, judgement 31/881 and others). LNA LSHA, 1535. f., 8. apraksts [description] (hereafter – apr.), 267. lieta [file] (hereafter – l.).

[31] LNA LSHA, 1535. f., 8. apr., 329. l.

[32] See more: Latvijas Senāta nolēmumu atziņas: vēsturiskais mantojums [Lessons learned from decisions of the Latvian Senate: Historical heritage]. Ievads [Introduction], p. 7.

[33] LNA LSHA, 1535. f., 8. apr., 306. l.

right to use the church property was transferred to the Central Board. Thus, the Constitution of the Church had envisaged that the church as a legal person could exist also after a congregation was dissolved.[34] This legal aspect remains relevant today in connection with the issues of returning property to religious organisations if new congregations are established, which could cause disputes regarding the title to property.

Most often, M. Čakste outlined a legal problem in the judge's separate opinion in connection with wrong reasoning in using the findings from case law and doctrine, drawing attention to legal uncertainties and, possibly, insufficient discussions among the court's composition.

As a convinced democrat and defender of parliamentary order, he could not reconcile himself to the coup of 15 May 1934 and the authoritarian regime of the time in Latvia, which he did not hide in private conversations with his colleagues. However, the issue of the legality or illegality of the said regime was never discussed at the hearings of the Senate's Court or Assembly.[35] Throughout World War II, he believed in the victory of England and its allies but also hoped that this victory would bring Latvia freedom again.[36] M. Čakste sought to restore the functioning of Latvian courts during the period of German occupation.[37] In exile, M. Čakste was a recognised scholar of law in the area of international law, and wrote an article about the international legal concept of the Soviet Union, which was published in a prominent American legal journal (1949). Mintauts Čakste also has analysed the agrarian structure of the Soviet Latvia and other legal issues. The article "Das persönliche Eigentum der Sowjetbürger" was published by Dietrich André Loeber in the magazine dedicated to the Soviet law that he edited. M. Čakste is the author of 16 analytical research articles on international law.[38]

When reading and assessing the findings of the Latvian Senate, it is worth keeping in mind that the legal regulation has changed since the time when they have been created. However, this does not affect the understanding of law, based on the principles of a democratic state governed by the rule of law, and legal thinking, which the Latvian Senators and employees of the Bureau of Judgements held during the interwar period on what it should be like among lawyers of contemporary

[34] LNA LSHA, 1535. f., 12.III apr., 1834. l.

[35] *Čakste, A*. Mintauts Čakste. Publikācijas [Mintauts Čakste. Publications], p. 9.

[36] Ibid., p. 9. "A. Rumpēters, while in exile, had heard about M. Čakste that, in case of disputes, it was impossible to reach an understanding and a compromise with him. To a certain extent, this could be applicable also to his social and political activities. Convinced about the correctness of his opinion, Čakste defended it strictly at the Senate's debates and, when outvoted, sometimes wrote his separate opinion. Others, perhaps, did it less frequently. M. Čakste was a man of principle."

[37] *Čakste, A*. Mintauts Čakste. Publikācijas [Mintauts Čakste. Publications], p. 19.

[38] *Apse, D.* Mintauta Čakstes zinātniskais mantojums. Tā nozīme Latvijas valstsgribas turpinātībā [Scientific Legacy of Mintauts Čakste. Its Standing in Continuity of Will for Latvian Statehood]. In: LU Juridiskās fakultātes 7. starptautiskās zinātniskās konferences rakstu krājums. Tiesību zinātnes uzdevumi, nozīme un nākotne tiesību sistēmās I. Legal Science: Functions, Significance and Future in Legal Systems I. The 7th International Scientific Conference of the Faculty of Law of the University of Latvia.] Rīga: LU Akadēmiskais apgāds, 2019, p. 474. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Juridiskas-konferences/LUJFZK-7-2019/iscflul-7_2019_Ties-zin-uzd-noz-nak.pdf. [last viewed 25.02.2021].

Latvia, *inter alia*, in applying the Civil Law provisions.[39] The examples and legal institutions, described in the conditions of the contemporary legal system, mostly have similar regulation and could be useful in developing judicature on a certain matter. The interaction of subsidiary sources, in particular, using the findings from doctrine (V. Bukovskis, V. Sinaiskis, etc.) builds bridges across ages and promotes uniform case law and continuity in the understanding of law. The area of Latvian law is inconceivable without the studies, monographs, articles by A. Loeber, M. Čakste and other outstanding scientists and practitioners, as well as the findings from case law. They will inspire many more future generations of lawyers.

Summary

1. The scientific contribution by Senators A. Loeber and M. Čakste is universal and significant in the context of European and global thinking. Notwithstanding the circumstances, they remained loyal to democratic Latvia. Their findings develop the Latvian legal system, in particular, in the last stage of the interwar period, reveal deep understanding of most diverse issues of private law, etc., criticising the previous faulty legal reasoning.
2. The range of legal issues to which answers were provided pertains to an extensive area of law – branches of law, interdisciplinary aspects of the legal system, revealing the good command they had of the problematic issues of all branches of law. The protected legal benefit and assessment of values, as well as the legal methodology for correct application of law are disclosed in convincing reasoning. This has had a lasting significance in the correct application of civil law and further development of international law.
3. The findings made by personalities – Senators A. Loeber and M. Čakste – in the judgements by the interwar Latvian Senate, the findings of other outstanding scholars of law of other ages and the findings from doctrine used in their interaction build bridges across ages and promote the development of united case law and succession in the understanding of law. Findings – these sterling achievements – continue their path and have brought into the Latvian legal thinking the breath and quality of the world.

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Limits to Freedom of Speech in the Republic of Latvia During the Parliamentary Period (1918–1934)

Dr. iur. **Elīna Grigore-Bāra**
Faculty of Law, University of Latvia
Docent, Department of Theory and History of Law
E-mail: *elina.grigore-bara@lu.lv*

The article is dedicated to the analysis of one element of the constitutional identity of the Latvian State – freedom of speech – during the initial democratic period in the State's existence. The author analyses the rules on the protection of honour and supervision of the press as limits to freedom of speech. It is concluded in the article that the boundaries between one person's freedom of speech and another person's honour in the Republic of Latvia changed little compared to the previous period in the history of law and that honour as a legal benefit was prized more highly. The framework of freedom of the press, in turn, was constantly expanded. However, the creation of the lists of prohibited books and third-rate and obscene literature proves that the State did not rely on individuals exercising freedom of speech properly. Paternalistic treatment of its citizens was not unknown to the new democratic republic.

Keywords: freedom of speech, freedom of the press, legal protection of honour, constitutional law, penal law.

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Introduction

Freedom of speech is one of the civic freedoms and a person's fundamental right. However, it is not only a public subjective right, it is, simultaneously, also a constitutional value, reflecting the society's value judgements in a certain period. Within the framework of this article, the author studies the limits to freedom of speech as one of the elements in the selfhood of the Latvian State, which reveal the understanding of values and law in the Latvian society during the initial stage of the existence of the State of Latvia.

Latvia's statehood is based on the state continuity doctrine. The occupation of Latvia by the USSR did not terminate the existence of the Latvian State but only significantly limited its capacity.[1] The State of Latvia was established as a legal person on 18 November 1918 and it continues to exist. Thus, the selfhood of the State today and in the interwar period is the same. The State's selfhood could be studied from the perspective of Hans Kelsen's concept of the basic norm[2] or could be examined as the constitutional identity of the State.[3] H. Kelsen defended a purely legal concept of the state, contending that the state and the legal system were identical concepts as to their content.[4] The state exists as a legal order.[5] The constitutional identity, in turn, is understood as the fundamental values and basic principles of a nation state.[6] It unites the nation on the level of consciousness and the legislator may enshrine it legally in the constitution and laws.[7] Although the second approach points to broader (not purely legal) sources of the state's selfhood, they both share at least two significant features. Both perspectives implicitly envisage that the State's identity is revealed also in regulatory enactments, and both recognise the dynamic nature of the State's selfhood. H. Kelsen writes that the basic norm is the grounds for creating or applying legal norms, giving a formally dynamic nature to the legal system. Separate provisions of the legal system cannot be logically derived from the basic norm through deduction. The creation or application of a legal norm is an act of will rather than of thinking.[8] Thus, neither is identity a static category, it may develop and expand over time because it is open to the subject's experience.[9]

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1 See more: Nepārtrauktības doktrīna Latvijas vēstures kontekstā [The State Continuity Doctrine in the Context of Latvia's History]. Collective of authors, scientific ed. Prof. *Jundzis, T.* Rīga: Latvijas Zinātņu akadēmijas Baltijas stratēģisko pētījumu centrs, 2017.

2 *Lazdiņš, J.* Rechtspolitische Besonderheiten bei der entstehung des lettischen Staates und seiner Verfassung. *Journal of the University of Latvia. Law*, No. 7, 2014, p. 10.

3 *Osipova, S.* Tautas gars, pamatnorma un konstitucionālā identitāte [The Spirit of the Nation, Basic Norm, and the Constitutional Identity]. In: *Osipova, S.* Nācija, valoda, tiesiska valsts: ceļā uz rītdienu [Nation, Language, Rule-of-Law State: Towards Tomorrow]. Rīga: Tiesu namu aģentūra, 2020, pp. 38, 39.

4 *Schöbener, B., Knauff, M.* Allgemeine Staatslehre. 2. Aufl. München: Verlag C. H. Beck, 2013, S. 75.

5 *Kelsen, H.* Reine Rechtslehre. Studienausgabe der 1. Auflage 1934. Herausgegeben von *Jestaedt, M.* Tübingen: Mohr Siebeck, 2008, S. 127.

6 *Osipova, S.* Tautas gars … [The Spirit of the Nation …], p. 40.

7 *Osipova, S.* Latvijas Republikas konstitucionālā identitāte Satversmes tiesas spriedumos [The Constitutional Identity of the Republic of Latvia in the Constitutional Court's Judgements]. In: *Osipova, S.* Nācija … [Nation …], pp. 45, 48.

8 *Kelsen, H.* Reine Rechtslehre, S. 74–75.

9 Konstitucionālo tiesību komisijas viedoklis "Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu" [Opinion of the Constitutional Law Committee "On the Constitutional Foundation of the State of Latvia and the Inviolable Core of the *Satversme*"], paragraph 65, p. 24. Available: http://blogi.lu.lv/tzpi/files/2017/03/17092012_Viedoklis_2.pdf [last viewed 20.03.2021].

The author aims to research the understanding and the course of development of one element forming the constitutional identity of the Latvian State – freedom of speech – in the initial democratic stage (parliamentary period) of the State's existence, insofar it is revealed in regulatory enactments. By revealing the dynamics of the constitutional identity, its internal diversity becomes evident, which allows taking a broader perspective on the possible solution to the present problems.

The status of freedom of the press and freedom of speech as elements of constitutional identity is confirmed by the fact that those were the first two freedoms mentioned in the founding act of the Republic of Latvia – Part V of the Political Platform "Civil Liberties".[10] Such a choice necessarily follows from the idea of a democratic republic, because freedom of expression is a necessary precondition for free elections. The significance of free elections is revealed by the laconic words of the introductory part to the Latvian Constitution adopted in 1922 – "The people of Latvia in their freely elected Constitutional Assembly have decided to have such a national Constitution."[11]

As in the Political Platform, also in the second provisional constitution – Article 9 of the Provisional Regulation on the Order of the Latvian State of 1 June 1920, freedom of the press is named alongside freedom of speech.[12] The concept of freedom of the press is no longer included *expressis verbis* in Article 100 of the *Satversme* of the Republic of Latvia; however, the contemporary fundamental rights dogmatics assumes that the concept of freedom of speech is broader and includes also the concept of freedom of the press as one of the ways, in which freedom of speech is manifested.[13] Moreover, the same approach to formulating the constitutional guarantees for freedom of speech was used both in the Fundamental Laws of the Russian Empire of 1906 and the unadopted Part II of the *Satversme* of the Republic of Law. Therefore, the author will research these two freedoms, named separately in the Political Platform and the Provisional Regulation on the Order of the Latvian State, together, as two ways whereby freedom of speech manifests itself.

1. Constitutional Framework of Freedom of Speech

Four civic freedoms were enshrined in the First Provisional Constitution of Latvia, i.e., the Political Platform: freedom of the press, speech, assembly and association, which had to be ensured by the Provisional Government Regulations. Five other freedoms were added to these four in the Provisional Regulation on the Order of the Latvian State: inviolability of a person, home and correspondence, as well as freedom of conscience and freedom to strike. These freedoms had to be ensured and established by respective laws. A comparison of both provisional constitutions reveals that the legislator rather than the executive power (the government) was entrusted with the establishment of civil freedoms. This, of course, is linked to the changes in the political situation as the outcome of the War of Independence. However, the substantive certainty of freedom of speech did not change, the wordings were equally laconic.

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[10] *Pagaidu Valdības Vēstnesis*, No. 1, 14(1).12.1918.

[11] *Valdības Vēstnesis*, No. 141, 30.06.1922.

[12] *Valdības Vēstnesis*, No. 123, 03.06.1920.

[13] *Kučs, A.* Komentārs Satversmes 100. pantam [Commentary on Article 100 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VIII. Fundamental Human Rights]. Collective of authors, scientific ed. Prof. *Balodis, R.* Rīga: Latvijas Vēstnesis, 2011, pp. 343–344.

To reveal how freedom of speech was understood at the time, the draft Part II of the *Satversme* needs to be examined. The intention had been to guarantee freedom of speech in Article 94, Part II of the *Satversme*. Two versions of this article were submitted for discussion. The first one provided: "The citizens shall have the right, within the limits of law, to express their conviction in speech, writing, drawings and other forms of expressions. This right may not be denied in service and employment relationships". The second version included an additional sentence: "Censorship shall not exist in Latvia."[14] This wording of the fundamental right did not cause extensive discussions at the Constitutional Assembly. Apart from the rapporteurs, only two other deputies took the floor at the plenary session – Markuss Gailītis, representing the non-partisan group of landless peasants and smallholders, and social democrat Fēlikss Cielēns. M. Gailītis supported the second version of Article 94 but proposed expanding it, following the model of the German constitution. F. Cielēns, in turn, proposed deleting from the article the words "within the limits of law" and introducing the principle that only the court could make someone liable for criminal offences in the press.[15] Within the *Satversme's* Committee itself, opinions differed as to which version should be supported. One of the rapporteurs, Andrejs Kuršinskis, on behalf of one part of the Committee, defend the second version to emphasize that censorship normally did not exist, thus highlighting the exceptional nature of Article 117 of the *Satversme*. Co-rapporteur Jānis Purgalis, however, insisted that censorship was necessary in some cases, therefore, the first version should be supported. It is significant that President of the Constitutional Assembly Jānis Čakste, putting these two proposals for vote, called the second version "more radical". The Constitutional Assembly dismissed the proposals made by both F. Cielēns and M. Gailītis, as well as the entire second version of Article 94.[16] The choice of such formulation of freedom of speech is evidence of a strong conviction that limits to freedom of speech should be set also in a democratic republic and, thus, censorship was not deemed to be a legal institution that should be categorically denied.

Limits to freedom of speech, intended in the *Satversme*, were defined also in Article 117 of the *Satversme*, which authorised the Cabinet, during the state of exception, to suspend or restrict the application, *inter alia*, of Article 94, in the scope defined in a special law.[17] Two elements in this legal norm require attention. Limiting freedom of speech in certain cases was again placed in the competence of the executive power, and it was also assumed that this fundamental right even could be suspended. Thus, the Latvian Constitutional Assembly did not regard freedom of speech as universal civic freedom, which should be ensured both in times of peace and times of war, but envisaged instead that, in cases of certain threats, freedom of speech could be given up altogether, although temporarily.

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[14] Satversmes sapulces V sesijas 2. sēdes (1922. gada 18. janvārī) stenogramma [Transcript of the 2nd sitting of V session of the Constitutional Assembly (18 January 1922)], p. 535. Available: http://flriga.lu.lv/tzpi/materiali/Satversmes_sapulces_stenogrammas.pdf [last viewed 20.03.2021].

[15] Ibid., pp. 535–536.

[16] Satversmes sapulces V sesijas 2. sēdes (1922. gada 18. janvārī) stenogramma [Transcript of the 2nd sitting of V session of the Constitutional Assembly (18 January 1922)], pp. 536–538.

[17] Latvijas Republikas Satversmes 2. daļa. Pamatnoteikumi par pilsoņu tiesībām un pienākumiem (netika pieņemta) [Part 2 of the *Satversme* of the Republic of Latvia. Fundamental Rules on Citizens' Rights and Obligations (was not adopted)]. In: *Šilde, Ā.* Latvijas vēsture. 1914–1940. Valsts tapšana un suverēnā valsts [The History of Latvia. 1914–1940. Formation of the State and the Sovereign State]. Stokholma: Daugava, 1976, p. 704.

Article 94 of the *Satversme* repeated almost verbatim the first part of Article 118 of the Constitution of the German Reich,[18] Article 117, however, was closer to Article 41 of the Fundamental Laws of the Russian Empire.[19] During the debates of the Constitutional Assembly, rapporteur J. Purgalis explained that in all countries in certain emergency situations the possibility to restrict the civic freedoms in the interests of national security was envisaged.[20] Most probably, the recent experience of World War I and the Latvian War of Independence had reinforced the conviction that in an emergency (war) situation restricting or even suspending an individual's freedoms was inevitable or, at least, useful.

The formulation of freedom of speech in draft Part II of the *Satversme* (as in the Fundamental Laws of the Russian Empire and the Constitution of the German Reich) included the clause "within the limits of law" – citizens were granted rights only within the limits of law. Jānis Pleps has explained that the authorisations to the legislator, included in the text of Part II of the *Satversme*, should not be considered as being clauses on the restrictions on fundamental rights but rather as further legislative plans.[21] In assessing the meaning of the clause "within the limits of law", one can conclude that, primarily, the decision on the aims or expedience of freedom of speech was recognised as being in the discretion of the State and not an individual. Freedom of speech was not regarded as a citizen's natural right but as a subjective public right granted by the State, which existed only within the limits defined by the State. This wording reflected the understanding of an individual's right as created by the State, not existing naturally or supranationally. Hence, the State had greater discretion in creating the legal regulation on freedom of speech. The State was not obliged to justify interference into a person's freedom since its existence outside the framework defined by law was not even recognised.

2. Protection of Honour as the Limitation to Freedom of Speech

Pursuant to Immanuel Kant's philosophy of law, the general law on rights envisaged a person's freedom of external actions, which was compatible with the freedom of others in accordance with the general law.[22] Hence, also the limits

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[18] "Artikel 118 (1) Jeder Deutsche hat das Recht, innerhalb der Schranken der allgemeinen Gesetze seine Meinung durch Wort, Schrift, Druck, Bild oder in sonstiger Weise frei zu äußern. An diesem Rechte darf ihn kein Arbeits- oder Anstellungsverhältnis hindern, und niemand darf ihn benachteiligen, wenn er von diesem Rechte Gebrauch macht." Die Verfassung des Deutschen Reichs ["Weimarer Reichsverfassung"] vom 11. August 1919. Available: http://www.documentarchiv.de/wr/wrv.html [last viewed 23.03.2021].

[19] 41. Iz"jatija iz dejstvija izlozhennyh v sej glave postanovlenij v otnoshenii mestnostej, ob"javlennyh na voennom polozhenii ili v polozhenii iskljuchitel'nom, opredeleny osobymi zakonami [41. Exceptions from the validity of the regulations set forth in this chapter in relation to areas declared under martial law or in a state of exception are determined by special laws]. *Complete collection of laws of the Russian Empire* – Vol. XXVI, No. 27805. Available: http://www.hist.msu.ru/ER/Etext/apr1906.htm [last viewed 20.03.2021].

[20] Satversmes Sapulces V sesijas 10. sēdes (1922. gada 7. februārī) stenogramma [Transcript of the 10th sitting of V session of the Constitutional Assembly (7 February 1922)], pp. 738–739. Available: http://flriga.lu.lv/tzpi/materiali/Satversmes_sapulces_stenogrammas.pdf [last viewed 20.03.2021].

[21] *Pleps, J.* Komentārs Satversmes 116. pantam [Commentary on Article 16 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VIII. Fundamental Human Rights]. Collective of authors, scientific ed. Prof. *Balodis, R.* Rīga: Latvijas Vēstnesis, 2011, p. 752.

[22] *Rubenis, A.* Imanuels Kants. Ķerras stūmēja mēģinājums tuvoties karalim [Immanuel Kant. The Wheelbarrow Pusher's Attempt to Approach the King]. Rīga: Minerva, 2006, p. 212.

to freedom of speech should be marked in the place where the freedom of other persons begins. However, the peculiarity of freedom of speech is that it does not come up against the others' freedom of speech (these, to a certain extent, may even overlap or exist in parallel) but against the other persons' honour. The scope of an individual's freedom of speech depends upon the honour of another person.

Long before the constitutional safeguards for freedom of speech were adopted, a person's honour had been recognised as a value under legal protection. With respect to a person's honour, the boundaries of freedom of speech are broader and also vaguer compared to the procedure when the scope of freedom of speech is defined in law. Broader, because freedom of speech, until it does not injure a particular person and, thus, does not cause damage, is not limited at all. The vagueness, in turn, is linked to the possible difficulties in forecasting, whether a person will regard the particular statement as offensive. The fact that the limits to freedom of speech have been violated becomes apparent only in the particular case – at the moment when another person has felt defamation and turns to court. To be fair, it must be added that defamation and insult were not based on purely subjective, i.e., the victim's own, perception of honour. Professor Pauls Mincs has explained in the case of an insult the matter is not of a whim, injured selfishness and the victim's excessive sensitivity in assessing the events but such action by the perpetrator that would have offended an average person of the same cultural level and in the same circumstances.[23] This, i.e., the criminal law system for delimiting honour and freedom of speech, has two additional important features: the limits to freedom of speech are individualised (more adapted to each individual case) and are based on the effectiveness of other kinds of social norms (in particular, morals) in society. Admittedly, with the changing role of morals as a social regulator and growing diversity of opinion in society, such limitation to freedom of speech would become vaguer and harder to predict.

Initially, the declaration of freedom of speech on the constitutional level did not impact the legal regulation on protecting a person's honour. During the period researched, there were two mechanisms for the protection of personal honour in the Republic of Latvia – of the criminal law or the civil law, and, hence, also three most important regulatory enactments that defined the limits to freedom of speech in this regard. Primarily, the protection of honour was exercised within the framework of penal law. Penal laws defined the boundary between one person's freedom of speech and the other person's honour. Two Penal Laws were in force in the Republic of Latvia during the interwar period. Pursuant to "Provisional Regulation on Latvian Courts and Procedure for Administering Justice"[24] of 6 December 1918, the Penal Laws of the Russian Empire of 22 March 1903 were introduced in Latvia and the new Penal Law entered into force on 1 August 1933. Whereas the civil law boundaries between freedom of speech and personal honour followed from Part III of the Collection of Baltic Local Laws or the Baltic Civil Law.

[23] *Mincs, P.* Krimināltiesības. Sevišķā daļa [Criminal Law. Special Part]. With Commentaries by *Liholaja, V.* Rīga: Tiesu namu aģentūra, 2005, p. 302.

[24] *Pagaidu Valdības Vēstnesis*, No. 1, 14.(1.)12.1918.

2.1. Delimiting Freedom of Speech and a Person's Honour in Penal Law

The Penal Law of 22 March 1903 was applicable throughout almost the entire parliamentary period of Latvia.[25] Chapter 28 of the law defined criminal offences against person's honour – 12 articles altogether (Art. 530–540[1]). Moreover, only one of them, i.e., Article 540[1] (on appropriation of a person's name) was adopted in 1925 by the Latvian legislator, but one more (Art. 532.p.) had been amended in 1906. Until 1933, the remaining ten articles were in force in their initial wording; i.e., that of 1903. This indicates that, in this respect, law of the Russian Empire did not cause a collision with the legal system of a democratic republic.

Following more than thirteen years of drafting the new penal law and postponing the entry into force of the new law several times, on 16 June 1933, the *Saeima* adopted the Law on Introducing the Penal Law and the Law on Disciplinary Punishments, providing that the Penal Law would enter into force on 1 August 1933.[26] Chapter 32 of the new law "Defamation" consisted of 11 articles – Art. 508–518. The wording and sanctions of some articles had been amended; however, the Latvian legislator had not introduced conceptual changes in this area. In analysing the new Penal Law, Arveds Švābe had established that only 53 articles of the total 584, i.e., approximately 9 %, were entirely new. This can be explained by the fact that the main source for the new law was the previous Penal Law of 1903.[27] Comparing the liability for injuring honour and libel, defined in both laws, also Diāna Hamkova has concluded that the regulation had been quite similar. She points out one innovation – criminal law liability was aggravated if the injury had been done by publishing systematically in a periodical offensive information about the private and family life of certain persons and if the editor or publisher of the periodical had been recognised as being liable for it.[28] It needs to be added that also in this case the elements of the criminal offence had been defined already in the initial wording of the law of 1903. However, these elements of the criminal offence were transferred from Chapter 15 of the previous law "Violation of the regulations on supervising printing-houses or other printing facilities, the press, libraries, reading rooms and performances" and, thus, a crime to be prosecuted in public procedure had turned into a private delict, subject to the procedural rules of private charges.[29]

In view of the fact that the regulation on the protection of honour of the two laws does not differ significantly, the author will examine them jointly. The Penal Laws set out liability for two types of injuries to honour: personal insult (Art. 530 of 1903 Law; Art 508 of 1933 Law) and defamation (Art. 531 of 1903 Law; Art. 508 of 1933 Law). Personal insult was an intentional personal injury of honour or derogation

[25] 1903. gada 22. marta Sodu likumi. Tulkojums ar paskaidrojumiem un ar motīviem par Latvijas valdības laikā izdotiem grozījumiem. Tieslietu ministrijas sevišķas komisijas sagatavojumā [Penal Laws of 22 March 1903. Translation with explanation and reasons for amendments introduced during the period of the Latvian Government. Prepared by the special committee of the Ministry of Justice]. 3rd edition. Rīga: Valsts tipogrāfija, 1930.

[26] *Valdības Vēstnesis*, No. 138, 27.06.1933.

[27] *Švābe, A*. Mūsu sodu likumu valoda [Language of our Penal Laws]. *Tieslietu Ministrijas Vēstnesis*, No. 6–8, 1933, pp. 139–140.

[28] *Hamkova, D.* Goda un cieņas krimināltiesiskā aizsardzība. Promocijas darbs [Doctoral thesis "Criminal Law Protection of Honour and Dignity"]. Rīga: Latvijas Universitāte, 2009, p. 74. Available: http://dspace.lu.lv/dspace/bitstream/handle/7/5038/13775-Diana_Hamkova_2009.pdf?sequence=1&isAllowed=y [last viewed 21.03.2021].

[29] 1933. gada 24. aprīļa Sodu likums ar likumdošanas motīviem un sīkiem komentāriem [Penal Law of 24 April 1933 with Legislative Reasoning and Detailed Commentaries]. Complied by *Mincs, P., Ehlerss, H., Jakobi, P., Lauva, J.* Repeated edition. Rīga: SIA "Grāmata", 2016, p. 158.

of a person, disrespectful treatment of them, whereas an important element in the offence of defamation was spreading information that injured a person's honour, i.e., lowering a person's respect in the eyes of other persons.[30] If an offending, derogatory or humiliating opinion was intentionally stated, the act could be qualified as an insult, while if information was spread, i.e., facts that had injured the plaintiff's honour had been disclosed to another person, the act already could be qualified as defamation. The analysis of these two types of injuries to honour reveals a difference in two respects, i.e., in the private (personal) or public nature of the injury and the injury's link to the truth.

Professor P. Mincs wrote that in the case of insult a person's sense of self-respect was injured, causing them mental suffering.[31] An anonymous author who wrote in the Herald of the Ministry of Justice explained that, in the case of insult, a person's self-respect or subjective honour is injured.[32] Thus, this offence, essentially, is aimed at the person himself or herself, their integrity and self-esteem. Therefore, in the case of insult, it was not important, whether the injury had occurred in public or private. Privately made statements also were punishable if it was proven that they were insulting and that the perpetrator had intended to injure the other person's honour or, at least, had been indifferent towards the consequences of his actions. For example, in a case of 1925, the court recognised that also sending an insulting letter had to be qualified as an insult. However, an insult *in absentia* was not punishable. In insult cases, the truthfulness of the statements was not significant. Thus, an opinion that was based on genuine facts but was insulting was recognised as being criminally punishable.[33]

The elements in the crime of defamation were aimed at protecting a person's good name (reputation) and public assessment (respect in the eyes of others). Thus, the elements of this offence no longer included the requirements that the victim had been personally addressed, it was, though, important to identify the unlawful disclosure of such circumstances that could cause a third person's derogation or disrespect towards the victim. Essential characteristics were the public nature of statements (the publicity condition) and the facts made public (not solely an opinion).[34] In the case of defamation, it was possible to free oneself from liability if the accused proved that the disclosed information complied with the truth (*exceptio veritatis*) or if he had sufficient grounds to consider the disclosed circumstance as being true and he had done for the good of the State or society, in the interests of performing his duty, or in protecting his own or his family's honour. The defence of truth disclaimer, though, was meaningless if the disclosed information pertained to the leader of a foreign state or a foreign diplomatic representative in Latvia or the injured person's private or family life.[35] In this regard, P. Mincs characterised the evolution of the elements of defamation. First of all, the punishment was envisaged for slander, i.e., intentional disclosure of untrue information that could injure the

[30] K. V. Goda aizskaršana [Injury to Honour]. *Tieslietu Ministrijas Vēstnesis*, No. 9, 1926, pp. 356–357.
[31] *Mincs, P.* Krimināltiesības … [Criminal Law …], p. 302.
[32] K. V. Goda aizskaršana [Injury to Honour], p. 356.
[33] Sodu likums ar komentāriem – izvilkumiem no Senāta Krimināla kasācijas departamenta spriedumiem un ar alfabētisko un salīdzināmiem rādītājiem [Penal Law with Commentaries – Extracts from the Judgements by the Senate Criminal Cassation Department with an Alphabetic and Comparative Indexes]. Complied by *Mincs, P., Lauva, J.* 2nd edition. Rīga: Valsts tipogrāfijas izdevums, 1938, pp. 250–251.
[34] *Mincs, P.* Krimināltiesības … [Criminal Law …], pp. 303–304.
[35] Articles 537, 538 of the Penal Law of 1903; Articles 515, 516 of the Law of 1933.

victim's honour in the eyes of third persons. If the accused was able to prove the truthfulness of the disclosed information, he was released from the punishment. This construction was based on the opinion that anything that complied with the reality could be freely discussed. However, this construction, which the professor deemed to be primitive, was gradually replaced by the concept of defamation, which envisaged linking the punishment with the nature of disclosed information. This approach followed from the assumption that society is not at all interested in having all ugly and bad things becoming public without sufficient grounds.[36]

The Penal Law tolerated insults, i.e., did not recognise as being punishable, in several cases – in family relations and in relations that were based upon disciplinary power. Children could not bring complaints against their parents; however, the courts have had assessed differently the cases of insult between married spouses. For example, in 1923, a case recognised that married spouses had common interests and the need of mutual yielding, which made the injury of honour inconceivable. In married relationships, only insult that was combined with actions of violent nature was said to be punishable.[37] However, already in 1935, a court concluded that the law did not provide exceptions with respect to married spouses and, thus, one spouse could submit a claim against the other if honour was injured.[38] Similarly, punishment was not impending also in those cases where the accused had disciplinary power and he, in exercising it within reasonable boundaries, had humiliated someone. A certain official position extended the boundaries of a person's freedom of speech. For example, a priest could instruct and scold members of his congregation. Thus, in 1929, a court reviewed a case, in which a Catholic priest was accused of addressing the plaintiff, who had entered the church in a short-sleeved and low-necked dress, by saying: "You, there, starkers, go dress yourself!" The court recognised that in this case the Penal Law was not applicable.[39]

In broadening the boundaries of certain persons' freedom of speech, accordingly, the level of protection of their honour was raised both in the cases of insult and defamation. The Penal Law of 1903 listed *expressis verbis* four groups of persons entitled to this higher level of protection for their honour: parents and other ascending kin; clergy of the Christian faith; state and local government officials; military guard; a leader of a foreign state or a diplomatic representative, as well as captains of steamships or seagoing vessels, and prison guard officials while performing their duties of office.[40] The Penal Law of 1933, in turn, worded the same idea more laconically: who has injured honour, if it can be recognised as being qualified as to the injured person, shall be punishable by prison sentence.[41]

In Latvia, during the parliamentary period, the alignment of freedom of speech and protection of honour was differentiated, depending on the accused and the victim. The boundaries of freedom of speech were guarded stricter if it was targeting persons who had certain power or had a higher social status. In such cases, the law

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[36] *Mincs, P.* Krimināltiesības … [Criminal Law …], p. 304.

[37] Sodu likums ar komentāriem … [Penal Law with Commentaries …], p. 250, note 8 (1923. g. 16. oktobra spriedums Rubina lietā) [(Judgement of 16 October 1923 in Rubin's Case)].

[38] Ibid., p. 252, note 22 (1935. g. 4. maija spriedums Dombrovskas lietā) [(Judgement of 4 May 1935 in Dombrovska's Case)].

[39] Ibid., p. 252, note 17 (1929. g. 30. novembra spriedums Pilečinas lietā) [(Judgement of 30 November 1929 in Pilečina's Case)].

[40] Article 532 of the Penal Law of 1903.

[41] Article 511 of the Penal Law of 1933.

provided for stricter penalties. Likewise, stricter sanctions were defined in those cases of defamation when a person's honour was undermined in the eyes of peers.[42]

2.2. Delimiting Freedom of Speech and a Person's Honour in Civil Law

The civil law limits to freedom of speech were defined in Chapter III of the Collection of Baltic Local Laws.[43] Only two articles pertained to the protection of honour, included in Section 19 "Claims following from special types of prohibited activities", its Sub-section 3, entitled "Compensation for Injury of Honour". Article 4560 of the Civil Law provided: "An injury to honour, apart from its criminal law consequences, gives the victim only the right to demand the perpetrator to retract his works or to ask for forgiveness; but pecuniary compensation, decided on by the court, he receives only if the injury has caused actual loss or lost profit to him." Article 4561 set a shortened prescription period for such claims – one year.[44] It must be noted that Article 4560, in unchanged wording, was in force since 1864, when the collection of civil laws was approved. Friedrich Georg von Bunge, the codifier of the Baltic private law, indicated several sources of law for this article – references were made to the Estonian Knightly Law and Land law, the Statute of Kurzeme, the Statute of Piltene, the Laws of Riga City, the Laws of Lübeck City, Regulation of German Supreme Court of 1555, and, finally, to the customary law.[45] For example, para. 218 of the Statute of Kurzeme, referred to, was included in the section "On Offences and Punishments" and provided: "Those who have caused oral or written injustice once, shall issue retraction, if unable to compose it, shall repay its value; if they have acted so repeatedly, they shall fall into disrepute."[46]

H. Blese questioned the significance of civil law protection of honour, noting that injury to honour or insult "in the current times are of interest only for lawyers specialising in criminal law."[47] He maintained that not a single case was known where this article of civil laws had been applied in the last decades – neither the Latvian Senate nor the former Russian Senate had made any statements about

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[42] For example, the Penal Law of 1933 provided that in the case of insult the perpetrator should be punished by arrest or a monetary fine, not exceeding 550 Lats. However, in all cases of defamation various penalties involving deprivation of liberty were envisaged.

[43] Vietējo civillikumu kopojums (Vietējo likumu kopojuma III. daļa). Tulkojums ar pārgrozījumiem un papildinājumiem, kas izdoti līdz 1917. g. 31. decembrim, un ar dažiem paskaidrojumiem. Tieslietu ministrijas sevišķas komisijas sagatavojumā [Collection of Local Civil Laws (Part III of the Collection of Local Laws). Translation with Amendments and Additions Issued before 31 December 1917, and with Some Explanations. Prepared by the Special Committee of the Ministry of Justice]. Rīga: Valtera un Rapas akciju sabiedrība, 1928.

[44] Article 4561 of Part III of CBLL was expressed in this wording by the Regulation of 28 August 1924 Regulation on Revoking the Difference in the Prescription Period Existing in the Laws of Vidzeme and Kurzeme (*Valdības Vēstnesis*, No. 206, 11.09.1924). The territorial particularism was revoked by this amendment – the special provision of Kurzeme regarding the prescription period of six months was revoked. It needs to be added that this prescription period had been in force in Kurzeme at least from the beginning of the 17th century (such was set in para. 145 of the Statute of Kurzeme (1617).

[45] Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Keisers Alexander II. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Keiserlichen Majestät Eigener Kanzlei, 1864.

[46] Kurzemes un Zemgales muižnieku tiesības un likumi jeb Kurzemes statūti [The Rights and Laws of Kurzeme and Zemgale Nobility or the Statute of Kurzeme]. In: Latvijas tiesību avoti. Teksti un komentāri. 2. sējums. Poļu un zviedru laiku tiesību avoti (1561–1795) [Sources of Latvian Law. Texts and Commentaries. Volume 2. Sources of Law of Polish and Swedish Times (1561–1795)]. Edited by Dr. hist. *Blūzma, V.* Rīga: Juridiskā koledža, 2006.

[47] *Blese, H.* Goda aizskaršana civiltiesību laukā [Injury to Honour in the Area of Civil Law]. *Jurists*, No. 3/4(81/82), 1937, column 65.

this legal provision. Moreover, already in 1871, J. Schiemann, the advocate of the Courland High Manorial Court, had expressed doubts regarding the validity of this legal institution. His main argument had been that the particular provision of civil law should be deemed as being revoked by providing regulation with the same content in the penal laws.[48] Commenting on the motives for applying the Penal Law of 1903, Nikolai Tagantsev explained that the double prosecution for the injury to honour, which had existed in the Russian laws, had to be eliminated. Therefore, the civil law compensation for the injury to honour had been revoked, leaving only the criminal prosecution. Compensation for the injury to honour as a private penalty (*poena privata*) was based on a differential understanding of honour, i.e., it was intended for the protection of the honour of service, family or estate. However, by introducing the unified understanding of personal honour, the State has committed itself to protect this personal benefit on the same terms as the State already protects a person's health or freedom.[49] Hence, in creating the legal regulation, the legislator's aim had been to establish effective protection for a person's honour, but the impact that this regulation had on a person's freedom of speech in general had not been identified yet or, at least, was not considered to be noteworthy. Although, formally, the particular article of the Baltic Civil Laws was valid, the legal doctrine of the time and also the case law showed that the criminal regulation was considered to be the main mechanism for the protection of honour and, thus, the threat of punishment as the boundary-mark for a person's discretion.[50]

3. Legal Framework for Freedom of the Press

Freedom of the press is to be viewed as the public aspect of freedom of speech.[51] Therefore, both during the existence of the Russian Empire and in the newly established Republic of Latvia, freedom of the press received more attention than the private manifestations of freedom of speech. The Latvian legislator was considerably more active in the area of regulating freedom of the press.

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[48] *Blese, H.* Goda aizskaršana civiltiesību laukā [Injury to Honour in the Area of Civil Law]. *Jurists*, No. 3/4(81/82), 1937, column 65–66.

[49] Ugolovnoe ulozhenie 22 marta 1903 g.: s" motivami, izvlechennymi iz ob"jasnitel'noj zapiski redakcionnoj komissii, predstavlenija Min. justicii v" Gosudarstvennyj Sovet i zhurnalov" – osobogo soveshhanija, osobogo prisutstvija departamentov" i obshhego sobranija Gosudarstvennogo Soveta, a ravno s" ob"jasnenijami k" dopolnitel'nym" uzakonenijam" i izvlechenijami iz" reshenij Ugolovnago kassacionnago departamenta i obshhago sobranija Pravitel'stvujushhego senata i Glavnago voennago suda kasatel'no vvedennyh" v" dejstvie v" Rossii statej. Po izdanijam N. S. Taganceva [Criminal Code of 22 March 1903: with motives, extracted from the explanatory note of the editorial commission, the presentation of Min. Justice to the State Council and magazines – a special meeting, a special presence of departments and the general meeting of the State Council, as well as explanations for additional legalizations and extracts from the decisions of the Criminal Cassation Department and the general meeting of the Government Senate and the Main Military Court regarding the articles implemented in Russia. According to the publications of N. S. Tagantsev]. Edited by a member of the advisory board at the Ministry of Justice *Jacobi, P. N*. Riga: Leta, 1922, pp. 1088–1089.

[50] It must be added that due to the prevailing significance of penal law, this norm was not transferred to the Civil Law of 1937, leaving the demarcation of boundaries between honour and freedom of speech only within the framework of the Penal Law. Upon reinstating the Latvian Civil Law in 1992, the Supreme Council eliminated this deficiency, adding Section 23521 to this law. Whereas in 2009, the elements of the crime of injury to honour [insult] was excluded from the Criminal Law (Section 156), the reasons started for this step was the need to prevent overlapping with the civil law protection of honour.

[51] *Kučs, A.* Komentārs Satversmes 100. pantam [Commentary on Article 100 of the *Satversme.*], p. 359.

Pursuant to the Law on Leaving the Former Laws of Russia in Force in Latvia, adopted by the People's Council on 5 December 1919[52], up to 1924, Regulation on Censorship and the Press (Vol. 16 of the Collection of Laws of Russian Empire) of 1890, with further amendments of 1906, 1912, as well as additions adopted by the Russian Provisional Government on 27 April and 12 July of 1917, was formally in force in Latvia. Historian Gints Zelmenis has researched that, actually, during the first years of its existence, in the Republic of Latvia the area of the press had been regulated by various orders by the Minister for the Interior and government regulations.[53] Thus, actually continuing the traditions of the former Russian Empire of limiting freedom of speech in emergency conditions, from 1919 to 1921 wartime censorship existed in Latvia.[54] Moreover, regulating the exercise of this freedom was transferred into the competence of the executive power.

The author does not aim to research the nature and intensity of limitations to civil freedoms during war or any other emergency conditions, which, clearly, change the balance between various values under legal protection, therefore the article focuses on the general regulations, adopted in the legislative procedure of normal (peacetime) circumstances. The following four are considered to be the most important regulatory enactments, shaping the framework of freedom of the press during the period researched: Law on the Press of 1 February 1924,[55] Law on the Productions of Printing Undertakings, Libraries and Reading Rooms of 11 November 1924[56] and Law on Adjudicating Matters of the Press of 11 November 1924 (formally these were amendments to the Criminal Procedure Statute),[57] as well as Regulation on Protecting the Youth Against Third-Rate and Obscene Literature of 26 April 1927[58], issued in the procedure set out in Article 81 of the *Satversme* of the Republic of Latvia. Legal regulation defined two types of limits to freedom of the press: 1) personal – by restricting by law the circle of persons who were responsible for disseminating information; 2) substantive – envisaging restrictions or prohibition to disseminate information with certain content.

3.1. Personal Limits to Freedom of the Press

In the newly established Republic of Latvia, the work on the legal framework for freedom of the press lasted several years. The government had submitted the new draft legal regulation on the press already to the Constitutional Assembly, but it was never examined at the plenary session.[59] The new law on the press was adopted by the first convocation of the *Saeima* at the beginning of 1924. Bruno Kalniņš, the

[52] *Likumu un valdības rīkojumu krājums* [Collection of Laws and Government Orders], issue 13, No. 154, 31.12.1919, p. 170.

[53] *Zelmenis, G.* Cenzūra un to reglamentējošā likumdošana Latvijā (1918–1934) [Censorship and Regulatory Legislation in the Republic of Latvia (1918–1934)]. *Latvijas Vēstures Institūta Žurnāls*, No. 4(85), 2012, p. 80. Available: https://www.lvi.lu.lv/lv/LVIZ_2012_files/4numurs/G_Zelmenis_Cenzura_LVIZ_2012_4.pdf [last viewed 26.03.2021].

[54] By the order of the Commander-in-Chief of 29 July No. 16, on the basis of the Cabinet Decision of 28 July, starting with 29 July, the previous wartime censorship was introduced with respect to all periodicals in the counties of Rīga, Cēsis, Valmiera and Valka (*Latvijas Sargs*, No. 99, 30.07.1919, p. 2). The wartime censorship was revoked on 25 March 1921 (*Strādnieku Avīze*, No. 69(574), 27.03.1921, p. 1).

[55] *Valdības Vēstnesis*, No. 35, 12.02.1924.

[56] *Valdības Vēstnesis*, No. 257, 11.11.1924.

[57] Ibid.

[58] *Valdības Vēstnesis*, No. 92, 28.04.1927.

[59] *Treijs, R.* Par preses brīvību, pret cenzūru [For Freedom of the Press, Against Censorship]. *Latvijas Vēstnesis*, No. 41/42, 12.02.1999. Available: https://www.vestnesis.lv/ta/id/21748 [last viewed 27.03.2021].

rapporteur on the draft law, underscored that the responsible committee had based the new law on principles that complied with the contemporary understanding of democracy in Western Europe.[60]

The first article of the Law on the Press, in accordance with the understanding of fundamental rights of the time, provided: "Freedom of the press shall exist in Latvia within the limits of this law". Thus, the law was not viewed as the restrain of freedom but rather the creator of freedom of the press. Therefore, we also do not see concern in the parliamentary debates about this law, whether the law would place disproportional restrictions on the individual's freedom of speech; instead, the discussion focuses on the persons who should be granted the right to become involved in dissemination of information, i.e., to be managing editors and publishers. The second article of the Law on the Press defined the circle of subjects, who could be the managing editors and publishers in Latvia – the qualification of citizenship and age (at least 25 years) was set, likewise, this right was denied to persons whose rights had been restricted by a court's judgement or against whom criminal prosecution had been initiated for crimes that entailed loss or restriction of rights. If a legal person wanted to become a publisher, the same requirements were applicable to its representative. A foreign citizen could become a managing editor or publisher only with permission by the Minister for the Interior. Moreover, the law required the managing editor to reside permanently in Latvia.

A Cabinet member (in difference to a member of the *Saeima*) was prohibited from being a managing editor. When the draft law was discussed at the *Saeima*, Arveds Bergs criticised sharply the absence of such restriction with respect to members of the *Saeima*. He was worried that a managing editor, protected by the deputy's immunity, could act arbitrarily and injure the honour of other persons with impunity. He also pointed to a case, where the *Saeima* did not allow initiation of legal proceedings against one editor on the basis of a private complaint.[61] However, five years later the Law on the Press was amended, prohibiting also members of the *Saeima* from becoming the managing editor of a periodical.[62] This amendment was adopted to rule out the slightest possibility that a member of the *Saeima*, as a managing editor, could escape criminal liability for injuring other persons' honour.[63]

To monitor the personal limits to freedom of the press, described above, a system for registering periodicals was introduced. To establish a periodical, an application had to be submitted to the Ministry of the Interior, indicating: a) title of the publication and indications regarding its nature (political, literary, technical, etc.); b) information about the managing editor and the publisher; c) printing house, where it will be printed; d) procedure (frequency) of publication; e) language of the

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[60] Latvijas Republikas Saeimas III sesijas 17. sēde 1923. gada 12. decembrī [17th sitting of III session of the *Saeima* of the Republic of Latvia on 12 December 1923]. In: Latvijas Republikas Saeimas stenogrammas. III sesija (19 sēdes) (no 1923. gada 9. oktobra līdz 1923. gada 14. decembrim) [Transcripts of the III *Saeima* of the Republic of Latvia (19) sittings (from 9 October 1923 to 14 December 1923)]. Rīga: Latvijas Republikas Saeimas izdevums, [s. a.], column 435.

[61] Latvijas Republikas Saeimas III sesijas 17. sēde 1923. gada 12. decembrī [17th sitting of III session of the *Saeima* of the Republic of Latvia on 12 December 1923], column 439–440.

[62] Pārgrozījums Preses likumā [Amendments to the Law on the Press]. *Valdības Vēstnesis*, No. 109, 17.05.1929.

[63] Latvijas Republikas III Saeimas III sesijas 15. sēde 3. maijā 1929. gadā [15th sitting of III session of the *Saeima* of the Republic of Latvia on 3 May 1929]. In: Latvijas Republikas III Saeimas stenogrammas. III sesija, 1929. gads [Transcripts of III *Saeima* of the Republic of Latvia. III session. 1929]. Rīga: Latvijas Republikas Saeimas izdevums, [s. a.], column 468–469.

periodical.[64] The Ministry of the Interior had a fortnight to verify that there were no statutory obstacles to establishing the periodical and had to make a corresponding declaration. If during the operation of the periodical, the publisher wanted to change any of the circumstances indicated in the initial application, as well as in the case of the managing editor's or the publisher's death, an additional declaration by the Ministry of the Interior had to be requested.[65]

An analogous system of application or registration was established also by the Law on Trading in Productions of Printing Undertakings, Libraries and Reading Rooms. The head of the respective county or the municipal prefect had to be informed about the establishment of a publishing house, a store of products of printing undertakings (book-stores), opening of a library or a reading room, as well as taking up door-to-door sale of books by submitting an application, similar in content to the one envisaged by the Law on the Press. No later than within a fortnight after the receipt of this application, the applicant was issued a declaration, which had to be permanently present in the applicant's undertaking. The declaration was not issued if the responsible person of the undertaking or the door-to-door salesman: a) could not indicate a permanent place of residence in Latvia; b) had not attained the age of 21; c) his rights were restricted by a court's judgement.[66] Compared to the requirements set for the managing editor and publisher, the ones set for the owner of a bookstore, a library or a reading room were slightly lower, i.e., the required age was lower and initiated criminal prosecution was excluded as the cause for dismissal.

Although the law did not allow anyone, freely and without prior application, to become an editor of a periodical, open one's own bookstore or even sell books by going door-to-door, the legislator's main aim was to ensure proper functioning of the liability mechanism in instances where freedom of the press was violated. The Law on the Press required submitting, together with the application to the Minister for the Interior, the editor's statement that he assumed responsibility for editing the periodical or a certain part of it. The manager in charge of a publishing house, a store selling the products of printing undertakings, a library or a reading room had to submit a written statement that he assumed responsibility. Information about the names and places of residence of persons involved in the publishing and circulation of periodicals and books was necessary to preclude violations of other persons' rights (injury to their honour) or committing other violations of rights with impunity under the cover of anonymity.

3.2. The Substantial Limits to Freedom of the Press

Substantial limits to freedom of the press were defined by the Law on the Press, Law on Trade in Productions of Printing Undertakings, on Libraries and Reading Rooms, and Regulation on Protecting the Youth against Third-Rate and Obscene Literature. These restrictions varied from restrictions to dissemination of information up to prohibition to store editions with certain content – the prohibited editions.

Pursuant to the Law on the Press, without permission of the chairperson of the said institution, it was prohibited to report on a closed sitting of the *Saeima* and court hearings *in camera*. In defamation cases, where the defendant did not have

[64] 1924. gada 1. februāra Preses likums [Law on the Press of 1 February 1924], Article 4.

[65] Ibid., Articles 5–8.

[66] Likums par tirdzniecību ar poligrāfisko iestāžu ražojumiem, par bibliotēkām un lasītavām [Law on Trade in Productions of Printing Undertakings, on Libraries and Reading Rooms: Law of the Republic of Latvia], Article 1–4.

the right to prove the truthfulness of his insult, the press could report only on the court's resolution, but reporting on other facts of the case could be allowed by the court's president only on the basis of the defendant's request. Prior to the court hearing or termination of the case, it was prohibited to report on inquisitory or pre-trial investigation materials, as well as on the content of the indictment. The law also allowed the Minister for the Interior together with the Minister for War during war or imminent war to prohibit for a certain period reporting in the press on the facilities and equipment of Latvia's military or maritime forces, as well as for guarding the external border of the State. These substantial limitations, defined in the Law on the Press, can be grouped in three trends, which reveal the aim of these restrictions: 1) publication of restricted access information only with permission for it; 2) not publishing information obtained in criminal procedure (in the name of the presumption of innocence); 3) not disseminating news of military nature (in the interests of national defence).

A significant and, at the same time, rather vague restriction on freedom of the press was included in Article 18 of the Law on the Press, which granted to the Minister for the Interior the right to confiscate productions of printing undertakings entering from abroad, as well as to prohibit bringing certain periodicals in from abroad if their content was criminal in accordance with Latvian laws. It has to be added, however, that the law established also three exceptions when confiscation was inadmissible. The substantial restrictions could not limit the range of publications accessible to the legislator, institutions of higher education and research and organisations, as well as the press (editorial boards of newspapers). The same idea of substantial restrictions was continued in Article 10 of the Law on Trading in Productions of Printing Undertakings, Libraries and Reading Rooms: "Stores, warehouses and collections of productions of printing undertakings, libraries and reading rooms, as well as door-to-door salesmen may not store and disseminate books that are prohibited in Latvia, as well as other productions of printing undertakings, the lists of which shall be published in "Government Herald"". The concept of "prohibited books" appears in this law, but its content lacked strict definition. To prevent this, this legal provision was applied in conjunction with the Law on the Press. Therefore, the Minister for the Interior, publishing several times in "Government Herald" the lists of books prohibited in Latvia, also referred to Article 18 of the Law on the Press and used as substantiation Article 10 of the Law on Trading in Productions of Printing Undertakings, Libraries and Reading Rooms. In accordance with this procedure, the first list of prohibited books was published in "Government Herald" already on 1 December 1924, prohibiting to bring into Latvia and disseminate 180 specific titles.[67] When reading this list of prohibited books, we see that, predominantly, the Minister for the Interior had recognised as having criminal content publications of anarchistic, communist or monarchic orientation. Thus, the concept "criminal" was interpreted in the context of crimes against the State (against the lawful power).

A mechanism similar to the lists of prohibited books was established by the Cabinet Regulation of 26 April 1927. The circulation of certain editions was restricted with the aim of protecting the youth against third-rate and obscene literature. The Regulation provided that the Ministers for Education and for the Interior established a special committee, which decided on the publications to be

[67] Valdības iestāžu paziņojumi [Aizliegto grāmatu saraksts] [Announcements by Governmental Institutions [List of Prohibited Books]]. *Valdības Vēstnesis*, No. 273, 01.12.1924.

included in the list of third-rate and obscene literature. The committee's decisions were approved by the Minister for Education and also these were announced in "Government Herald". The publications included in this list could not be displayed openly or offered at bookstores, kiosks, public spaces, they could not be handed out to persons below the age of 18 and kept in school and youth libraries. The first such list of literature, harmful for youth, was approved on 19 July 1927 by the outstanding Latvian poet and thinker Jānis Rainis, being the Minister for Education at the time.[68] Although also in this case vague legal terms were used in the legal provisions – third-rate and obscene literature, the more specific aim of this legal regulation helped to fill it with content, i.e., protecting immature personalities from literature detrimental to their development, *inter alia*, proper socialisation.

Compliance with both the Law on the Press and the Law on Trade in Productions of Printing Undertakings, on Libraries and Reading Rooms was guaranteed by including the respective elements of the criminal offences in penal laws. Chapter fifteen of the Penal Law of 1903 (Art. 292–903) was dedicated to infringements of the rules on supervision of the press Also, in the Penal Law of 1933 criminal offences in the area of the press were included in a separate chapter – the nineteenth, "Violations of the rules on supervising printing houses and other printing undertakings, the press, libraries, reading rooms, performances and cinematographs" (Art. 317–332). P. Mincs explained that all these infringements placed in this chapter had in common the fact that they all targeted regulations, the aim of which was to prevent the abuse of such measures or to ensure prosecution for the abuse of such measures which, being technically easier, allow addressing an unlimited circle of persons.[69] Thus, the rules included in this chapter did not directly protect national, social or individual interests, which would be damaged by abusing freedom of the press, but were aimed at the formal side of exercising freedom of the press. The objective of these elements of offences was to ensure functioning of the system for supervising the press, which would be an important preventive measure for protecting other lawful interests. This leads to the conclusion that the boundaries of freedom of speech, in their public aspect, were strictly guarded, irrespectively if the violation of them caused damage to the State or a private person.

Summary

1. The first two provisional constitutions of the Republic of Latvia guaranteed *expressis verbis* freedom of the press and freedom of speech. The Fundamental Laws of the Russian Empire of 1906, the unadopted Part II of the *Satversme* of the Republic of Latvia, as well as the contemporary dogmatics of fundamental rights recognised that freedom of speech, as a broader concept, included also freedom of the press. Therefore, the author examines these two civil freedoms, referred to separately in the first constitutional legal acts of Latvia, as two manifestations of freedom of speech.
2. Freedom of speech was not viewed as an inalienable natural right of citizens but as a subjective public right, granted by the State, which existed only within the limits set in law. The State had greater discretion in developing the legal regulation on freedom of speech. It was not obliged to justify

[68] Sēnalu un neķītrības literatūras saraksts Nr. 1 [List of Third-Rate and Obscene Literature No. 1]. *Valdības Vēstnesis*, No. 157, 20.07.1927.

[69] *Mincs, P.* Krimināltiesības … [Criminal Law …], p. 135.

intervening in an individual's freedom or examine its proportionality because the existence of freedom of speech outside the framework defined in law was not recognised.

3. There were dual limits to freedom of speech: 1) freedom of speech ended where injury to another person's honour began; 2) due to its public nature, freedom of the press could be exercised in the procedure and within the framework established by law. In both cases, violation of the limits of freedom of speech entailed penalty. In the case where honour was injured, the penalty depended on the victim's (the insulted person's) will because in these cases law envisaged the procedure of private prosecution. However, when the limits to freedom of the press had been violated, the procedure of public prosecution was applicable, moreover, the elements of criminal offences were formal – a person could be punished for violating regulations on monitoring the press irrespectively of the fact whether this infringement of rights caused damage to the national, social or individual interests.
4. Demarcation of one person's freedom of speech and the other person's honour in the Republic of Latvia, compared to the previous period in legal history, remained almost unaltered. The reason for this was the close link between the concept of honour and public view on morals and customs. Honour was strictly guarded, insulting or offensive exercise of freedom of speech entailed criminal liability, but the civil law protection of honour was relegated to the second place. Honour as a legal benefit was more highly valued than freedom of speech, whereas the differentiated criminal liability for injuries to honour (depending on the legal and social status of the persons involved) showed that democratic values (in particular, equality) were slowly taking root in society.
5. Compared to the previous period of legal history, the framework of freedom of the press was continually broadened in the Republic of Latvia. Legal regulation defined two types of limits to freedom of the press: 1) personal – by restricting by law the circle of persons who were responsible for disseminating information; 2) substantive – envisaging restrictions or prohibition to disseminate information with certain content. In establishing the personal restrictions on freedom of the press, the legislator wanted to ensure proper functioning of the liability mechanism in instances where freedom of the press was violated. The substantive restrictions, in turn, were set for reaching various aims – starting with non-disclosure of information of military nature for the sake of national security up to making lists of obscene and third-rate literature to protect children and youth from inappropriate content. The creation of lists of prohibited books and third-rate and obscene literature allowed within the framework of freedom of the press showed that State, nevertheless, did not rely on individuals exercising freedom of speech properly, therefore paternalistic treatment of its citizens was not unknown to the new democratic republic.

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www.apgads.lu.lv
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