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Track Record in Fight Against Corruption in Serbia – How to Increase Effectiveness of Prosecution?*

Dr. iur. **Marina Matić Bošković**
Faculty of Law, Megatrend University
Senior Research Fellow and Lecturer
Institute of Criminological and Sociological Research
E-mail: *m.m.boskovic@roldevelopmentlab.com*

Dr. iur. **Jelena Kostić**
Institute of Comparative Law
Senior Research Fellow and Associate Professor
E-mail: *j.kostic@iup.rs*

To improve efficiency in the suppression of corruption and to fulfil international obligations, Serbia adopted the Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Terrorism and Corruption in 2016. The law foresees many new solutions that should contribute to the effectiveness of processing of corruption. One of the reasons for the adoption of law was the fulfilment of GRECO's recommendations from the second round of evaluation, as well as the obligations stipulated in the national policy documents, the National Strategy for the Fight against Corruption (2013–2018), the Action Plan for Chapter 23 and the Strategy for Investigating Financial Crimes for the period 2015–2016.

The measures and activities that were foreseen in the Strategy for Investigating Financial Crimes are aligned with European standards and good practice and are transposed in the Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Terrorism and Corruption. After six years of implementation of this law, it necessary to analyse the results and impact of its application.

The goal of this research is to provide recommendations for the improvement of both national legislation and the practice of public prosecution in the suppression of corruption. In the paper, authors started from the assumption that the effectiveness of its suppression depends on the quality of the legal solutions that regulate the work of the public prosecutor's office, as well as their application in practice. To realize the goal of the research, the dogmatic-legal method and content analysis were used in the paper.

Keywords: public prosecutions, suppression, corruption, efficiency.

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Contents

Introduction

The fight against corruption is a central aspect of the rule of law within the EU system, and it is a key requirement in the Serbia EU accession process.[1] In recent years, the EU has introduced interim benchmarks, particularly for Chapters 23 and 24 of the accession negotiations, emphasizing the importance of *reforms* in the judiciary combating corruption. One of the most challenging interim benchmarks for Chapter 23 is for Serbia to establish a track record of efficient and effective investigations, prosecutions, convictions, and asset confiscations in corruption cases, including high-level cases.[2] While there have been some notable achievements in combating corruption, such as the adoption of laws in key anticorruption areas and change of the institutional set-up, the reforms have not been fully consolidated.[3] Implementation gaps remain a challenge, with legislative changes often failing to translate into tangible improvements in practice. As a result, in 2023 Corruption Perception Index Serbia is ranked lowest since 2012.[4] In 2021, House of Freedom rated Serbia 1 out of 4 according to the effectiveness of protective measures against corruption, stating that, although the number of arrests and criminal prosecutions in cases of corruption increased in

[1] *Bazerkoska, J. B.* EU Enlargement and Anti-Corruption Standards: From Candidacy to Accession. In: Cooperation and Enlargement: Two Challenges to be Addressed in the European Projects – 2022, *Pellat, G., Zafiroski, J.* and *Šuplata, M.* (eds). Springer, 2024, p. 149.

[2] European Union Common Position, Chapter 23: Judiciary and fundamental rights, Brussels, 8 July 2016, AD 20/16.

[3] The current legal framework aimed at combating and preventing corruption was adopted or amended to address recommendations and requirement of international and regional bodies. The most relevant recommendations provided GRECO in its Evaluation reports, MONEYVAL, UNCAC, etc. The main laws relevant for regulation of the prevention and fight against corruption are: the Criminal Code, the Law on the Organisation and Competence of the State Authorities in Suppression of Organized Crime, Terrorism and Corruption, the Law on Agency for Prevention of Corruption, the Law on Whistleblowers protection, the Law on the Financing Political Activities, the Law on Liability of Legal Persons for Criminal Offenses, the Law on Seizure and Confiscation of the Proceeds from Crime and the Law on Prevention of Money Laundering and Financing of Terrorism, but also Criminal Procedure Code. Although some laws are not directly related to the corruption, they are relevant to anti-corruption policy and establishment of anti-corruption environment, like Law on Free Access to Information and Law on Public Procurement. The Criminal Code of the Republic of Serbia has been amended several times to, *inter alia*, better comply with international requirements, however, frequent amendments could cause challenges in investigation and prosecution of corruption cases. See: *Stojanović, Z.* Da li je Srbiji potrebna reforma krivičnog zakonodavstva? [Does Serbia need criminal legislation reform?]. Crimen, No. 2, 2013, pp. 119–143.

[4] Serbia was in the 104th place amongst 180 countries. Corruption Perception Index by Countries for 2023. Available: https://www.transparency.org/en/cpi/2023 [last viewed 05.04.2024].

previous years, verdicts for cases of high corruption were very rare, despite reports that included members of the executive power.[5]

In 2016, the National Assembly of Serbia passed the Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Terrorism and Corruption[6] (hereafter also referred to as the Law). The law aimed to improve Serbia's rating at the Financial Action Task Force (FATF), implement the Financial Investigation Strategy 2015–2016, and address recommendations to strengthen the country's track record in fighting corruption.[7] Furthermore, the establishment of special departments for suppression of corruption within the public prosecution service is aligned with recommendations No. 5 issued in the Second Round of evaluation by the Council of Europe Group of States against Corruption (GRECO).[8]

Among its provisions, the Law envisaged establishment of four special departments for the suppression of corruption within the Higher Public Prosecutor's Office in Belgrade, Novi Sad, Kraljevo, and Nis, that became operational in March 2018.[9] Additionally, the law introduced other anti-corruption institutes in accordance with comparative good practice, such as liaison officers in relevant institutions, task forces, and financial forensic experts in public prosecution.[10] The aim of these novelties was strengthening of cooperation amongst the competent authorities in the field of corruption suppression, as well as the improved efficiency of investigations and criminal prosecutions in that field.

Despite these efforts, continued vigilance and sustained activities are needed to effectively combat corruption in Serbia. It is essential to ensure that the established mechanism and departments function efficiently and that there is firm coordination among relevant institutions to address corruption effectively at all levels. Starting from that assumption, and to make feasible recommendations for improvement in this paper, the authors have applied the dogmatic-legal method to identify the need to improve relevant regulations both in the field of the fight against corruption and those governing the organization and work of the police and public prosecutor's office. In

[5] GRECO, The Fifth Round of Evaluation. Preventing corruption and improving integrity within central government bodies (at the highest executive functions) and law enforcement authorities. Evaluation report, Serbia. Adopted by GRECO at the 90th Plenary Meeting (Strasbourg, 21–25 March 2022), GRECO, Group of States against Corruption, Council of Europe, p. 7. Available: https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680a7216d [last viewed 05.04.2024].

[6] The Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Terrorism and Corruption, Official Gazette of the Republic of Serbia, No. 94/2016, 87/2018-another law and 10/2023.

[7] *Matić Bošković, M.* Results of repressive response to corruption – performance of specialized anticorruption prosecution departments. In: The Role of Society in the Fight against Corruption, *Kostić, J., Stevanović, A.* (eds). Belgrade: Institute of Comparative Law and Institute of Criminological and Sociological Research in Cooperation with the Judicial Academy, 2020, pp. 63–77.

[8] Joint First and Second Evaluation Round, Evaluation Report on the Republic of Serbia, adopted by GRECO at its 29th Plenary Meeting, Strasbourg, 19–23 June 2006, p. 34. Available: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ca2c7 [last viewed 05.04.2024]. See also: *Johnsøn, J.* Anti-Corruption Strategies in Fragile States – Theory and Practice in Aid Agencies, Edward Elgar Publishing, 2016.

[9] Article 13 of the Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Terrorism and Corruption.

[10] More about the role of financial forensic experts see in: *Mirić, F., Ranaldi, V.* The Role of financial forensic experts and Europol in combating financial crime. In: Institutions and Prevention of Financial Crime, Thematic Conference Proceedings of International Significance, *Kostić, J., Stevanović, A.* and *Matić Bošković, M.* (eds). Belgrade: Institute of Comparative Law and Institute of Criminological and Sociological Research in cooperation with the Judicial Academy, 2021, pp. 63–75.

addition, to propose options for improvement, the authors have also analysed the data from various reports, which is important for reaching a conclusion about the results of the work of special departments for suppression of corruption, as well as the quality of cooperation with other competent authorities and institutions in the fight against corruption.

In the first part of this paper, the authors will characterise the content of European standards in the field, with a special reference to those related to the activities of the public prosecution, then proceed to analyse the national legislation, while the final part of the paper presents an analysis of the content of relevant national reports to gain an insight into the results of the competent authorities in the field of corruption suppression.

1. European standards on role of public prosecutor in suppression of corruption

European standards in the field of the fight against corruption recognize the importance of cooperation between the state authorities and the public prosecutor's office, as well as specialization and a multidisciplinary approach.

According to the Criminal Law Convention on Corruption,[11] it is necessary to adopt measures at the national level to ensure that state authorities, as well as all civil servants, cooperate in accordance with national legislation with the authorities responsible for investigation and prosecution by informing on their own initiative mentioned authorities or provide them with all the necessary information at their request.[12] The importance of exchange of information, cooperation and organization of consultative meetings is also recognize in the Opinions adopted by the Consultative Council of European Prosecutors (CCPE).[13]

Specialization as an essential prerequisite for the fight against corruption is stated in the Resolution of the Council of Europe (97)24 on 20 guiding principles in the fight against corruption.[14] According to the principle 7, it is necessary to enable the specialization of persons and authorities responsible for the fight against corruption at the national level, as well as to provide them with adequate resources and training in order to realize their competences.[15]

The need to improve the efficiency of the public prosecutor's office in combating corruption is highlighted in European standards related to the organization and work of public prosecutors. Point 8 of the Recommendation of the Committee of Ministers from 2000 on the role of the public prosecutor in criminal justice[16] states: to effectively

[11] Criminal Law Convention on Corruption, Council of Europe, European Treaty Series, No. 173, Strasbourg, 27.01.1999. Available: https://rm.coe.int/168007f3f5 [last viewed 05.04.2024].

[12] Article 21 of the Criminal Law Convention on Corruption.

[13] Item 77 of Opinion No. 11 (2016) of the Consultative Council of European Prosecutors on the quality and efficiency of the work of prosecutors, including in the fight against terrorism and serious and organized crime, adopted by the CCPE. Council of Europe, Strasbourg, 18 November 2016. Available: https://rm.coe.int/16807474b9 [last viewed 05.04.2024].

[14] Adopted by the Council of Ministers on 6 November 1997 at the 101st session of the Council of Ministers, Council of Europe. Available: https://polis.osce.org/council-europe-resolution-97-24-twenty-guiding-principles-fight-against-corruption [last viewed 05.04.2024].

[15] *Matic, M.* Specijalizovana antikorupcijska tela [Specialized Anti-Corruption Authorities]. In: Pravni mehanizmi sprečavanja korupcije u Jugoistočnoj Evropi: sa posebnim osvrtom na sektor odbrane [Legal Mechanisms for Preventing Corruption in Southeast Europe: With Special Reference to the Defence Sector], *Rabrenović, A.* (ed.). Belgrade: Institute of Comparative Law, 2013, pp. 65–89.

[16] Recommendation Rec(2000)19 The Role of Public Prosecution in the Criminal Justice System, Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000. Available: https://rm.coe.int/16804be55a [last viewed 05.04.2024].

prevent new forms of crime, the specialization and training of public prosecutors should be one of the priorities of the justice system.[17] In addition to the establishment of special departments, or the assignment of cases to public prosecutors who have special knowledge and experience in dealing with cases concerning certain criminal acts, specialization should also be understood as further training of employees in competent authorities and improvement of their work.[18]

A similar position is contained in Opinion No. 14 (2019) of the CCPE, according to which prosecutors should adapt their activities to the development of criminality.[19] This implies the use of new techniques available to them if they are in accordance with the law, as well as the specialization of public prosecutors and the application of a multidisciplinary approach. Therefore, continuous training of prosecutors dealing with corruption and economic crime should include skills that allow the prosecutor to understand the balance sheet, understand information technologies and work with complex software.[20] To that end, lecturers and experts from relevant fields outside the public prosecutor's office should be hired and exchanges of experiences in the fight against corruption between prosecutor's offices should be organized.

2. Legal framework in Serbia – shortcomings of the rules regulating fight against corruption

The Law on the Organization and Competence of Authorities in the Fight Against Organised Crime, Terrorism and Corruption established new mechanisms for the fight against corruption and economic crime through the specialisation of competent state authorities, prosecutor's offices, courts and police.

The current jurisdictional structure of special departments within higher public prosecutor's offices, as defined by Article 2 of the Law, has been subject to criticism and poses challenges in practice. These challenges stem from the superficial division of jurisdiction between the Special Prosecutor's Office for Organized Crime and special departments for suppression of corruption[21] and the dominance of economic crimes in the workload of these special departments.

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[17] *Matić Bošković, M., Kostić, J.* Specijalizacija državnih organa u suzbijanju finansijskog kriminaliteta i korupcije [Specialization of State Authorities in Combating Financial Crime and Corruption]. Srpska politička misao [Serbian Political Thought], No. 3, 2019, p. 262. DOI: https://doi.org/10.22182/spm.6532019.11.

[18] *Matić Bošković, M., Ilić, G.* Javno tužilaštvo u Srbiji – Istorijski razvoj, međunarodni standardi, uporedni modeli i izazovi modernog društva [Public Prosecution in Serbia – Historical Development, International Standards, Comparative Models and Challenges of Modern Society]. Belgrade: Institute for Criminological and Sociological Research, 2019, p. 67.

[19] Opinion No. 14 (2019) of the Consultative Council of European Prosecutors, the Role of Prosecutors in Fighting Corruption and Related Economic and Financial Crime, Council of Europe, Paris, 22 November 2019. Available: https://rm.coe.int/opinion-14-ccpe-en/168099399f [last viewed 05.04.2024].

[20] Item 55, Opinion No. 14 (2019) CCPE.

[21] Special Prosecutor's Office for Organized Crime is the authority to scrutinize criminal offenses committed by public officials, who perform the function on the basis of appointment, appointment or election by the National Assembly, the President, the Government, the general session of the Supreme Court of Justice, the High Judicial Council or the High Prosecutorial Council (HPC). The officials of the executive and judicial authorities, as well as the directors of public companies are included, while the persons elected by the citizens, such as the members of the Parliament, the president of the Republic, councilors, mayors, the heads of the provincial government are in the jurisdiction of the special departments of the higher prosecutors' offices. When it comes to criminal offenses against the economy, the SPO for Organized Crime is competent if the realized property benefit

Professionals advocate for a reconsideration of this jurisdictional structure, proposing that basic forms of offenses currently under the purview of special departments for the suppression of corruption should be shifted back to the jurisdiction of basic prosecutor's offices.[22] This reallocation aims to concentrate efforts on high corruption, optimizing attention, time and resources. It is argued that such a change would not only enhance efficiency but also contribute to the professionalization of staff in basic public prosecutor's offices.

Furthermore, the omission of tax evasion from the catalogue of crimes under the jurisdiction of special departments is seen as negatively impacting efficiency, especially in cases of money laundering where tax evasion is a common predicate offense. Specialization in handing tax crimes is expected to expedite legal proceedings and change the overall approach and attitude toward tax evasion as a significant social issue.[23]

To ensure an effective fight against corruption, professionals recommend amending the Law with the aim to concentrate the competence of special departments for the suppression of corruption on all the criminal acts including corruption, while excluding the lightest criminal offenses against the economy from their jurisdiction.[24]

The Law envisages the possibility of establishing a financial forensic service in the public prosecutor's office for organized crime and special departments of higher public prosecutor's offices for suppression of corruption, with the aim to support public prosecutors in the assessment of financial flows and financial transactions.[25] However, a financial forensic officer is employed only in the Special Public Prosecution Office for Organized Crime, while the special departments for suppression of corruption of higher public prosecution offices still do not have such a service. Although the financial forensics service is important for the work of special departments, there are obstacles to its establishment due to its legal position.[26]

A financial forensic expert is a civil servant who has special professional knowledge in the field of finance, accounting, auditing, banking, stock exchange and business operation, and who completed specialized training at the Judicial Academy in the field of criminal law.[27] In all stages of the criminal procedure, the financial forensic expert

value is over 200 000 000 dinars, and over 800 000 000 dinars when it comes to the value of public procurement (Article 3 of the Law on the Organization and Competence of Authorities in the Fight Against Organised Crime, Terrorism and Corruption).

[22] There are proposals to return to the jurisdiction of basic prosecutor's offices the following criminal offenses: Article 227, para. 1 of the Criminal Code (abuse of the position of a responsible person, Article 359 of the Criminal Code (abuse of an official position) and 364 of the Criminal Code (embezzlement). Information about the positions of the prosecutors was obtained during the meetings with the public prosecutors of the special departments for suppression of corruption of the Higher Public Prosecutor's Offices from Niš, Kraljevo, Novi Sad and Belgrade.

[23] *Kostić, J., Pavlović, Z.* Poreski delikti u zakonodavstvu Savezne republike Nemačke [Tax Offenses in the Legislation of the Federal Republic of Germany]. Strani pravni život [Foreign Legal Life], Vol. 64, No. 1, 2020, p. 150.

[24] Information about the positions of the prosecutors was obtained during the meetings with the public prosecutors of the special departments for suppression of corruption of the Higher Public Prosecutor's Offices which were held in September 2023.

[25] Article 19 of the Law on the Organization and Competence of Authorities in the Fight Against Organised Crime, Terrorism and Corruption.

[26] *Škulić, M.* Organizacija i nadležnost državnih organa čija je funkcija suzbijanje koruptivnih krivičnih dela [Organization and jurisdiction of state bodies whose function is to suppress corrupt criminal acts]. In: Finansijski kriminalitet [Financial Crime], *Kostić, J., Stevanović, A.* (eds). Belgrade: Institute of Comparative Law and Institute of Criminological and Sociological Research in cooperation with the Judicial Academy, 2018, p. 30.

[27] Article 19, paragraph 4 of the Law.

prepares documents that are based on the collected evidence in the form of analysis of documentation and financial flows in the pre-investigation phase, and reports in the phase of the investigation.

Defining a financial forensic expert as a civil servant gives rise to several doubts and challenges in practical implementation. The high requirements set for a financial forensic expert, coupled with defining the position as a civil servant, have led to a lack of interested experts willing to work in public prosecution. Consequently, the special departments are not adequately supported by financial forensic experts, raising concerns about the effectiveness of the Law. This situation underscores the need to reassess the requirements and conditions for the position of financial forensic experts to attract qualified professionals and ensure the proper functioning of special departments.

Due to the non-competitive salaries in some special departments for suppression of corruption, forensic experts employed in some other legal entities and institutions are mainly retained on the basis of service contracts. In addition, there is no special educational programme for financial forensics, – the prospective specialists generally undergo training that may not provide an adequate level of knowledge in all necessary areas, so it seems that to act in certain cases, it would be necessary to engage persons who possess very specific knowledge and experience in a particular field.

The Law on the Organization and Competence of Authorities in the Fight Against Organised Crime, Terrorism and Corruption establishes a dual position for the special departments of higher prosecutors' office for the suppression of corruption. Public prosecutors in these departments are responsible to the head of the higher prosecutor's office, even though they operate within the jurisdiction of the appellate court. Additionally, the Special Prosecutor's Office for Organized Crime is tasked to coordinate the work of the special departments.[28]

The significance of the head of the higher prosecutor's office to the work of public prosecutors in special departments lies in their authority to assign public prosecutors to work in special departments through the annual schedule, as well as exercise other hierarchical competences.[29] However, the Law does not specify the coordination role of the Special Prosecutor for Organized Crime. To ensure the efficiency and autonomy of the work of special departments, there is a need to reassess the current organization structure and identify a feasible solution. One option is to strengthen the link between special departments for the suppression of corruption and the Special Prosecutor's Office for Organized Crime by integrating special departments as part of the Special Prosecutor's Office. This integration could enhance coordination and streamline operations within the framework of combating corruption.[30]

A good solution envisaged in the Article 20 of the Law, which has also given certain results in practice is obligation of 13 institutions to appoint a liaison officer

[28] Article 15 of the Law on the organization and competences of state authorities in the suppression of organized crime, terrorism, and corruption.

[29] *Bzenić, M.* Osnivanje i funkcionisanje posebnih odeljenja za suzbijanje korupcije u višim javnim tužilaštvima [Establishment and functioning of special departments for combating corruption In: Higher Public Prosecutor's Offices]. In: Represivne mere u borbi protiv korupcije, primena u praksi i predlog za unapređenje [Repressive measures in the fight against corruption, application in practice and proposal for improvement], Belgrade: Association of Prosecutors and Deputy of Public Prosecutors of Serbia, Royal Norwegian Embassy and the Balkan Trust for Democracy, 2019, p. 28.

[30] Ibid., pp. 29 and 30.

to facilitate cooperation and enhance the exchange of data.[31] Additionally, upon the request of the competent public prosecutor, liaison officers may also be appointed in other bodies and organizations. The introduction of liaison officers has elevated cooperation between various stated bodies to a higher level. Prior to the establishment of liaison officers, cooperation among different state authorities was more formal and relied on written correspondence following different procedures, which often hindered efficiency. With the appointment of liaison officers, cooperation has become more informal, fostering greater efficiency through direct personal contact between the public prosecutor and the liaison officer. The specialized knowledge possessed by civil servants in various state bodies is invaluable to prosecutors, aiding in defining requests and determining the most efficient means of obtaining evidence.

The same applies to the possibility of forming task forces, composed of experts from various fields who are employed in different state bodies and institutions, and who may possess adequate knowledge and experience of importance for the detection and prosecution of crimes that are the subject of the work.[32] Having in mind the complexity of cases in which joint task forces are formed, the ability of the public prosecutor to manage the task force and coordinate the work of all members is crucial.[33] The need for training public prosecutors in management techniques is important due to the leading role and importance of prosecutorial expertise in coordinating the efforts of the task force.

Eradication of the crimes involving corruption requires adequate and timely cooperation between the prosecution and the police. However, such cooperation is absent in practice. The prosecutors believe that it would be more effective if there were a prosecutor's police that would answer to the prosecutors for their work. In addition, prosecutors do not receive a sufficient number of criminal reports from the police, but mostly from internal control and inspections, and the largest number from citizens. However, due to a lack of knowledge, criminal reports filed by citizens are not adequate quality and most of them refer to activities that do not have elements of a criminal offense.[34]

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[31] Tax Administration – Tax Police, Customs Administration, National Bank of Serbia, Administration for Prevention of Money Laundering, Agency for Economic Registers, Central Registry of Securities Depository and Clearing, State Audit Institution, Republic Geodetic Institute, Agency for Suppression of Corruption, the Republic Fund for Pension and Disability Insurance, the Republic Fund for Health Insurance, the Republic Directorate for Property of the Republic of Serbia and the Office for Public Procurement.

[32] The possibility of forming a task force is provided by Article 21 of the Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Terrorism and Corruption.

[33] The need for a multidisciplinary approach existed before. Article 96 of the Law on International Legal Assistance in criminal matters, Official Gazette of the Republic of Serbia, No. 20/2009 mentions joint investigation teams. Therefore, we agree with the opinion of the authors, who believe that instead of term "task force", the term "prosecution teams" is more acceptable. Listed according to *Pavlović, Z. S.* Institucionalni kapaciteti Srbije za suprotstavljanje organizovanom kriminalu, terorizmu i korupciji [Institutional capacities of Serbia to counter organized crime, terrorism and corruption] In: Finansijski kriminalitet [Financial Crime], *Kostić, J.* and *Stevanović, A.* (eds). Belgrade: Institute of Criminological and Sociological Research and Institute of Comparative Law in cooperation with the Judicial Academy, 2018, pp. 64–65.

[34] Information about the positions of the prosecutors was obtained during the meetings with the public prosecutors of the special departments for suppression of corruption of the Higher Public Prosecutor's Offices which were held in September 2023.

When it comes to cooperation with the police, it seems that the results of that cooperation are mixed. The 2011 Criminal Procedure Code[35] established the leading tole of public prosecutors in the investigation phase, yet there are procedural challenges hindering the exercise of this role. According to the Code, police officers are required to adhere to the instructions of public prosecutors. However, as the police fall under the jurisdiction of the Ministry of Interior, many prosecutors have reported instances where police officers fail to comply with their order. Moreover, the Criminal Procedure Code lacks an effective mechanism that would empower public prosecutors to enforce their leading role and compel police officers to adhere to their orders.[36] This discrepancy poses significant challenges to the effective coordination between prosecutors and law enforcement agencies during the investigation phase.

In addition, the responsibility for prosecuting corruption is considered to be shifting between different prosecutors, who have generally felt that the police did not provide enough evidence in cases of high corruption.[37] The reason for this may be the fact that according to the law, the police first submits the report to the Ministry of Internal Affairs, and then to the prosecutor, which affects the possibility of adequate management of the investigative procedure by public prosecutors. Therefore, one of the possible solutions is the establishment of a special prosecutor's police, which would be accountable exclusively to the public prosecution.[38]

The specialization of judicial bodies makes sense only if they have adequate powers and resources with the improvement of financial responsibility, independence of the judiciary and the media, the existence of campaigns to raise awareness, civil activism, etc.[39] In addition, one of the basic prerequisites for an effective fight against corruption is independence in the work of judicial office bearers. When it comes to public prosecutors, the new Law on Public Prosecutions from 2023 introduced protective measures that should lead to more autonomy in processing of cases, such as complaint to the High Prosecutorial Council on the annual schedule, complaint to the High Prosecutorial Council against the obligatory instruction of the superior prosecutor, abolishment of the obligation to report on a case to the head of public

[35] Criminal Procedure Code, Official Gazette of the Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021, 62/2021.

[36] *Škulić, M., Ilić, G.* Novi Zakonik o krivičnom postupku Srbije – Kako je propala reforma, šta da se radi? [The New Criminal Procedure Code of Serbia – How the Reform Failed, What to Do?]. Belgrade: Prosecutors Association of Serbia, IRZ, 2012, p. 134.

[37] GRECO, Fifth Round of Evaluation. Preventing corruption and improving integrity within central government bodies (at the highest executive functions) and law enforcement authorities, evaluation report, Serbia, p. 7.

[38] Policy Note, How to Strengthen Independence in the Work of Public Prosecutors and Improve the Processing of Corruption Cases, Belgrade: Prosecutors Association of Serbia, 2024, p. 25. According to the survey results 94% of public prosecutors believe that changings in regulating cooperation between police and public prosecutors will contribute to the efficiency of the fight against corruption. Majority of public prosecutors are advocating establishment of prosecutorial police.

[39] *Matić Bošković, M.* Efekti borbe protiv korupcije – nužnost analitičkog pristupa [Effects of the fight against corruption – the necessity of an analytical approach]. In: Represivne mere u borbi protiv korupcije, primena u praksi i predlog za unapređenje [Repressive measure in the fight against corruption, application in practice and proposal for improvement], Belgrade: Association of Prosecutors and Deputy of Public Prosecutors of Serbia, Royal Norwegian Embassy and The Balkan Trust for Democracy, 2019, p. 7.

prosecutor's office, and limitation of possibility for temporary transfer of public prosecutors.[40]

3. Results of fight against corruption in Serbia

In the annual report on Serbia, the European Commission assesses track record in fight against corruption. In the 2023 Report, it is concluded that the Republic of Serbia could additionally improve its results in investigations, criminal prosecution and making legally binding court decisions in cases of high-level corruption, as well as the seizure and confiscation of property acquired through the commission of a criminal offense.[41] The European Commission recognized a slight increase of new investigations and final verdicts in high-level corruption cases, but the number of new indictments decreased. Furthermore, during 2022, there have been no new cases of final confiscation of property recorded, for which records are necessary. European Commission identify establishment of an efficient coordination mechanism as a tool to operationalize the goals of prevention and eradication of corruption. As a positive development, the European Commission states that there has been a slight increase in the number of final verdicts for high-level corruption compared to 2021. The Commission emphasised the need for a resolute political will to effectively solve the issue of corruption, as well as a strong criminal justice response to high-level corruption.[42]

The special departments have faced challenges from the outset, leading to ongoing struggles with efficiency and effectiveness. Despite being in operation since 2018, their overall clearance rate has barely exceeded 100%, and the backlog of pending cases in increasing, contributing to an increasing delay in clearance of cases. Although there are variations in performance among the special departments in the four cities, the majority of the problems appear to be systematic rather than individual. It is essential to address these systemic issues before delving into more specific individual challenges. This approach is crucial for enhancing the overall effectiveness and efficiency of the special departments in combating corruption and related offenses.[43]

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[40] *Nenadić, S.* Šta nam donosi novi Zakon o javnom tužilaštvu? [What does the new Law on Public Prosecution bring us?]. Belgrade: Prosecutors Association of Serbia, 2023. See also: *Tonry, M.* Prosecutors and Politics in Comparative Perspective, Crime and Justice, University of Chicago Press Journals, Vol. 41, 2012, pp. 1–33.

[41] EU Commission, Staff Working Document, Serbia 2023 Report accompanying the document Communication from the Commission to the Euro Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communication on EU Enlargement policy, Brussels, 08.11.2023 SWD(2023) 695 final, p. 32. Available: https://neighbourhood-enlargement.ec.europa.eu/document/download/9198cd1a-c8c9-4973-90ac-b6ba6bd72b53_en?filename=SWD_2023_695_Serbia.pdf [last viewed 05.04.2024].

[42] EU Commission, Staff Working Document, Serbia 2023 Report accompanying the document Communication from the Commission to the Euro Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communication on EU Enlargement policy, p. 5.

[43] Calculation is made based on data available in the Annual Report of the Supreme Public Prosecutor's Office for 2019, 2020, 2021, 2022. Annual Report of the Supreme Public Prosecutor's Office for 2019. Available: http://admin.rjt.nlnet.rs/docs/RAD_JAVNIH_TUZILASTAVA_2019.pdf [last viewed 05.04.2024]; Annual Report of the Supreme Public Prosecutor's Office for 2020. Available: http://www.rjt.gov.rs/docs/rad_javnih_tuzilastava_2020_0421.pdf [last viewed 05.04.2024]; Annual Report of the Supreme Public Prosecutor's Office for 2021. Available: rjt.gov.rs/docs/rad-javnih-tuzilastava-na-suzbijanju-kriminaliteta-i-zastiti-ustavnosti-2021.pdf [last viewed 05.04.2024] and the Annual Report of the Supreme Public Prosecutor's Office for 2022. Available: http://www.rjt.gov.rs/docs/Izvestaj_Republika_Srbija_Republicko_javno_tuzila%C5%A1tvo_mart2023.pdf [last viewed 05.04.2024].

The overall number of cases received by special departments across the four public prosecutor's offices ranged from 5427 in 2019 to 4228 cases in 2022.[44] Individually, special departments received approximately 800 to 2000 cases each year, varying depending on the specific year. As anticipated, Belgrade reported the highest share of incoming case, accounting for 38 percent of the total in 2022. Efficiency of the special departments gives rise to concern. The Belgrade special department experienced a significant 44% decrease in clearance rate in 2022 compared to previous year. This drop was primarily driven by a 29% increase in incoming cases and a 14% decrease in resolved cases, which had an impact on the overall national outcome. The total number of unresolved cases across all special departments increased from 6152 in 2019 to 7055 in 2022. Additionally, the calculated disposition times indicate that it took over a year and a half, from 2020 to 2022, for a case to be resolved on average. In 2022, no cases of final confiscation of property were recorded, compared to one in 2021 and three in 2020.[45]

Seizure of assets is one of the requirements of the established track record. According to special departments, financial investigations, conducted in parallel with criminal investigations as defined by the Law on Confiscation of Property Derived from a Criminal Offence[46] pose challenges. Leading both types of investigations simultaneously is perceived as a duplicative effort by public prosecutors, yet it is currently counted as a single case. Financial investigations require specialized knowledge of various regulations and specific skills.[47] This complexity suggests the need for special prosecutors dedicated to financial investigations. However, separating criminal and financial investigations may not necessarily bring benefits to the special departments. An alternative solution, such as designating one prosecutor to lead parallel criminal and financial investigations, as seen in Belgrade, could be more effective. Furthermore, the lack of support from financial forensic experts remains a critical issue for financial investigations.

A prevalent issue regarding human resources in the special departments is the persistent absence or shortage of personnel. Since their establishment, these departments have encountered shortages of prosecutors, prosecutorial assistance, financial forensics experts, and administrative staff. While there were initial intensive training efforts, they have diminished over time. Moreover, there is currently no specialization of prosecutors, although some have identified successful models from other jurisdictions.[48] Addressing these staffing issues and implementing specialized training programmes could significantly enhance the effectiveness of the special departments in combating corruption and related crimes.

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[44] Data are collected from the Annual Report of the Supreme Public Prosecutor's Office for 2020, p. 70; Annual Report of the Supreme Public Prosecutor's Office for 2021, p. 67. and the Annual Report of the Supreme Public Prosecutor's Office for 2022, p. 70.

[45] EU Commission, Staff Working Document, Serbia 2023 Report accompanying the document Communication from the Commission to the Euro Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Communication on EU Enlargement policy, p. 33.

[46] The Law on Confiscation of Property Derived from a Criminal Offence, Official Gazette of the Republic of Serbia, No. 32/2013, 94/2016, and 35/2019.

[47] The threshold for conducting of the financial investigation for the crime of receiving a bribe of 1 500 000 RSD (~13 000 EUR) should be lifted, since low number of criminal acts fulfil this criterion. As a result, only few financial investigations could be conducted in the practice.

[48] Information about the positions of the prosecutors was obtained during the meetings with the public prosecutors of the special departments for suppression of corruption of the Higher Public Prosecutor's Offices which were held in September 2023.

An additional challenge for establishment of the track record in fight against corruption is the structure of the criminal cases assigned to the special departments for suppression of corruption. According to the public prosecutors working in the departments around 80% of cases are against economy, mostly – criminal offences of embezzlement, abuse of the position of a responsible person, and abuse of official position. This structure of cases cannot contribute to the fight against corruption in Serbia, hence the special departments should, in cooperation with police and other relevant institutions, focus and invest efforts into resolving classical corruption cases.[49]

4. Recommendations for improvement of track record

To improve the track of the special departments for suppression of corruption, it is necessary to make additional efforts to strengthen legislative framework and to ensure full implementation in practice.

One of the main challenges in practice is represented by the limited human resources. To improve efficiency of criminal investigation and processing of corruption cases, it is crucial to increase the number of public prosecutors, prosecutor's assistants, and administrative staff. This requires the engagement of additional financial resources to increase the salaries of public prosecutors working in special departments and the employment of additional support staff.

An adequate support of financial forensic experts is of particular importance for the track record of public prosecutors. To attract this profile of experts to work in special departments of public prosecutor's offices for suppression of corruption there is a need to strengthen their position by law. Defining the position of a financial forensic expert as a civil servant due to inadequate remuneration discourages experts who possess specific knowledge in the financial field to work in the special departments.

To eradicate corruption, adequate and timely cooperation is needed between the prosecutor's office and the police. However, in the practice there are many challenges that prevent effective cooperation. According to the national legislation, public prosecutors lead the investigation, but there are no effective mechanisms in place to ensure that the police will follow the public prosecutors' orders in a timely and adequate manner. Furthermore, police officers are responsible for their work to the Ministry of Internal Affairs, and they have to implement orders issued by their superiors. Therefore, the possibility of establishing a special prosecution police should be considered as one of the options that could contribute to the efficiency of investigation.

To improve track record, the jurisdiction of the special departments for suppression of corruption should be revised. It seems that the criminal offense of tax evasion has been unjustifiably left out of the jurisdiction of special departments for suppression of corruption. Bearing in mind that public prosecutors act in cases against perpetrators of the crime of money laundering where tax evasion is a predicate crime, it seems justified that tax evasion should also be under the jurisdiction of special departments, while, for instance, the criminal offense of embezzlement, which is easier to prove, could be under the jurisdiction of the basic public prosecutor's offices.

Leading of financial investigations requires special knowledge in various fields and specific skills. In addition, parallel proceedings in criminal and financial investigations take a lot of attention. Therefore, the possibility of appointing one

[49] Information obtained during the meetings with the public prosecutors of the special departments for suppression of corruption of the Higher Public Prosecutor's Offices held in September 2023.

prosecutor to lead those investigations in parallel with the conduct of criminal investigations in the same case by another public prosecutor should be considered. However, in financial investigations, the support of financial forensics would be especially important. Therefore, their position in criminal proceedings against perpetrators of criminal acts with a corrupt element should be improved in the most efficient manner and in due time.

The Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Terrorism, and Corruption prescribes that work of the special departments for suppression of corruption of the Higher Public Prosecutor's Offices is coordinated by the Special Prosecutor's Office for Organized Crime. However, the Law does not specify modalities of coordination. In addition, the Law prescribe that public prosecutors from special departments for suppression of corruption are responsible for their work to the Senior Public Prosecutor, specifically head of higher prosecutor's office. Head of higher prosecutor's office has jurisdiction to adopt annual schedule on work of public prosecutors and transfer public prosecutors from special department to work on general crime within the higher prosecutor's office. Therefore, the possibility of integrating special departments for suppression of corruption into the Special Prosecutor's Office for Organized Crime as its special organizational units should be considered, since it could strengthen autonomy of work of public prosecutors, contribute to the more secure position of prosecutors working of corruption cases and improve coordination in the fight against corruption.

Summary

In the coming period, it is necessary to improve the efficiency of the special departments for suppression of corruption of the Higher Public Prosecutor's Offices. This implies an increase in the number of public prosecutors, prosecutors' assistants and administrative staff. Due to the importance of financial forensic experts, there is a need to improve their position by changing the provision that stipulates that they have the position of civil servants. In addition, it is necessary to foresee financial incentives that would attract adequate personnel.

Of particular importance for the effective suppression of corruption is establishment of adequate and timely cooperation between police officers and public prosecutors. Bearing in mind the problems that exist in practice, which are conditioned by the inadequate legal solution, the possibility of establishing a special prosecution police could be considered. In addition, the position of special departments for suppression of corruption should be improved. It appears to be an unacceptable solution that the public prosecutors acting in those departments are accountable to the Senior Public Prosecutors, and that their work is coordinated by the Public Prosecutor for Organized Crime. Therefore, it seems that an adequate solution for the aforementioned departments is to act as separate organizational units of the Special Prosecutor's Office for Organized Crime.

It could be more effective if the criminal offense of tax evasion was placed under the jurisdiction of the special departments for suppression of corruption of the Higher Public Prosecutor's Office, because the prosecutors from these departments are already acting in those cases when tax evasion is a predicate crime in the money laundering cases. Having in mind that financial investigations require the possession of special knowledge and skills, and that leading them in parallel with criminal investigations by one person is very time-consuming, the possibility should be considered that

the financial investigation is led by a public prosecutor specialized in that field in parallel with the criminal investigation led by another public prosecutor at the same time.

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Disciplinary Liability and Other Means Impacting the Employee's Behaviour in Labour Relations in Latvia and Lithuania

Dr. iur. **Annija Kārkliņa**
Faculty of Law, University of Latvia
Professor at the Civil Law Department
E-mail: *annija.karklina@lu.lv*

Dr. iur. **Ingrida Mačernytė-Panomariovienė**
Institute of Law, Lithuanian Centre for Social Sciences
Senior Research Fellow at the Legal System Research Department
E-mail: *ingrida.macernyte@teise.org*

The article examines the regulation and practice of employee liability in employment relationships in two Baltic states – Latvia and Lithuania. Considering that the Latvian Labour Law regulates the disciplinary liability of employees, while in Lithuania disciplinary punishments (except for the most severe punishment – dismissal) have not been provided for since 2017, the authors analyse the regulatory framework of these countries and reflect on the case law, as well as outline the main differences and problematic issues in the context of employee liability.

Keywords: disciplinary liability, employer, employee, reproof, reprimand, notice of termination by an employer.

Contents

Introduction

Employee disciplinary liability in many countries is seen as an important mechanism for disciplining employees, i.e. punishing the offending employee, at the same time serving as a preventive tool for avoiding possible misconduct, which can have a positive impact on the quality of work, productivity and efficiency of the employer's business.

The Latvian Labour Law (hereafter – LL) provides for two types of disciplinary punishment – reproof (Latv. *piezīme*) and reprimand (Latv. *rājiens*). As practice shows, disciplinary punishment is a relatively common form of punishment in practice, and it is not uncommon for employees who have been disciplinarily punished to take legal action to have the disciplinary punishment overturned. The section of the article on the Latvian legislation will address various issues related to the application of disciplinary punishments, e.g., the difference between the two disciplinary punishments – a reproof and a reprimand, what procedural steps an employer must take in order to apply a disciplinary punishment, the problem of the time limit for applying disciplinary punishments, the procedure for challenging disciplinary punishments and how to distinguish a disciplinary punishment from an employer's notice, which is also considered a means of punishing an employee. To clarify the content and the problems of these issues, the decisions of the courts of different instances will be analysed.

However, the situation in Lithuania is different: since 2017, Lithuania has moved away from disciplinary punishments in the form of a reproof or a reprimand, but it leaves the most severe penalty – dismissal. Currently, the Lithuanian legislation retains only the employer's notice as a mechanism to punish an employee for misconduct and at the same time to deter other employees from committing misconduct. The article will outline the reasons why Lithuania decided to opt out of disciplinary liability, as well as the main findings on notice as a form of punishment and the procedural aspects of this procedure.

Due to the limited volume of the article, it will not deal with the civil liability framework as a form of employee liability.

1. Disciplinary liability of employees in Latvia

1.1. Characteristics of regulatory framework

In Latvia, the main regulatory act that regulates employment relationships is the LL, which was adopted in 2001 and entered into force on 1 June 2002.[1] Disciplinary liability is regulated by Article 90 of the LL, and this article was amended several times (last amendments were adopted in 2018).

Public officials – those employed in various service relationships have specific laws and regulations governing their disciplinary liability, e.g. the 1994 Judicial Disciplinary Liability Law[2] governs the liability of judges, but the 2006 Law On Disciplinary Liability of State Civil Servants[3] governs the disciplinary liability of

[1] Darba likums [Labour Law] (06.07.2001). Available: https://likumi.lv/ta/en/en/id/26019-labour-law [last viewed 06.06.2024].

[2] Tiesnešu disciplinārās atbildības likums [Judicial Disciplinary Liability Law] (10.11.1994). Available: https://likumi.lv/ta/en/en/id/57677-judicial-disciplinary-liability-law [last viewed 06.06.2024].

[3] Valsts civildienesta ierēdņu disciplinmāratbildības likums [Law On Disciplinary Liability of State Civil Servants] (30.05.2006). Available: https://likumi.lv/ta/en/en/id/136110-law-on-disciplinary-liability-of-state-civil-servants [last viewed 06.06.2024].

civil servants. Compared to the LL, these special laws contain a more comprehensive disciplinary framework and a wider range of disciplinary punishments. For example, Article 11 of the Law on Disciplinary Liability of Civil Servants provides for disciplinary sanctions that do not apply in the employment relationship, such as reprimand, reduction of the monthly wage (not more than by 20% for a time period from three months to one year); demotion for a time period not exceeding three years, removal from the position and removal from the position without the right to apply for a position in state administration for one year.

1.2. Types of disciplinary punishment and cases of application

The disciplinary responsibility of the employee and the right of the employer to punish the employee for violations of the working procedure arise from the employee's commitment to comply with certain working procedures and orders of the employer. The agreement on subordination is one of the essential components which distinguishes the employment contract from other contracts.[4] As stated in the legal literature, disciplinary liability is incurred when an employee is guilty of an unlawful act, i.e. negligently performing their duties or acting unlawfully, or is guilty of an omission, i.e. failing to perform their duties.[5]

The purpose of disciplinary punishment is not only to punish and ensure that the offending employee complies with the conditions of the working procedure and the contract of employment and refrains from committing further violations, but also as a deterrent to try to prevent other employees from committing possible violations in the future.[6]

In Latvia, there are only two disciplinary punishments in employment relationships – reproof and reprimand. Article 90 of the LL does not identify any differences between them, but in practice a reprimand is generally considered to be a more severe disciplinary punishment than a reproof. The employer has the right to reproof or reprimand the employee at its discretion. In order to specify the application of these types of disciplinary punishment at a particular employer, the employer may, in the terms and conditions of employment or in another internal regulation (local source of law), define what is meant by a reproof and a reprimand for that employer, i.e. for which violations each of these punishments is applied and what consequences it entails at that employer.[7] It should be emphasized that the employer's internal rules on the disciplinary liability of an employee must not, of course, worsen the employee's legal position in relation to the rules laid down in the LL. Employers (especially small companies) rarely set criteria in their internal legislation to distinguish which type of

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[4] *Slaidiņa, V., Skultāne, I.* Darba tiesības [Employment Rights]. Rīga: Zvaigzne ABC, 2011, p. 101.

[5] Ibid.

[6] Darba likums ar komentāriem [Labour Law with comments]. Zvērinātu advokātu birojs „BDO Zelmenis&Liberte". Riga: Latvijas Brīvo arodbiedrību savienība: 2020, p. 237. Available also: https://arodbiedribas.lv/wp-content/uploads/2020/02/new_dl_ar_kom.pdf; see also: Judgement of 19 May 2022 of the Vidzeme District Court in case No. C71240421, para. 12. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].
On the importance of work from the point of view of the legal philosophy, see: *Lazdiņš, J.* Laime Jāņa Pliekšāna (Raiņa) tiesību filozofijā [Happiness in the legal philosophy of Jānis Pliekšāns (Rainis)]. Latvijas Vēstures Institūta Žurnāls, 2022, Speciālizlaidums, 116, pp. 7–22.

[7] In comparison, UK legislation requires employers to make internal rules for disciplinary action and encourages internal rules to be made in line with the Acas Code of Practice on disciplinary and grievance procedures. See: Taking disciplinary action against an employee. Available: https://www.gov.uk/taking-disciplinary-action; http://www.acas.org.uk/index.aspx?articleid=2174 [last viewed 12.05.2024].

disciplinary punishment is applicable to an employee. Employers usually assess this on a case-by-case basis after a specific violation has been committed.

In practice, employers sometimes have terms and conditions of employment that provide for "disciplinary punishments" that the employer itself has devised, such as pay cuts, demotions, etc.[8] However, these are not disciplinary punishments that are allowed in the employment relationship, so such "punishments" will be considered null and void. It should be stressed that Latvian LL does not allow penalties of a material nature – fines, contractual penalties, etc. Consequently, even if the employee agrees to it, contractual penalties cannot be agreed upon in the employment contract. The only case in Latvia where a contractual penalty may be applied in the context of an employment relationship is in the case of a breach of a restriction of competition by an employee – i.e. if the former employee, after termination of the employment relationship, fails to comply with the agreed restriction of competition and takes up employment with a competitor of another employer or otherwise breaches the terms of the agreement[9] (see Article 84 of the LL). In the case of a breach of a restriction on competition, the application of a contractual penalty is possible because the employment relationship between the contracting parties – i.e. between the employee and the employer – no longer exists.

Article 90(1) of the LL states: "an employer may give a written reproof or issue a reprimand in writing to an employee for violation of specified working procedures or an employment contract, referring to the circumstances that indicate the violation committed." Accordingly, under this Article, disciplinary punishment is applicable if the employee has either breached the established working procedure or the terms of the contract of employment. According to Article 54 of the LL, the working procedure in an undertaking is determined by the working procedure regulations, the collective agreement, the employment contract and the orders of the employer. The case law also indicates that, in addition to the collective agreement, the working procedure regulations, the employment contract and the orders, the working procedure in an undertaking is also governed by job descriptions, various regulations and other acts issued by the employer's management, including the concept of "working procedure and contract regulations", which covers not only individual employer's documents with such titles, but also regulatory acts governing the duties of members of certain professions at work.[10]

As stated in the case law, an employee may be subject to disciplinary punishment in cases where the employee has committed an unlawful, culpable act (act or omission) – has failed to perform or has improperly performed the duties set out in the employment contract or working procedure, "without it being necessary to establish that the breach committed is substantial, that the employee acted with malicious intent or that the employer has suffered damage as a result of the breach."[11]

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[8] Decision of 5 July 2022 of the Senate Action Session No. SKC-820/2022 in case No. C69335521, para. 3.

[9] 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. (See Article 84 (5) of the LL).

[10] Judgement of 16 March 2023 of the Supreme Court No. SKC-33/2023 in case No. C30397020, para. 10. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[11] Judgement of 7 October 2022 of the Riga District Court in case No. C29278021, para. 7.3. See also: Judgement of 10 November 2023 of the Vidzeme District Court in case No. C71146323, para. 7.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

Although the first paragraph of Article 90 of the LL refers to "violation of the working procedure or the employment contract" as a ground for disciplinary punishment, in the author's opinion, violation of ethical norms may also be a ground for disciplinary punishment (e.g., if an employee is rude to clients, disrespectful to colleagues, etc.).

In contrast to the approach of some foreign countries,[12] the Latvian LL does not stipulate that disciplinary liability is applicable only for violations listed in the regulatory framework. This approach is to be welcomed, as it is undoubtedly not possible for the legislator or the employer to foresee and list all types of disciplinary violations.

In practice, employers sometimes misunderstand the suspension from work (which is regulated by Article 58 of the LL), as a form of disciplinary punishment.[13] In this context, the Supreme Court has also stated that "suspension from work is not a disciplinary sanction for a specific, verified and proven misconduct of an employee, but rather a preventive measure reserved to the employer for the elimination of a possible threat to address potential risks to interests"[14] preventing the employee from being present at work and performing their duties where the employer has as yet unverified but credible facts which give reason to believe that the failure to suspend the employee may prejudice the legitimate interests of the employer or of third parties.[15]

1.3. Procedural rules for the application of disciplinary punishment

1.3.1. Time limit for applying disciplinary punishment

It is essential to comply with the time limit for disciplinary punishment. Article 90(3) of the LL provides "A reproof or a reprimand may be issued not later than within one month from the day of detecting the violation, excluding the period of temporary incapacity of the employee as well as the period when the employee is on leave or does not perform work due to other justifiable reasons, but not later than within 12 months from the day the violation was committed […]".

Thus, the law provides that the employer must impose disciplinary punishment within one month from the date of detecting the violation. It is often difficult (especially in the case of more complex violations) to identify exactly what constitutes the "detecting" of a violation – whether it is, for example, the moment when a whistleblower report or customer complaint is received about an employee's misconduct, or whether "detecting" is when an internal investigation results in a report on the conclusion of the investigation, which already establishes the fact of the violation committed by the employee, and is presented to the employer's management board. Assessing the violation committed by an employee requires verifying various facts, investigating the situation, and often interviewing witnesses (and the interviews may be repeated, for example in the case of contradictory testimony), so one month is a short timeframe for disciplinary punishment in more

[12] As mentioned in the legal literature, in some foreign countries, for example, Belgium and Japan, there is an opposite approach – there it is possible to apply disciplinary liability only for those violations that are exhaustively listed in the regulatory acts. See: *Slaidiņa V., Skultāne I.*, p. 105.

[13] Article 58 (1) of the Labour Law states: Suspension from work is a temporary prohibition, imposed by a written order of an employer, for an employee to be present at the workplace and to perform work, without disbursing remuneration to the employee during the period of suspension.

[14] Judgement of 26 April 2022 of the Riga District Court in case No. C33412221, para. 11.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[15] Ibid.

complex situations. Therefore, a proposal to extend the time limit to three months (similar to the right of the employer under Article 58 of the LL to suspend an employee from work for up to three months) should be considered. Also, because the LL does not automatically link disciplinary punishment to any other negative consequences, there is no reasonable justification for such a short time limit of one month. Moreover, in employment relationships, the general limitation period for bringing an action (including for damage caused by an employee) is two years, which means that even if the employee had not been subject to disciplinary punishment, the employer could claim damages from the employee within two years.

Until the 2014 amendments to the LL, the maximum period within which disciplinary punishment could be imposed was only 6 months from the date of the violation.[16] The Cabinet of Ministers, as the promoter of the draft law, suggested that this period should be extended to 12 months, explaining that it is necessary to reduce the number of cases in which it is impossible to punish an employee because the employee is temporarily unable to work, is on maternity leave and has been absent from work for more than six months. Therefore, to reduce the number of cases where an employee fails to perform their duties for justified reasons for more than six months and therefore avoids disciplinary liability, a proposal to extend the period for issuing a reproof and a reprimand to twelve months was proposed and accepted by the Latvian Parliament. The existing version thus provides for a more favourable condition for the employer in terms of time limits.[17]

To summarise, the employer must take a decision on disciplinary punishment within one month from the day of detecting the violation , but this does not include the employee's period of temporary incapacity for work, leave or other excusable reasons, but if 12 months have elapsed since the violation was committed, the disciplinary punishment will not be applicable – it will be time-barred (this period is preclusive and cannot be extended).

1.3.2. Request and evaluation of the employee's explanations

In order for an employer to impose a disciplinary punishment, Article 90(2) of the LL sets out the obligations that an employer must fulfil, namely, "(2) Prior to expressing a reproof or a reprimand, the employer shall familiarise the employee in writing with the essence of the violation he or she has committed and then request from him or her an explanation in writing regarding the violation committed."

Thus, the employer is first obliged to inform the employee of the nature of the violation, stating both the factual circumstances of the violation and the corresponding legal circumstances, i.e. the rule under which the employee's conduct qualifies as a violation. It follows that the employer, when issuing either a reproof or a reprimand, must justify it based on objective circumstances indicating that a violation has been committed. In fulfilling this requirement, it is not sufficient to refer to general circumstances without adding substance – the employer is obliged to specify the specific acts and circumstances in which the violation was committed.

The employer shall, in accordance with this Article of the LL, require the employee to provide a written explanation of the violation. The law does not specify the period

[16] Darba likums [Labour Law] (06.07.2001). Available: https://www.vestnesis.lv/ta/id/26019-darba-likums [last viewed 06.06.2024].

[17] Likumprojekts "Grozījumi Darba likumā" [Draft Law "Amendments on Labour Law"]. Latvijas Republikas Ministru kabinets. No. 90/TA-952 (2013). Available: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/1016FA82F40AC4EFC2257BC50037F713?OpenDocument [last viewed 06.06.2024].

within which the employee must provide a written explanation. When issuing the request for an explanation, the employer should, for the sake of clarity, specify till which date the employee should provide the explanation. The employer should set this time limit with the calculation that the reproof or reprimand may be given no later than one month from the date of the discovery of the violation (to comply with the time limit for disciplinary punishment laid down in Article 90(3)).[18] Failure to submit written explanations within the time limit shall not prevent the employer from taking disciplinary action against the employee. It should be noted here that, although Article 90(2) of the LL provides that the employee shall submit the explanation in writing, exceptions to this mandatory written requirement could be made in certain cases in the employee's interest (e.g. if the employee is unable to do so due to a health condition, because the employee is visually impaired, etc.) – in this case this provision should be applied reasonably, finding alternative options for the recording of the explanation. Even in a situation where the employee has not provided a written explanation, but would have presented the explanation orally, and the employer is thus clear about the employee's viewpoint (position) on the violation, in the author's view, there would be no reason to disregard such an oral explanation (to treat it as unprecedented). Consequently, the statutory requirement for a written explanation should not be understood as absolute in all cases.

Based on the explanation given by the employee, an assessment is made as to whether the violation has been committed or whether there are justifiable reasons for it, leading to a decision on whether or not to impose a disciplinary punishment. Explanations are therefore requested on the circumstances which give rise to the imposition of a possible disciplinary punishment.[19] In each individual case, when deciding whether to impose a punishment, the employer must consider the proportionality between the violation committed and the punishment to be imposed. Furthermore, when deciding on a disciplinary punishment, the employer must observe that only one reproof or reprimand may be issued for each violation (see Article 90(3)).

1.3.3. Form and content of disciplinary punishment

The LL requires disciplinary punishment to be in writing. A reproof or reprimand must be in the form of a written order by the employer. Article 90(3) of the LL provides: "the employer has the obligation to issue a written order to an employee by which the employee is issued a reproof or a reprimand." The mandatory written form requirement is included to allow the employee to challenge the disciplinary punishment in court if necessary. If the employer orally refers to the employee's breach of the working procedure or the contract of employment, this will not constitute a disciplinary punishment and will have no legal effect.

It must be clear from the order imposing the disciplinary punishment exactly for what violation the employer is imposing disciplinary liability. The employee will then be able to defend himself properly if he considers that the disciplinary punishment is unjustified.[20]

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[18] Darba likums ar komentāriem [Labour Law with comments]. Zvērinātu advokātu birojs „BDO Zelmenis&Liberte". Riga: Latvijas Brīvo arodbiedrību savienība, 2020, p.176.

[19] Judgement of 1 March 2022 of the Latgale District Court in case No. C26138120, para. 7.1. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[20] Judgement of 15 March 2023 of the Riga District Court in case No. C30584221, para. 10.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

When imposing a reproof or reprimand, the employer must consider the nature of the violation, how significant it was, the circumstances in which it occurred, and the employee's previous work and personal qualities.[21] In addition, the employer must assess the proportionality between the violation and the punishment. Although the legislation in principle allows a high degree of flexibility to the employer in the application of disciplinary punishment, the employer should respect the principle of equality – i.e. the same employer should have the same disciplinary policy for different employees for the same violation in the same circumstances (i.e. principle of equal rights). As further pointed out in Latvian case law, if an employer targets only one or a few employees for unlawful conduct, but at the same time does not impose liability on other employees, the employer's actions may show signs of targeting a specific person, which, in conjunction with other signs, may in certain situations also be indicative of psychological terror (i.e., mobbing or bossing).[22]

Disciplinary punishment is individual – this means that in situations where several employees have committed a violation together, each employee must be issued a separate reproof or reprimand.

In case law, there have been cases where several employees have been subject to different disciplinary punishments for the same violation, but the court has found nothing unlawful. These are cases where two or more employees have committed the same violation, but one is a first-time offender and the other is a repeat offender. In this case,[23] the first-time offender was issued a reproof, and the repeated offender was reprimanded. Therefore, it can be concluded that if a person has committed the same violation with the same consequences repeatedly, a different (i.e., more severe) disciplinary punishment may be imposed compared to a first-time offender.

To summarise, in order for an employer to prove that disciplinary punishment has been imposed, the employer must have three documents, dated consecutively, to prove it: 1) a document in which the employer describes the nature of the violation committed and on the basis of which the employee's explanation is requested; 2) a written explanation by the employee; 3) a document (order) containing the decision to impose disciplinary punishment and the type of disciplinary punishment. In the event of a dispute, the employer may need to prove that these documents were issued to the employee. Accordingly, the issue of these documents and the notification of the employee should be done either by registered mail or by delivery against signature (preferably in the presence of neutral witnesses). In fact, all the forms of informing the employee referred to in Article 112.[1] of the LL "Notification of notice" would apply in this situation (even though the Article grammatically refers specifically to the forms of notification of notice).

1.4. The employee's right to request the revocation of disciplinary punishment

The LL lays down rules on how an employee can ask the employer to revoke a disciplinary punishment or challenge it in court. To balance the interests of the parties in this respect, the LL was amended in 2018.

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[21] *Slaidiņa, V., Skultāne, I.* Darba tiesības [Employment Rights], p. 108.

[22] Judgement of 28 April 2020 of the Supreme Court in case No. SKC-276/2020 C30407917, para. 10.4.3., see also: Judgement of 3 July 2019 of the Supreme Court Administrative Law department in case No. SKC 474/2019 (A420287716), para. 12. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[23] Judgement of 29 January 2015 of the Vidzeme District Court in case No. C14034114. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi/pdf/205459.pdf [last viewed 06.06.2024].

Article 90(4) of the LL provides that an employee has the right to request the revocation of a reproof or reprimand within one month from the date on which the reproof or reprimand was made. However, it should be stressed that in a situation where an employee seeks to have a disciplinary punishment revoked, the employee must comply with the procedure laid down in Article 94, i.e. the employee must first submit a complaint to the duly authorised person within the undertaking, who shall examine the employee's complaint immediately but no later than within seven calendar days of receipt of the complaint. By providing for such an internal pre-litigation procedure in cases of revocation of disciplinary punishment, the legislator has sought to relieve the courts by allowing for the possibility that the employer might change its decision, or the parties might find a compromise when considering the issue of revocation of disciplinary punishment. The employee and the representative of employees have the right to participate in the examination of the complaint, provide explanations and express their views.

The requirement in Article 94(2) of the LL for the employer to deal with the complaint "immediately but not later than seven days" after receiving it may be burdensome in situations where there are several holidays in a row (e.g. Christmas holidays, turn of the year holidays).

If the employer has not dealt with the complaint within seven days and has not given the employee a reply on the decision taken, the employer is deemed to have revoked the reproof or reprimand. This presumption was introduced by the 2018 amendments to encourage employers to respond in good faith to employee complaints. Recent case law has also concluded that: "[...] by failing to review the claimant's complaint regarding the revocation of the reprimand and by failing to provide a reply on the decision within the seven-day time limit set out in Article 94(2) of the LL [...] the respondent has breached the statutory preclusive time limit for reviewing the complaint, which, under Article 90(4), gives rise to a presumption that the employer has revoked the reprimand."[24]

If, when considering a complaint about the revocation of a reproof or reprimand, the employer decides not to revoke the disciplinary punishment, the employee must be informed of this and the employee has the right to bring an action before the courts within one month of receipt of the employer's decision. It should be noted that if the employee has not complied with the preliminary out-of-court procedure laid down in Article 94 of the LL for the relevant category of cases, the court will have grounds, based on Article 132(1)(7) of the Civil Procedure Law, not to accept the employee's claim.[25]

In an action for revocation of an order imposing a disciplinary punishment, the rules laid down in the Civil Procedure Law apply.[26] The court is obliged to examine whether the employer had a lawful basis for imposing the disciplinary punishment.[27] Respectively, the employer must specify the violation committed by the employee and provide evidence to prove it.[28]

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[24] Judgement of 5 May 2022 of the Riga District Court in case No. C30506821, para. 7.3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[25] Darba likums ar komentāriem [Labour Law with comments]. Zvērinātu advokātu birojs „BDO Zelmenis&Liberte". Riga: Latvijas Brīvo arodbiedrību savienība, 2020, p. 246.

[26] Civilprocesa likums [Civil Procedure Law] (14.10.1998). Available: https://likumi.lv/ta/en/en/id/50500-civil-procedure-law [last viewed 06.06.2024].

[27] Judgement of 10 November 2023 of the Vidzeme District Court in case No. C71146323, para. 7.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[28] Judgement of 5 May 2022 of the Riga District Court in case No. C30584221, para. 10.3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

The Labour Law's regulation on the protection of the rights of the employee as a socially weaker party leads to the conclusion that the employer bears the burden of proving that the disciplinary punishment imposed on the employee is justified.[29]

Latvian case law shows that disputes over the revocation of disciplinary punishments come before the courts quite frequently. The punishments imposed may limit the employee's opportunities for promotion, affect future remuneration or have other adverse consequences for the employee.[30] One of the aspects where the fact of disciplinary punishment can also have a negative impact is in situations where the employer carries out a reduction in the number of employees. In such situations, according to Article 108 of the LL, the preference for continuation of the employment relationship is given to those employees with better performance, and the criterion of "better performance" may also include an assessment of the employee's previous performance or disciplinary punishment.

Given that a disciplinary punishment may have the above negative consequences for the employee, the LL provides for the regulation of the extinction of disciplinary punishments – Article 90(5) of the LL provides: "If a new reproof or reprimand has not been issued to the employee within a one-year period from the day of issuing a reproof or reprimand to the employee, the employee shall be regarded as not having been disciplined." This means, for example, that an employer would not be justified in refusing to grant an employee a bonus or other material incentives payable to employees of that employer, simply because the employee had been subject to a disciplinary punishment more than one year ago.

1.5. Distinction between disciplinary action and termination of employment

The LL – Article 101 – lays down the framework for employers' notice (notice of termination by an employer), i.e. the situations in which the employer is entitled to unilaterally notify the employee of the termination of the employment relationship are listed. Points 1 to 5 of the first paragraph of this Article list the cases under which the employer may, subject to the conditions, procedure and time limits laid down by law, terminate the contract of employment on the grounds of the employee's conduct. These cases of termination related to the employee's conduct are the following circumstances: 1) the employee has significantly violated the employment contract or the specified working procedures without a justifiable reason; 2) the employee, when performing work, has acted illegally and therefore has lost the trust of the employer; the employee, when performing work, has acted contrary to moral principles and such action is incompatible with the continuation of employment relationship; 4) the employee, when performing work, is under the influence of alcohol, narcotic or toxic substances; 5) the employee has grossly violated labour protection regulations and has jeopardised the safety and health of other persons. These five cases of termination are essentially similar to the violations for which disciplinary liability may be imposed, which is why the relevant question in legal studies is how to draw the line between disciplinary punishment and the more severe measure of termination of employment contract. As indicated by the case law, a reproof, a reprimand and

[29] Judgement of 5 May 2022 of the Riga District Court in case No. C30584221, para. 10.3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024], see also: Pierādīšanas pienākuma sadale civillietās [Distribution of the burden of proof in civil cases]. Senāta prakses apkopojums (2017.-2021.). LR Augstākās tiesas Senāts. 2022, pp. 17–19. Available: www.at.gov.lv

[30] Judgement of 9 March 2011 of the Supreme Court Civil Case Department in case No. SKC-281/2011. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

the harshest measure – notice of termination, are all legal remedies which an employer may impose on an employee for unlawful conduct, considering the seriousness of the violation.[31]

The Supreme Court's case law recognises that the criterion for the application of a disciplinary punishment and Article 101(1)(1) of the LL[32] is essentially one, i.e. a breach of the established working procedure or the employment contract. However, the constituent elements of these provisions are delimited only by the substantiality of the violation.[33] Thus, the case law emphasises that the difference between a disciplinary punishment and a termination of the employment relationship is the substantiality of the violation committed by the employee, since, without doubt, a reproof or a reprimand is a more lenient sanction for the employee than termination of the employment relationship. Where an employee has committed a violation, the employer must always assess the substantiality of the violation. In particular, if the employee's violation is not substantial, the employer is entitled to issue a reproof or reprimand the employee (or, of course, not to take disciplinary action), but only if the employee's violation is substantial will the employer be entitled to terminate the contract of employment. The case law also states that, although termination is not a disciplinary punishment, "termination of the employment relationship on non-retaliatory grounds is the most serious possible consequence that an employee may suffer if he has, without justifiable cause, seriously breached his contract of employment or the established working procedures, with adverse consequences for his reputation and future career. Termination of employment is therefore, in its meaning, the most serious of the punishments that an employer may impose on an employee for a serious breach of the contract of employment or of the established working procedures."[34]

As mentioned above, the LL provides that only one reproof or reprimand may be issued for each violation (Article 90(3)). In developing the principle of law derived from this provision, case law has recognised that, in labour law, a disciplinary punishment and termination of employment cannot be imposed at the same time.[35] The imposition of several punishments on an employee for the same violation may lead to the conclusion that the employee is thereby impermissibly exposed to repeated negative consequences which, by their very nature, fall within the scope of the *ne bis in idem* or double jeopardy principle.[36] It should be clarified that this does not exclude the possibility that, in addition to disciplinary liability, an employee may also be subject to other forms of liability, such as civil liability, administrative liability or even criminal liability, for the same violation.

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[31] Judgement of 26 April 2022 of the Riga District Court in case No. C33412221, para. 11.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[32] Article 101 (1) 1) of the Labour Law prescribes: "An employer has the right to give a written notice of termination of an employment contract in case if the employee has significantly violated the employment contract or the specified working procedures without a justifiable reason."

[33] Judgement of 13 December 2022 of the Supreme Court of the Republic of Latvia of No. SKC-858/2022 in case C30584221, para. 7.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[34] Judgement of 8 March 2024 of the Kurzeme District Court in case No. C69427723, para. 11.3.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[35] Decision of 5 July 2022 of the Senate Action Session in case No. SKC-820/2022 C69335521, para. 3, see also Judgement ofc9 March 2011 of the Senate in case No. SKC 281/2011 (C30379509). Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[36] Decision of 5 July 2022 of the Senate Action Session in case No. SKC-820/2022 C69335521, para. 3. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

In the event of a notice, the employer must comply with the provisions of Article 101(2) of the LL: "When deciding on the possible notice of termination of the employment contract, the employer has the obligation to evaluate the seriousness of the violation committed, the circumstances in which it has been committed, as well as the personal characteristics of the employee and his or her previous position." As the court concluded, "the reprimands thus can be taken into account in assessing the respondent's past performance, whereas in the case of a notice of termination, […] the notice cannot be based solely on the circumstances of the employee's past performance."[37] The systematic nature of the violations is a reflection of the employee's past performance, but not of the substantiality of the violation in question.[38]

2. Regulation of employees' liability in Lithuania

2.1. Changes in legal regulation

The concept of labour discipline as a legal category in Lithuanian law emerged only after the adoption of the Labour Code of the Republic of Lithuania in 2002[39] (hereinafter – LC).[40] As in Latvia, so in Lithuania LC stipulated that disciplinary measures could be applied to employees who violated labour discipline (Art. 227 of the LC), from them: 1) note; 2) reprimand; 3) dismissal (Art. 237 of the LC). Article 234 of the LC provides that a breach of labour discipline is the failure to perform or the improper performance of work duties due to the fault of the employee. The first two disciplinary penalties were discretionary and could be imposed by the employer for almost any breach of work discipline. However, the most severe disciplinary sanction, dismissal, can only be imposed by the employer in cases provided for by law (Art. 136 (3) of the LC):

(1) where the employee is negligent in the performance of his/her duties or otherwise breaches labour discipline, provided that he/she has been disciplined at least once during the preceding twelve months;
(2) where the employee has committed a single act of serious misconduct (Article 235 of the LC).

At the time, the Supreme Court of Lithuania stated that the purpose of disciplinary sanctions other than dismissal was to discipline the offending employee, to encourage the employee to obey the employer's work discipline and to perform his/her job functions in good faith.[41] As the nature of work itself has changed over more than 10 years, bringing the relationship between employee and employer closer to a contractual relationship of equals, there has been a need for change in this area, too. After the Lithuanian labour law reform, in 1 July 2017, after the entry

[37] Judgement of 8 May 2023 of the Riga District Court in case No. C33421321, para. 12.3. See also: Judgement No. SKC-281/2011. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[38] Judgement of 8 May 2023 of the Riga District Court in case No. C33421321, para. 12.3. See also: Judgement of 9 March 2011 of the Supreme Court Civil Case Department in case No. SKC-281/2011. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [last viewed 30.05.2024].

[39] Labour Code of the Republic of Lithuania. (04.06.2002). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.169334?positionInSearchResults=99&searchModelUUID=f7e66a51-941a-4253-9217-ab50c4890a49 [last viewed 06.06.2024].

[40] *Tiažkijus, V.* Darbo teisė: Teorija ir praktika [Labor Law: Theory and Practice]. I tomas. Vilnius: Justitia, 2005, pp. 15–16.

[41] Judgement of 25 June 2001 of the Supreme Court of Lithuania in case G. Skolov v. UAB "Geola", No. 3K-3-740/2001. Teismų praktika, No. 16, 2001. p. 138.

into force of the new version of the LC,[42] the concept of disciplinary responsibility of an employee no longer exists. Since 2017, Article 58 of the LC newly regulates the procedure for terminating the employment contract due to the employee's fault, which provides: An employer has the right to terminate an employment contract without notice and without payment of severance pay if the employee, through an act or omission attributable to him or her, commits a breach of the obligations imposed by employment law or the employment contract. The reason for termination may be: 1) a serious breach of the employee's employment duties; 2) a second breach of the same employment obligations committed by the employee within the last twelve months.

According to Prof. T. Davulis, "this does not mean that a party's failure to perform or improper performance of its contractual obligations will not lead to negative consequences – breaches of employment obligations will be grounds for termination of the employment contract or for refusal to grant incentive payments (Art. 58(2)-(3), 142(2) of the LC)."[43] In other words, the move refusal from disciplinary penalties is away from the avoidance of "punishment" and towards the enforcement of agreements, the recognition of the parties as equal partners in the employment relationship, and the pursuit of accountability between parties.[44]

However, the regulation of civil servants' disciplinary liability still is determined in the regulatory acts of Lithuania. Article 33 of the Civil Service Law provides that one of the following disciplinary penalties may be imposed on a civil servant for official misconduct: 1) a warning; 2) a reprimand; 3) a severe reprimand; 4) dismissal.[45]

2.2. Grounds for violation of work duties

As mentioned above, the LC currently includes only one – the most severe disciplinary sanction, – dismissal. According to Article 58(2) of the LC, the reason for termination of an employment contract may be 1) gross violation of the employee's job duties or 2) a second instance of the employee committing the same job duty violation over the past 12 months. In the Article 58(3) of the LC there are listed seven violations which can be considered a gross violation of job duties, i.e.:

1) failure to come to work for the entire workday or shift without a valid reason;
2) showing up at the workplace during working hours under the influence of alcohol or narcotic, psychotropic or toxic substances, except for cases when said intoxication was caused by the performance of professional duties;
3) refusal to undergo a medical examination when such an examination is required according to labour law provisions;
4) harassment on the basis of gender or sexual harassment, acts of a discriminatory nature, or the violation of honour and dignity with respect to other employees or third parties during working hours or at the workplace;

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[42] Labour Code of the Republic of Lithuania (14.09.2016). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/676587f2cf1911e9a56df936f065a619?jfwid=-k3id7tf7e[last viewed 30.05.2024].

[43] *Davulis, T.* Darbo teisės rekodifikavimas Lietuvoje 2016–2017 [The Recodification of Labour Law in Lithuania 2016–2017]. Teisė, 104, 2017, p. 23.

[44] *Mačernytė-Panomariovienė, I., Krasauskas, R., Vainorienė, A., Bagdanskis, T., Sederevičė, D.* Besikeičiantys darbo santykiai ir jų reguliavimas Lietuvoje. Monografija [Changing Employment Relations and their Regulation in Lithuania. Collective Monograph]. Vilnius: Mykolo Romerio universitetas, 375, 2023, p. 31.

[45] Republic of Lithuania Law on the Civil Service (25.06.2020). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/7c2993b22a7211eb8c97e01ffe050e1c [last viewed 30.05.2024].

5) deliberately causing the employer material damage or attempting to deliberately cause the employer material damage;
6) an act of a criminal nature committed during working hours or at the workplace;
7) other infringements which result in gross violation of the employee's job duties.

However, the legislator's list is not exhaustive, other violations of duties can be regulated by the employer in local normative legal acts. It should also be noted that dismissal is a right of the employer, not an obligation.

Disciplinary action is exclusively reserved for breaches of labour discipline in the case of failure to perform or improper performance of work duties. However, the regulatory framework may also impose disciplinary liability on an employee for other misconduct, such as breaches of ethical norms.[46] The Supreme Court of Lithuania has ruled that "disciplinary penalties, including dismissal, may be imposed only if the employee commits a breach of labour discipline resulting from the failure to perform or improper performance of the duties laid down in the LC, the employment contract, the rules of procedure and/or other special legal acts, due to the employee's fault." [47]

According to Prof. T. Davulis, if the employer gives illegal instructions or does not inform the employee of his/her specific duties, the failure to comply with such instructions, or the failure to perform certain work without knowing that it is required to be carried out, may not be the basis for imposing disciplinary liability, as the prerequisites of the disciplinary liability – the employee's unlawful actions and/or guilt for the breach of the workplace disciplinary rules – do not exist either.[48]

According to the case law of the Court of Cassation of Lithuania, an unstated obligation is not an obligation. Where an employer fails to fulfil his duty to inform an employee of his duties and the employee, although exercising due care, fails to perform certain duties or performs them improperly precisely because of his ignorance, the employee's actions cannot be qualified as a fault and cannot form the basis for disciplinary liability.[49] On the other hand, there are exceptions under the law when dismissal cannot be considered a breach of duty, such as, a worker's refusal to work for reduced pay (Art. 45(2) of the LC)[50]; a worker's refusal to telework (Art. 52(2) of the LC); a temporary worker's refusal to work for a temporary worker (Art. 74(3) of the LC)); the reasoned refusal of a worker to work if there is a risk to his safety and health, or to work in a job for which he has not been trained to work safely, if he is not provided with collective protective equipment or if he is not provided with the necessary personal protective equipment himself (Art. 159 of the LC).

Disciplinary liability is a type of individual legal liability. It applies only to employees where the employer and the individual employee have an employment relationship. Therefore, as pointed out in one of the cases, it cannot be a breach of duty

[46] Commentary to the Labour Code of the Republic of Lithuania. Part III. Individual labour relations. Vilnius: Justitia, 2004. 622:345; Judgement of 12 July 2018 of the Supreme Court of Lithuania in case No. 3K-3-310- 403/2018. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[47] Judgement of 12 July 2018 of the Supreme Court of Lithuania in case No 3K-3-310-403/2018. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[48] Darbo teisė [Labour law]. Prof. Dr. Nekrošius, I. (ed.). Vilnius: TIC, 2008, pp. 384–385.

[49] Judgement 28 March 2019 of the Supreme Court of Lithuania in case No. e3K-3-130-701/2019. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[50] Judgement of 30 May 2005 of the Supreme Court of Lithuania in case No. 3K-3-314/2005; Judgement of 25 June 2020 of the Supreme Court of Lithuania in case No. e3K-3-199701/2020, p. 37. Available: https://eteismai.lt/ [last viewed 31.05.2024].

for a conflict to take place in a place other than the place of work (public place) and during a period other than the applicant's working day (rest day), when the applicant is not carrying out his immediate duties.[51]

Before the new LC, disciplinary liability was exclusive to the employee. Now "Disciplinary liability" is changed to "proper performance of job duties". For example, the LC also provides for consequences for the employer in the event of a breach of duty: "if the employment relationship under a fixed-term contract lasts for more than one year, the employer must give the employee at least five working days' written notice of the termination of the employment relationship at the end of the fixed term, and at least ten working days' written notice of the termination of the employment relationship if the employment relationship under a fixed-term contract lasts for more than three years. In the event of a breach of this obligation, the employer must pay the employee's wages for each day of the breach, up to a maximum of five or ten working days" (see Art. 69 of the LC). In the LC we find that both parties are liable for breaches of employment obligations, i.e. both the employee and the employer, e.g. Art. 41 of the LC states: "1. The parties to an employment contract shall observe the duties of equality between the sexes, non-discrimination on other grounds, fairness, the provision of information necessary for the conclusion and performance of the contract and the preservation of confidential information, before the conclusion of the employment contract and also when no employment contract has been concluded. It shall be prohibited to request information from a staff member which does not relate to his state of health, his qualifications or other circumstances not connected with the direct performance of his duties. 2. If these obligations are not fulfilled or are not properly fulfilled, the other party to the employment contract shall have the right to apply to the labour disputes body and claim compensation for the damage caused or to resort to any other remedy provided for in this Code."

If an employment contract has been concluded but did not enter into force without any fault on the part of the employee, the employer must pay the employee compensation in an amount no less than the employee's remuneration for the agreed period of work but no longer than one month. But in case if an employment contract was concluded but did not enter into force due to the fault of the employee, i.e. the employee failed to give the employer advance notice three working days before the agreed employment commencement date, the employee must compensate the employer for damages in an amount no more than the employee's remuneration for the agreed period of work but no longer than two weeks (Art. 42 of the LC).

The new Labour Law attempts to put the parties on an equal footing, stating that "in exercising their rights and fulfilling their duties, employers and employees must act in good faith, cooperate and not abuse the law", "Each party must exercise its rights and duties in such a way as to enable the other party to assert its rights with the least possible time and expense", "If one party fails to perform or improperly performs the obligations set out in this Article, the other party shall be entitled to damages or to have its rights protected by other means" (Art. 24 of the LC).

2.3. Procedural prerequisites for applying penalty

Based on the type of violation committed by the employee, the employer has various procedures for establishing the fact of the violation and the actions to be taken by the employer.

[51] Judgement of 12 July 2018 of the Supreme Court of Lithuania in case No. 3K-3-310- 403/2018. Available: https://eteismai.lt/ [last viewed 31.05.2024].

If an employee comes to work under the influence of alcohol or narcotic, psychotropic or toxic substances, the employer shall suspend the employee from work that day/shift, without allowing the employee to work and without paying remuneration. The law allows the employer to dismiss such an employee for fault on the grounds that "appearing drunk or under the influence of narcotic, toxic or psychotropic substances in the course of one's work at the place of work, except where such intoxication is caused by the performance of one's professional duties (Article 58 (3)(2) of the LC)" is considered to be a serious misconduct at work.

In investigating the circumstances of a possible violation of job duties committed by an employee, the employer may suspend the employee from work for up to 30 calendar days, paying the employee his or her average remuneration. Once the period of suspension is over, the employee shall be returned to the previous job, provided that grounds to terminate the employment contract did not arise due to the suspension.

In order to be able to terminate an employment contract with an employee who has committed a breach of duty, an essential condition is the determination of the employee's fault for the breach of duty. The fault of the employee can be manifested by action or inaction. In this case, the form of fault – intent or negligence – matters when it is directly provided for in the legal norm. For example, intentionally causing property damage to the employer or attempting to intentionally cause him property damage is considered a gross violation of work duties (See Art. 58(3)(5) of the LC).

Before taking the decision to terminate an employment contract, the employer must demand a written explanation from the employee, except for cases when the employee does not provide this explanation within the reasonable period established by the employer. The purpose of the above provision in Article 58(4) of the LC is to ensure that the employer has full information about the breach of employment obligations committed by the employee. By failing to request a written explanation from the employee, the employer restricts its ability to ascertain and take into account all the circumstances relevant to the decision to terminate the contract of employment pursuant to Article 58 of the LC, and also bears the risk of possible negative consequences, since the employee may not agree with the dismissal and may contest it, may point to circumstances (for example, confirming the absence of fault) which make it impossible to find that the dismissal was due to a breach of his/her duties and to apply the termination of the contract of employment pursuant to Article 58, of which the employer would have been aware had the employer decided differently to terminate the contract of employment on the grounds of fault. The Court finds that, where it is established that a serious breach of employment obligations has been committed, a breach of the provision in Article 58(4) of the LC concerning the requirement of a written explanation from the employee is not sufficient grounds for declaring the dismissal unlawful.[52]

An employment contract may only be terminated due to the same job duty violation being committed by the employee for a second time if when the first violation was established, the employee had the opportunity to provide an explanation, and the employer warned the employee, within one month of the violation coming to light, of possible dismissal for a repeat violation (Art. 58(4) of the LC).

It should be noted that the violation must be repeated within a period of twelve months, i.e. if a violation was committed, which according to the above-mentioned case law corresponds to the concept of a second violation of the same job duties, but

[52] Judgement of 28 March 2019 of the Supreme Court of Lithuania in case No. e3K-3-130-701/2019, pp. 50–51. Available: https://eteismai.lt/ [last viewed 31.05.2024].

exceeding the twelve-month period, then such a violation can be determined and the employee can be warned for such actions, but the employee cannot be dismissed, because these violations should be recorded as independent and separate, since the employee would not have violated the work order in the last twelve months.

The Supreme Court of Lithuania, noting the importance of the warning, has clarified that, in order for the grounds for termination of the contract of employment under Article 58(2)(2) of the LC to be applicable, the second breach of the employment contract must have been committed within the twelve months preceding the warning given to the employee, that is to say, the second breach must have been committed after the employee, who, after committing the first breach of his employment contract as established by the employer, and who has had the possibility of an opportunity of explaining his conduct to the employer, has been given a warning of his possible dismissal on grounds of the next offence.[53] Therefore, in the case of repeated breaches of employment obligations, the court must determine, on a case-by-case basis, whether the previous breaches of employment obligations, which have been recorded in accordance with the statutory provisions, and the subsequent breaches of employment obligations, which have been committed within a 12-month period, must be considered to be identical within the meaning of that provision of law.[54] It should be noted that the Supreme Court of Lithuania has ruled that mere references in the warning and the termination order to the same clauses of the institution's local regulations are not sufficient grounds for concluding that identical breaches of employment obligations have been committed.[55]

In order to dismiss a person under Article 58(2)(1) of the LC, the employer must prove not only that the misconduct has been committed, but also that the misconduct qualifies as grave.[56] In employment cases concerning the lawfulness and reasonableness of a disciplinary measure, the burden of proving that the disciplinary measure was lawful and reasonable rests with the employer (usually the defendant). In such cases, the employer must prove that all the conditions for disciplinary liability have been met[57].

When solving the question of whether a specific violation of work duties can be classified as gross, it is necessary to analyse its objective and subjective signs - the nature of the employee's illegal behaviour, the negative consequences caused by this violation, the degree and form of the employee's guilt, the motives and goals of the employee's actions, the influence of the actions of other persons on this violation and other important circumstances, it must also be assessed what kind of goods were violated, how clearly the duties of the employee were specified, what is the practice of assessing such or similar violations in the workplace, etc.[58] In the case law of

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[53] Judgement of 5 July 2019 of the Supreme Court of Lithuania in case No. e3K-3-244-248/2019, p. 38. Available: https://eteismai.lt/ [last viewed 31.05.2024].

[54] Ibid., p. 29.

[55] Ibid., p. 35.

[56] Judgement of 28 March 2019 of the Supreme Court of Lithuania in case No. e3K-3-130-701/201, p. 32; Judgement of 20 May 2020 of the Supreme Court of Lithuania in case No. e3K-3-158-684/2020, p. 28; Judgement of 24 February 2021 of the Supreme Court of Lithuania in case No. 3K-3-25248/2021, p. 19; Judgement of 12 May 2021 of the Supreme Court of Lithuania in case No. 3K-3-116-943/2021, p. 12.

[57] Judgement of 4 October 2004 of the Supreme Court of Lithuania in case V. B., R. Ž. v. AB "Panevėžio duona", No. 3K-3-513/2004.

[58] Judgement of 14 December 2012 of the Supreme Court of Lithuania in case No. 3K-3-562/2012; Judgement of 3 January 2013 of the Supreme Court of Lithuania in case No. 3K-3-107/2013; Judgement of 19 December 2018 of the Supreme Court of Lithuania in case No. e3K-3-461-695/2018 29, p. 30; Judgement of 27 February 2019 of the Supreme Court of Lithuania in case No. e3K-3-27-701/2019, p. 62; Judgement of 12 May 2021 of the Supreme Court of Lithuania in case No. e3K-3116-943/2021, p. 13.

the Court of Cassation (which is also relevant for the application of the provisions of the LC which entered into force on 1 July 2017), it has been pointed out that, when selecting the type of disciplinary sanction in accordance with the criteria laid down in Article 238 of the LC (which are essentially the same as the criteria laid down in Article 58(5) of the LC in force as from 1 July 2017), the employer must also assess the appropriateness of the disciplinary sanction to be applied and the impact of the sanction on the enforcement of labour discipline. The employee's attitude towards the infringement, the admission of guilt and the critical assessment of his or her conduct are also relevant to the choice of the type of disciplinary action, as they indicate whether the employer can expect the person who committed the infringement to reform himself or herself in the future, so that there is no need to be wary of his or her unlawful conduct or to fear deliberately unlawful actions. In other words, the employer shall assess the totality of the circumstances in order to decide whether there are grounds for confidence in the employee.[59] In order to establish a gross violation of labour discipline, it is not necessary in all cases that the employer suffers real losses due to the illegal actions of the employee[60].

LC does not provide the concept of the same violation of employment duties and does not otherwise disclose what is considered "the same violation of employment duties". In the assessment of the Court of Cassation, this condition should not be interpreted narrowly, as a requirement that the violations be identical, and also too broadly – so that any violation of work duties is not recognized as the same violation.[61] The Supreme Court of Lithuania decided that violations of work duties committed in the same field of activity, when the improperly performed duties are of a similar nature (for example, violations of financial discipline, violations of balancing public and private interests, violations of work safety requirements, absence from work or other violation of working time, etc.). The assessment of whether violations of work duties should be considered the same may depend on the functions performed by the employee, as well as the scope and variety of duties (for example, different criteria could be applied to managerial employees and those employees whose function is narrower). It should be emphasized that a similar opinion regarding which violations of work duties are to be considered the same is also taught in the legal doctrine.[62]

Dismissal should be a measure proportionate to the violation or entirety thereof, e.g., in one of the cases, the Court found that, in the event of a dispute, neither the law nor the provisions of the employment contract concluded by the parties make it clear that the employee had the obligation to acquire the qualifications necessary for working with the current employer at his own expense and during his rest, therefore there is no reason to state this breach of duty. The Court of Cassation drew attention to the fact that even if the failure to acquire the specified qualification would be qualified as a violation of the employee's work duties, such a violation should not be considered gross in accordance with Article 58(3)(7) of the LC.[63]

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[59] Judgement of 12 May 2021 of the Supreme Court of Lithuania in case No. e3K-3116-943/2021, p. 8.

[60] Judgement of 24 February 2021 of the Supreme Court of Lithuania in case No. 3K-3-25-248/2021, pp. 19–20.

[61] Judgement of 5 July 2019 of the Supreme Court of Lithuania in case No. e3K-3-244-248/2019.

[62] *Bagdanskis, T., Mačiulaitis, V, Mikalopas, M*. Lietuvos Respublikos darbo kodekso komentaras. Individualieji darbo santykiai [Commentary on the Labour Code of the Republic of Lithuania. Individual labour relations]. Vilnius: Rito projects, 2018, p. 253; *Bagdanskis, T.* Materialinė atsakomybė darbo teisėje [Material liability in labour law]. Vilnius, Registrų centras, 2008, p. 371.

[63] Judgement of 24 January 2021 of the Supreme Court of Lithuania in case No. 3K-3-25-248/2021, pp. 33–37.

The employer must take the decision to terminate an employment contract due to a violation committed by the employee within one month of the violation coming to light and within six months of the day that it was committed. The latter deadline shall be extended to two years if the violation committed by the employee comes to light upon carrying out an audit, an inventory check or an inspection of activities.

2.4. Consequences of applying a penalty and rights to dispute employers' resolution

A participant in an employment relationship who believes that another subject of labour law has violated his or her rights as a result of non-fulfilment or improper fulfilment of labour law provisions or mutual agreements must apply to a labour dispute commission with an application to resolve the labour dispute on rights within three months or, in cases of unlawful suspension, unlawful dismissal or breach of a collective agreement – within one month of when he or she found out or should have found out about the violation of rights (Art. 220 (1) of the LC).

The legal doctrine states that a finding of an infringement of employment obligations (except in the case of a decision to terminate the contract of employment) or a warning of possible dismissal for a second identical infringement is not subject to the procedure laid down in the Labour Disputes Act; the legality of such a finding may be examined by the labour disputes bodies only in the event that the employee contests the legality of dismissal from his/her job for serious misconduct or for a repetitive infringement of obligations in the manner laid down in Article 220(1) of the LC. The case law follows a similar line of reasoning. The Court finds that the adoption of the defendant's order establishing the applicant's breach of her employment obligations and warning the applicant of her possible dismissal for a second such breach is merely a procedural act, which did not have any substantive legal effects on the applicant, and that, in accordance with the legal provisions and case law discussed above, it follows that such an employer's order could not have been contested before the labour disputes committee or before a court.[64]

A staff member who is found to have breached his/her duties may be denied a bonus, if he/she commits a breach of his/her duties under labour law or the contract of employment during the preceding six months. The case law shows that employers impose even stricter restrictions, e.g. no bonus shall be awarded to employees who have committed serious misconduct in the last five years for perfect and continuous service with the company.[65]

It should be noted that the legislator only gives the employer such a right in respect of bonuses where the employer, on its own initiative, wishes to reward the employee for good work, performance or results (as a one-off act). Other bonuses intended to reward the employee's performance under the contract of employment, if the employer has agreed to pay them as an integral part of the salary, must be paid by the employer notwithstanding that the employee has committed a breach of duty.

Recent case law of the Court of Cassation on the qualification of bonuses paid to an employee states that a mandatory feature of a performance bonus is the establishment of clear indicators for the calculation and payment of the bonus amount. In the absence of clear indicators, there is no reason at all to classify the bonus as part of the remuneration. Such an attribute is not necessary to qualify an incentive bonus. On the other hand, this does not negate the fact that an incentive bonus

[64] Judgement of 4 April 2019 if the Vilnius District Court in case No. e2A-1350-910/2019; Judgement of 30 January 2018 of the Kaunas District Court in case No. e2S-289-773/2018.

[65] Judgement of 15 January 2024 of the Klaipėda District Court in case No. e2A-92-613/2024.

can also be defined on the basis of clear indicators for its calculation and payment. The employer's discretion to determine and pay the incentive bonus also implies the employer's right to decide on the calculation and payment of the bonus. This exercise of the employer's discretion is also manifested where, although the employer clearly defines the parameters for the calculation and payment of the bonus, the employer, while defining the parameters for payment, also establishes a rule that the bonus may be reduced or waived (withheld) in cases determined by the employer, including for breaches of labour discipline, thus confirming that the bonus is not paid as a permanent component of the remuneration.[66]

If an employee is suspended from work in the absence of a legal basis, the labour dispute resolution body shall order that the employee be reinstated and paid average remuneration for the period of forced absence and the material and non-material damage incurred. If an employee is dismissed from work in the absence of a legal basis or in violation of the procedure established by laws, the labour dispute resolution body shall take a decision to recognise the dismissal as being unlawful and to order that the employee be reinstated and paid average remuneration for the period of forced absence, from the date of dismissal to the date of enforcement of the decision but no more than one year, and the material and non-material damage incurred (Art. 218 of LC).

In case of breach of duty, the employee is threatened with dismissal. Of course, even if there is a gross violation of employment obligations or a second violation of the same employment obligations, the employer is not obliged to terminate the employment contract, but in such a situation, the future of the employee's employment relationship depends on the employer's grace. It should be noted that the termination of the employment contract due to the fault of the employee is formalized without warning, without paying the employee severance pay. However, is termination of employment the only consequence employees face? It turns out that such employees not only lose their main source of income – work, do not receive severance pay, but also because they are fired due to their fault – they do not receive unemployment insurance benefits for 3 months from the day of registration at the Employment Service.[67] This represents another negative consequence (punishment) for such employees. This regulation contradicts the Social and Employment Policy formed by the EU and Article 48 of the Treaty on the Functioning of the European Union, which stipulates that "the European Parliament and the Council shall take the measures necessary to ensure the free movement of workers in the field of social security; to this end, they adopt provisions to ensure for migrant workers and self-employed workers and their dependents: the payment of social benefits to persons living in the territories of the Member States"[68].

Summary

Although the laws and regulations of Latvia and Lithuania are quite similar in many legal issues, there are several differences in the regulation of disciplinary liability in labour relations. While two types of punishment are recognized as disciplinary

[66] Judgement of 2 February 2023 of the Supreme Court of Lithuania in case No. 3K-3-3-403/2023, p. 85. Judgement of 16 November 2022 of the Supreme Court of Lithuania in case No. e3K-3-260-1075/2022, pp. 34–35.

[67] Lietuvos Respublikos valstybinio socialinio draudimo įstatymas [Law on State Social Insurance of the Republic of Lithuania]. Lietuvos Aidas, 3 March 2023 .

[68] Consolidated version of the Treaty on the Functioning of the European Union. Available: https://eur-lex.europa.eu/legal-content/LT/ALL/?uri=CELEX%3A12012E%2FTXT [last viewed 06.06.2024].

punishments in labour law in Latvia – a reproof and a reprimand, Lithuania has refused such types of disciplinary punishment since 2017, and the most severe punishment in Lithuania nowadays is the employer's right to terminate an employee's employment contract. It should be noted that the regulation of disciplinary punishments has been preserved in the public sector, including civil service.

In general, disciplinary liability is a specific type of liability in employment relations, which by their nature are legal relations existing in the field of private law and regulated by an employment contract. As concluded above, the nature of work itself has changed over more than 10 years, bringing the relationship between employee and employer closer to a contractual relationship of equals, therefore a change of understanding has taken place in Lithuania, avoiding the understanding of "punishment" and reorienting to the enforcement of agreements, the recognition of the parties as equal partners in the employment relationship.

The experience of both countries shows that questions about the employee's liability often come up for consideration in the courts of these countries, and case law provides important insights into the interpretation of these questions. For example, in Latvian jurisprudence, in order to separate the employee's disciplinary punishment mechanisms from the employer's right to terminate the employment contract, the principle of prohibition of double jeopardy principle or *ne bis in idem* has been defined, i.e., case law has recognized that disciplinary punishment and termination of employment cannot be imposed at the same time.

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Natural Language, Legal Hurdles: Navigating the Complexities in Natural Language Processing Development and Application

Mg. iur. **Ilya Ilin**
Faculty of Law, University of Tartu
Doctoral student
E-mail: *ilya.ilin@ut.ee*

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

This article delves into the legal challenges faced in developing and deploying Natural Language Processing (NLP) technologies, focusing particularly on the European Union's legal framework, especially the DSM Directive, the InfoSoc Directive, and the Artificial Intelligence Act. It addresses the legal status and accessibility of language data and the development of NLP technologies under both contractual and exception-based models. The authors acknowledge the partial truth in the saying, "US innovates, China replicates, and the EU regulates". Although Europe's AI sector is a global competitor and its strict regulations ensure ethical standards and data protection, these regulations might not necessarily boost competitiveness. Such stringent regulations can introduce complexities that may inhibit innovation relative to regions with more lenient policies.

Keywords: natural language processing, copyright, artificial intelligence.

Contents

Introduction

Natural language processing (NLP) represents a specialized branch of artificial intelligence (AI) focused on enabling machines to interpret and interact with human language. This technology empowers computers to comprehend, recognize, process, and produce spoken and written forms of human communication.[1] Article 3(1) of the Artificial Intelligence Act[2] defines an AI system as

> *a machine-based system designed to operate with varying levels of autonomy, that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.*

The development of artificial intelligence (AI), particularly in the realm of NLP, has sparked numerous legal debates globally. This article seeks to add to these scholarly conversations, presenting the authors' initial perspective on the prevailing legal issues, especially within the ambit of intellectual property[3] (IP) law. Emphasis is placed predominantly on issues pertaining to copyright and related (neighbouring) rights.[4] The primary emphasis of this manuscript is on copyright, while due to the focus of the paper and space limitations, the systematic analysis of issues pertaining to trade secrets and personal data is absent. To a certain degree, the paper engages with the contractual dimensions of NLP. Specifically, it scrutinizes how the contractual terms governing NLP applications delineate the parameters for the utilization of user-generated input data, such as prompts and descriptions. Moreover, the relevance of contractual terms extends to the outputs of NLP, as they may confer *de facto* ownership rights and impose restrictions on use.

This paper expands its analysis beyond the mere development of NLP applications to explore the intricacies of their usage. It focuses on two main areas: firstly, the input aspects of NLP, which involve accessing and using language data[5] protected by copyright and related rights; and secondly, the legal status of the outcomes generated by NLP applications.

The authors highlight the lack of clarity of the existing legal framework in the EU to effectively manage the distinctive challenges brought forth by the evolution and

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[1] *Barthélemy, F., Ghesquière, N., Loozen, N. et al.* Natural language processing for public services. European Commission, Directorate-General for Digital Services. Publications Office of the European Union, 2022. Available: https://data.europa.eu/doi/10.2799/304724 [last viewed 14.04.2024].

[2] European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.html [last viewed 14.04.2024].

[3] Intellectual property (IP) includes rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization (as amended on 28 September 1979). Available: https://www.wipo.int/wipolex/en/text/283854 [last viewed 14.04.2024]. IP is traditionally divided into three main categories: copyright, related rights and industrial property.

[4] In the context of the article, the term "copyright" is frequently used to encompass related rights.

[5] According to Article 2 (1) of the Data Governance Act, "'data' means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording". Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act). OJ L 152, 3.6.2022, pp. 1–44. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0868&qid=1712322025563 [last viewed 14.04.2024].

implementation of NLP applications. This inadequacy is particularly evident in the legal ambiguity surrounding the training data (input) and the generated content (output). Such a lack of legal clarity could potentially have an adverse effect on the development and utilization of NLP technologies.

The authors argue that the regulatory framework for NLP, as outlined by the DSM Directive[6] and the InfoSoc Directive[7] in conjunction with the Artificial Intelligence Act, supports NLP development under a contractual model that imposes a remuneration obligation on AI service providers. This stifles innovation within Europe. Detailed arguments are presented below.

Before the adoption of the DSM Directive, NLP development primarily relied on the exceptions for temporary acts of reproduction, personal use, quotation rights, and research as defined in the InfoSoc Directive. The authors maintain that these exceptions remain pertinent today.

The DSM Directive introduced two exceptions for Text and Data Mining (TDM): the general-purpose TDM exception (Article 4) and the TDM exception for research (Article 3). However, both of these exceptions come with limitations that restrict the development and use of NLP technologies in Europe.

A common legal challenge for both TDM exceptions involves the legal uncertainty surrounding the concept of lawful access. It would benefit the development of NLP, if the concept of lawful access did not necessarily include access to a legal source. However, the authors argue that such an interpretation would conflict with the three-step test.

The main challenge of the general-purpose TDM (Text and Data Mining) exception concerns the rightsholder's opt-out right, which is reinforced by the transparency obligation of the AI Act. The TDM exception for research does not involve the opt-out right, but the primary issue is whether a provider of AI services can use a language model developed under this exception outside research settings. The authors express doubts about this possibility.

Legal challenges related to the output of NLP include the legal status of prompts, and further issues concerning the output of NLP encompass ethical and ownership implications. From an ethical perspective, the use of AI is not inherently negative; however, a transparency obligation should be enforced. Due to the absence of property rights covering NLP output, the contractual standard terms dictated by AI service providers prevail.

This research is mainly confined to the European Union (EU) legal framework. Given the United States' status as a leading knowledge-based economy and the international consensus on certain elements of its copyright system manifested among others in the TRIPS Agreement[8], examples from the US are also incorporated. The cases chosen to highlight legal issues extend beyond spoken and written language,

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[6] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive). OJ L 130, 17.5.2019, pp. 92–125. Available: http://data.europa.eu/eli/dir/2019/790/oj [last viewed 14.04.2024].

[7] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) OJ L 167, 22.6.2001, pp. 10–19. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0029&qid=1712245927823 [last viewed 14.04.2024].

[8] Agreement on Trade-Related Aspects of Intellectual Property Rights, amended on 23 January 2017 (TRIPS Agreement). Available: https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm [last viewed 14.04.2024].

encompassing audio, video, and image materials. The analysis builds upon the authors' preceding work rather than commencing from scratch.[9]

This article's sentence structure and communicative effectiveness were enhanced with the assistance of *OpenAI's ChatGPT* and *Grammarly*. However, it is important to clarify that the substantial analytical content and core insights were exclusively the work of the authors.

1. Natural Language Processing (NLP): The technological perspective

NLP lacks a universal legal definition, prompting discussions on its relationship with the broader AI concept and its role within AI legal frameworks. A concise overview of NLP technology will be provided to clarify this linkage.

NLP is not a new technology; its roots trace back to the 1950s, when researchers began exploring ways to enable machines to understand and interact with human language.[10] Over the decades, NLP has undergone significant development, with milestones such as the advent of rule-based systems in the 1960s and the rise of statistical models in the 1990s.[11] In recent years, the prominence of neural networks, particularly deep learning models, has marked a substantial breakthrough in NLP, showcasing the capability to handle extensive text data, comprehend intricate language patterns, and perform various tasks like machine translation, sentiment analysis, and text classification.[12] Concurrently, the emerging field of "generative AI" has gained significance. Large Language Models (LLMs) models like *GPT-3* exemplify the progress in this domain by generating human-like text and contributing to significant advancements in natural language understanding and content generation.[13]

In general, the development of NLP technology involves several stages, starting with language data collection, where vast amounts of text data are gathered from diverse sources. This is followed by pre-processing to clean and prepare the data (data preprocessing).[14] Next, the model training stage involves using machine learning

[9] See, e.g., *Kelli, A., Tavast, A., Lindén, K.* Building a Chatbot: Challenges under Copyright and Data Protection Law. In: Contracting and Contract Law in the Age of Artificial Intelligence. *Ebers, M., Poncibò, C., Zou, M.* (eds). Bloomsbury Publishing, 2022, pp. 115–134; *Ilin, I.* Legal Regime of the Language Resources in the Context of the European Language Technology Development. In: Human Language Technology. Challenges for Computer Science and Linguistics. Springer Nature Switzerland AG: Lecture Notes in Computer Science, 13212, 2022, pp. 367–376. Available: https://doi.org/10.1007/978-3-031-05328-3_24 [last viewed 14.04.2024].

[10] *King, M. R., & ChatGPT.* A conversation on artificial intelligence, chatbots, and plagiarism in higher education. Cellular and molecular bioengineering, 16(1), 2023, pp. 1–2. Available: https://doi.org/10.1007/s12195-022-00754-8 [last viewed 14.04.2024]; *Weizenbaum, J.* ELIZA – a computer program for the study of natural language communication between man and machine. Communications of the ACM, 9(1), 1966, pp. 36–45. Available: https://doi.org/10.1145/365153.365168 [last viewed 14.04.2024].

[11] *Feng, Z.* Past and Present of Natural Language Processing. In: Formal Analysis for Natural Language Processing: A Handbook. Singapore: Springer, 2023, pp. 3–48. Available: https://doi.org/10.1007/978-981-16-5172-4_1 [last viewed 14.04.2024].

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[13] *Foster, D.* Generative Deep Learning: Teaching Machines to Paint, Write, Compose, and Play (Japanese Version). O'Reilly Media Incorporated, 2019, pp. 139–140.

[14] *Goldberg, Y.* Features for Textual Data. In: Neural Network Methods for Natural Language Processing. Synthesis Lectures on Human Language Technologies. Springer, Cham. 2017, pp. 65–76. Available: https://doi.org/10.1007/978-3-031-02165-7_6 [last viewed 14.04.2024].

algorithms to learn patterns and structures in the data (model training).[15] After training, the model is evaluated and fine-tuned to improve its performance on language tasks (evaluation and fine-tuning). Finally, deployment involves making the model available for use in applications, with ongoing monitoring and updates based on feedback and advancements in technology (deployment and continuous improvement).

The creation of language datasets inherently involves the extensive use of language data. These data include textual data (e.g. written texts, transcribed speech, annotated sentences), speech data (e.g. audio recordings, phonetic and prosodic annotations), and multimodal data (e.g. image and text pairs, video and text, audio-text alignments).[16]

Following the development and deployment of a language model, the capacity to generate textual outputs accrues. These outputs may derive from discernible patterns and insights acquired during the training phase or be guided by specific instructions, commonly called prompts. For example, language models like *ChatGPT* generate textual outputs by interpreting user prompts, which guide the model in addressing specific tasks through semantic analysis and contextual understanding.[17] These prompts, serving as user inputs, lead to the generation of outputs through NLP algorithms, primarily transformer-based models[18], enabling the model to produce coherent and contextually appropriate responses. Put differently, prompts are converted into the resulting output. From a legal standpoint, the status of prompts in the realm of AI-generated content entails various complexities, predominantly concerning IP rights, contractual duties, and regulatory compliance.

At the same time, AI-generated content can be delivered across a spectrum of formats. These include text-based outputs like articles, stories, chatbot responses, and code snippets. Additionally, NLP models can generate structured data, such as tables or datasets, and contribute to interactive experiences like virtual assistants or personalized recommendations. The format of the generated content depends on factors such as input data, the capabilities of the NLP model, and the intended use case or platform.

2. Legal challenges related to the development of NLP

2.1. Language data access: copyright and related rights protection

Language data, crucial for NLP development, comes from a wide range of sources. This includes social media, speech and audio content websites, online publications, and sharing platforms like *GitHub*, as well as specialized repositories like *CLARIN*[19]

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[15] *Zhou, M., Duan, N., Liu, S., & Shum, H. Y.* Progress in neural NLP: modeling, learning, and reasoning. Engineering, 6(3), 2020, pp. 275–290. Available: https://doi.org/10.1016/j.eng.2019.12.014 [last viewed 14.04.2024].

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[17] *Mishra, S., Khashabi, D., Baral, C., Choi, Y., & Hajishirzi, H.* Reframing Instructional Prompts to GPTk's Language. 2021. Available: https://doi.org/10.48550/arXiv.2109.07830 [last viewed 14.04.2024].

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[19] Common Language Resources and Technology Infrastructure (CLARIN). Available: https://www.clarin.eu/content/clarin-nutshell [last viewed 14.04.2024].

and OpenCorpora, governmental[20] and institutional databases. Each source presents distinct opportunities and challenges regarding accessibility, quality, and legal considerations, highlighting the complex process of acquiring language data for NLP projects. The collection and processing of this data give rise to numerous legal considerations, covering areas such as intellectual property rights, data protection regulations, contract law, tort law, and other relevant legal fields.

Web scraping, a common data collection method, carries legal risks, including contract violations and copyright infringement. Illegally scraping copyrighted content or violating website terms of service may result in legal consequences, emphasizing the importance of careful data acquisition practices.[21] The issue is highlighted in the case of Doe et al. v. *GitHub*, *Inc.* et al.,[22] where *Microsoft*, *GitHub*, and *OpenAI* are accused of extensive "software piracy" through their AI coding assistant, *GitHub Copilot*. *GitHub Copilot* learns from publicly available code repositories scraped from the internet. Plaintiffs argue that by using this data, the defendants violated the rights of creators who shared code under open-source licenses, such as MIT and GPL, which require crediting the author. Furthermore, the defendants are accused of violating *GitHub's* terms of service and privacy policies.

Data sharing and reuse also bring up data ownership, integrity rights, and ethics issues. Recent discourse has highlighted data poisoning, as seen in the Nightshade article,[23] where artists counteract generative AI's unwanted content harvesting by intentionally manipulating data. This emphasizes the critical need to tackle legal issues related to copyrights and related rights legislation, such as whether data poisoning to prevent its harvesting could constitute a technological protection measure within the meaning of the InfoSoc Directive.

From the perspective of IP law, language data as such is often eligible for protection under copyright and related rights legislation. According to Article 2(1) of the Berne Convention[24], "'literary and artistic works' shall include every production in the literary, scientific and artistic domain". The Court of Justice of the European Union (CJEU), citing several cases, reiterates:

> *The concept of 'work' that is the subject of all those provisions constitutes, as is clear from the Court's settled case-law, an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, that concept entails that there exists an original subject matter, in the sense of being the author's own intellectual*

[20] Data Governance Act plays an essential role in the re-use of data held by public sector bodies and data intermediation services. For further discussion, see *Kamocki, P., Linden, K., Puksas, A., Kelli, A.* EU Data Governance Act: Outlining a Potential Role for CLARIN. In: CLARIN Annual Conference 2022, *Erjavec, T., Eskevich, M.* (eds). Linköping Electronic Conference Proceedings, 2023, pp. 57–65. Available: https://doi.org/10.3384/ecp198006 [last viewed 14.04.2024].

[21] *Pagallo, U., & Sciolla, J. C.* Anatomy of web data scraping: ethics, standards, and the troubles of the law. European Journal of Privacy Law & Technologies, No. 2, 2023, pp. 6–7, 9–10. Available: https://dx.doi.org/10.2139/ssrn.4707651[last viewed 14.04.2024].

[22] Class Action Complaint and Demand for Jury Trial in case No. 3:22-cv-06823, Doe et al. v. GitHub, Inc. et al., United States District Court for the Northern District of California. Available: https://githubcopilotlitigation.com/pdf/06823/1-0-github_complaint.pdf [last viewed 14.04.2024].

[23] *Heikkila, M.* This new data poisoning tool lets artists fight back against generative AI. 2023. Available: https://www.technologyreview.com/2023/10/23/1082189/data-poisoning-artists-fight-generative-ai [last viewed 14.04.2024].

[24] Berne Convention for the Protection of Literary and Artistic Works, signed at Berne on 9 September 1886 (Berne Convention). Available: https://www.wipo.int/wipolex/en/text/283698 [last viewed 14.04.2024].

> *creation. Second, classification as a work is reserved to the elements that are the expression of such creation.*[25]

CJEU also holds that the significant labour and skill cannot, as such, justify copyright protection, if they do not express any originality.[26]

Since copyright-protected work is an autonomous concept of the EU, the EU Member States need to take it into account when implementing and interpreting their copyright laws.[27] When it comes to NLP development, a reference must be made to the seminal *Infopaq* case, which suggests that copyright might subsist in a work comprising 11 consecutive words.[28] Advocate General Szpunar has suggested that even a book title such as *All Quiet on the Western Front* by Erich Maria Remarque naturally enjoyed copyright protection, together with the work as a whole.[29]

Related rights, such as those of performers, phonogram producers, *sui generis* database creators, broadcasters, and press publishers, are pertinent to NLP. Identifying the beneficiaries of these rights presents complexities akin to authorship determination. Particularly, when the beneficiary is a performer, verifying their identity is essential, highlighting similar challenges to identifying a work's author. This reflects the nuanced legal aspects of acknowledging and adhering to the rights relevant to NLP tasks.[30]

However, not every piece of language data is subject to copyright and the related rights protection. In the research literature, three types of language data could be outlined: works not covered by copyright (e.g. legal statutes, official documents), "safe" texts (e.g. manuals, technical documents, and official reports[31]), and

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[25] Judgment of the Court of Justice of the European Union of 12 September 2019, case No. C-683/17, Cofemel Sociedade de Vestuário SA v. G-Star Raw CV, para. 29. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=217668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9984025 [last viewed 14.04.2024].

[26] Judgment of the Court of Justice of the European Union of 1 March 2012, case No. C-604/10, Football Dataco Ltd, et al. v. Yahoo! UK Ltd, et al. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=119904&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2084171 [last viewed 14.04.2024].

[27] E.g, for further discussion on the evolution of the concept of work in Estonian copyright law, see *Kelli, A., Lepik, G.* Originality as a Key Concept of the Estonian Copyright Law. In: Handbook on Originality in Copyright. *Gupta, I.* (ed.). Singapore: Springer, 2023, pp. 1–19. Available: https://doi.org/10.1007/978-981-19-1144-6_10-1 [last viewed 14.04.2024].

[28] Judgment of the Court of Justice of the European Union of 16 July 2009, case No. C-5/08, Infopaq International A/S v. Danske Dagblades Forening, para. 48, 51. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=72482&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1892287 [last viewed 14.04.2024].

[29] Opinion of Advocate General Szpunar delivered on 25 October 2018, case No. C-469/17, Funke Medien NRW GmbH v. Bundesrepublik Deutschland, para. 1. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CC0469&qid=1669110125285 [last viewed 14.04.2024].

[30] *Ilin, I.* Legal Regime of the Language Resources in the Context of the European Language Technology Development. In: Human Language Technology. Challenges for Computer Science and Linguistics. LTC 2019. Lecture Notes in Computer Science, *Vetulani, Z., Paroubek, P., Kubis, M.* (eds). Springer, Cham, Vol. 13212, 2022, pp. 367–376. Available: https://doi.org/10.1007/978-3-031-05328-3_24 [last viewed 14.04.2024].

[31] As a matter of fact, in the Funke Medien case, CJEU asserted that military status reports "can be protected by copyright only if those reports are an intellectual creation of their author which reflect the author's personality and are expressed by free and creative choices made by that author in drafting those reports". Judgment of the Court of Justice of the European Union of 29 July 2019, case No. C-469/17, Funke Medien NRW GmbH v. Bundesrepublik Deutschland, para. 25. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10024671 [last viewed 14.04.2024].

copyright-protected texts.[32] Nonetheless, from a practical standpoint, relying solely on texts that are not covered by copyright to build datasets is insufficient. The limited volume and variety of such data would not support the development of an effective language model in that the use of "safe" and copyright-protected text becomes uninventable.[33]

To determine whether a text is protected by copyright, or if a "safe" text is copyrighted, the originality of the text must be assessed. The extensive body of caselaw harmonises the concept of originality at the EU level. It was already indicated in the *Infopaq* case that "copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation".[34] As seen, the originality is rooted in the concept of the author's creativity. In most EU Member States, copyright protection is contingent upon the work being a product of the author's intellect and personality, with the author typically being defined as a human being (e.g., Germany, Spain, France, Estonia). The human author approach is also supported by the analysis of Article 6*bis* of the Berne Convention, which regulates moral rights.[35]

The "human authorship" requirement introduces legal complexities for texts produced by AI with minimal human input. Copyright law analysis indicates that works generated without human effort are not eligible for copyright protection. Aware of this issue, AI service providers, including *OpenAI*, have instituted measures to curtail the use of AI-generated content for competing NLP development. Consequently, *OpenAI's* Terms of Use explicitly prohibit utilizing its outputs "to develop models that compete with *OpenAI*".[36] It is pointed out in the legal literature that since "the outputs of these applications are not protected by copyright, copyright exceptions, including the TDM exceptions, cannot apply to them".[37]

The act of gathering data not directly from the original sources but through intermediaries, such as social media platforms and repositories, introduces further legal intricacies. This approach imposes an additional layer of rights, typically those associated with *sui generis* database makers, necessitating careful legal navigation to address these rights adequately.[38]

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[32] *Truyens, M., Van Eecke, P.* Legal aspects of text mining. Computer Law & Security Review, 30(2), 2014, pp. 153–170. Available: https://doi.org/10.1016/j.clsr.2014.01.009 [last viewed 14.04.2024].

[33] *Ilin, I., & Kelli, A.* The use of human voice and speech in language technologies: the EU and Russian intellectual property law perspectives. Juridica International, Vol. 28, 2019, pp. 17–27.

[34] Judgment of the Court of Justice of the European Union of 16 July 2009, case No. C-5/08, Infopaq International A/S v. Danske Dagblades Forening, para. 37. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=72482&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1892287 [last viewed 14.04.2024].

[35] For further discussion, see *Kamocki, P., Bond, T., Lindén, K., Margoni, T., Kelli, A., Puksas, A.* Mind the Ownership Gap? Copyright in AI-generated Language Data, 2024. Linköping University Electronic Press (forthcoming).

[36] OpenAI. Terms of use. Effective: January 31, 2024. Available: https://openai.com/policies/terms-of-use [last viewed 14.04.2024].

[37] *Kamocki, P., Bond, T., Lindén, K., Margoni, T., Kelli, A., Puksas, A.* Mind the Ownership Gap? 2024 (forthcoming).

[38] *Kamocki, P., Hannesschläger, V., Hoorn, E., Kelli, A., Kupietz, M., Lindén, K., Puksas, A.* Legal Issues Related to the Use of Twitter Data in Language Research, 2022, pp. 68–75. In: Selected Papers from the CLARIN Annual Conference 2021. Linköping Electronic Conference Proceedings, *Monachini, M., Eskevichm, M.* (eds). Available: https://doi.org/10.3384/ecp1897 [last viewed 14.04.2024].

Therefore, the challenge of data access emerges distinctly. Recent legal actions in the US against OpenAI[39] underscore the conflict between authors or rights holders, who demand recognition and fair compensation for their copyrighted works, and NLP developers, who need broad access to data to build efficient language models. Nonetheless, the issue of accessing language data is not simply about balancing copyright and related rights against NLP developers' needs; it encompasses more intricate complexities.

NLP technology has substantial economic and social implications, engaging governmental and individual stakeholders in its advancement. End-users of NLP applications seek to safeguard their fundamental rights (e.g. the right to privacy), whereas governments focus on promoting economic, cultural, and social advancement. Balancing copyright and related rights with both public and private interests is crucial. Yet, this balancing act becomes increasingly challenging in the digital era, where the distinction between public and private interests often blurs. Interests among governments, businesses, and individuals are dynamic and may conflict, complicating the effort to reconcile these competing priorities.[40]

Even without exhaustive analysis, it is apparent that copyright and/or related rights typically safeguard data requisite for NLP development. Furthermore, additional restrictions may arise from the terms of service of repositories or social media platforms from which the data is harvested, along with an extra tier of rights, such as *sui generis* database rights. Consequently, the principal legal challenges in NLP development revolve around the accurate identification of the appropriate legal foundations for such activities.

Copyright-wise, NLP development mainly operates within two frameworks: the contractual model and the exception model. Additionally, hybrid models can arise, mixing contractual agreements with copyright exceptions for language data use. Due to its legal complexities and challenges, the following sections will examine both models, especially the exception model. This analysis is vital for grasping the complicated legal environment of NLP development and managing the delicate equilibrium between utilizing data for technological progress and adhering to copyright and related rights.

2.2. NLP development under the contractual model

The political discussions surrounding contractual models are not novel. The "Licences for Europe" stakeholder dialogue, initiated in 2013, includes Working Group (WG) 4, which outlines the Commission's objective as: "to promote the efficient use of text and data mining (TDM) for scientific research purposes. TDM currently requires contractual agreements between users (e.g. typically research institutions)

[39] Class Action Complaint and Demand for Jury Trial in case No. 1:24-cv-00084, Nicholas Gage v. Microsoft, OpenAI, United States District Court for the Southern District of New York. Available: https://fingfx.thomsonreuters.com/gfx/legaldocs/klvydkdklpg/OPENAI%20COPYRIGHT%20LAWSUIT%20basbanescomplaint.pdf [last viewed 14.04.2024]; Complaint and Demand for Jury Trial in case No. 1:23-cv-11195, the New York Times company v. Microsoft, OpenAI, United States District Court for the Southern District of New York. Available: https://nytco-assets.nytimes.com/2023/12/NYT_Complaint_Dec2023.pdf [last viewed 14.04.2024].

[40] For instance, some individuals may argue for adequate representation in training data to reduce potential discrimination, while authors might demand fair compensation for data use, possibly decreasing available training data. This illustrates the challenge of balancing ethical considerations in AI development with authors' rights, highlighting the complexity of aligning various interests in NLP technology.

and rights holders (e.g. publishers of scientific journals) to establish the modalities for technical access to the relevant data sets".[41]

The contractual model requires AI developers to obtain copyright holders' permission to use copyrighted materials, favouring rightsholders to ensure their participation in the AI-driven value chain. This motivates them to publicize agreements to influence AI development regulations. This model fosters collaboration between copyright owners and AI developers, supporting innovation within legal boundaries. For example, a press release highlights a strategic partnership between *BRIA*, a proprietary AI visual content tool developer, and Getty Images, a leading global visual content creator and marketplace. This agreement permits creatives to adapt images to their specific requirements using intuitive AI tools on *Getty Images*' platform.[42] In contrast, there is a legal case where *Getty Images* initiated a lawsuit against *Stability AI*, the creator of the AI art generator *Stable Diffusion*, accusing it of infringing upon *Getty Images*' rights.[43]

The contractual model tackles legal challenges in commercial research and creating language datasets and models for business. Yet, it faces practical difficulties, such as identifying rightsholders for anonymous blog posts or orphan works, leading to time-consuming and costly processes that can slow NLP development. The need for vast amounts of language data exacerbates this issue.

The use of the contractual model differs among internet giants like *Google* and *Yandex* in NLP development. For example, *Yandex's* voice assistant Alice sources input not just from its app but also from *Yandex's* other services (like navigation, taxi, and translation), integrating appropriate clauses in the licenses for these services.[44] *OpenAI's ChatGPT* terms stipulate that *OpenAI* can use content (input and output data) to deliver, maintain, develop, and enhance its services.[45] However, when developers lack proprietary materials for language data, employing the contractual model becomes expensive and time-consuming.

The contractual model can be broadly viewed as a social contract between creators and AI developers, suggesting a mutual understanding and agreement on the use of creative content in AI development.

Research literature suggests that generative AI systems have the potential to replace human creators in certain contexts. To address the potential displacement of human creators by generative AI systems, a proposed solution is to "introduce an output-oriented levy system that imposes a general payment obligation on all providers of generative AI systems in the EU. In contrast to remuneration systems based on

[41] European Commission. "Licences for Europe" stakeholder dialogue. 22 December 2017. Available: https://digital-strategy.ec.europa.eu/en/library/licences-europe-stakeholder-dialogue [last viewed 14.04.2024].

[42] BRIA Partners with Getty Images to Transform Visual Content Through Responsible AI. 25 October 2022. Available: https://investors.gettyimages.com/news-releases/news-release-details/bria-partners-getty-images-transform-visual-content-through [last viewed 14.04.2024].

[43] *Vincent, J.* Getty Images sues AI art generator Stable Diffusion in the US for copyright infringement. 6 February 2023. Available: https://www.theverge.com/2023/2/6/23587393/ai-art-copyright-lawsuit-getty-images-stable-diffusion [last viewed 14.04.2024].

[44] *Ilin, I.* Legal Regime of the Language Resources in the Context of the European Language Technology Development. In: Human Language Technology. Challenges for Computer Science and Linguistics. LTC 2019. Lecture Notes in Computer Science, *Vetulani, Z., Paroubek, P., Kubis, M.* (eds). Springer, Cham: 2022, Vol. 13212, pp. 367–376. Available: https://doi.org/10.1007/978-3-031-05328-3_24 [last viewed 14.04.2024].

[45] OpenAI. Terms of use. Effective: January 31, 2024. Available: https://openai.com/policies/terms-of-use [last viewed 14.04.2024].

AI training activities, this alternative approach would not weaken the position of the European AI sector or make the EU less attractive as a region for AI development. Even more importantly, an output-oriented AI levy system can be combined with mandatory collective rights management".[46]

The authors regard the proposal for an output-oriented levy system as innovative and stimulating, recognizing its potential benefits. However, implementing such an approach would involve significant political decision-making on many practical aspects. Essentially, this model would shift from granting authors exclusive rights (the right to prevent others from using their work for AI development) to entitling them to remuneration. This shift raises questions about how to distribute the collected levy among rightsholders (blank tape or private copying levy system serve here as a possible example) and to what extent AI developers must disclose the works and related rights objects utilized. Although the AI Act mandates transparency obligations, the question remains as to how detailed such transparency reports must be and whether this level of detail is technically feasible. Consequently, the likelihood of this suggested model being adopted appears slim.

In summary, the contractual model for accessing copyrighted materials requires identifying rightsholders (including the reliance on the extended collective rights management) and establishing negotiation and licensing agreements, adding complexity and potential costs to NLP development. This challenge is intensified by the requirement for a large volume of works for AI development. The proposal to implement an output-oriented levy system is innovative but encounters a need for political decisions and numerous practical hurdles.

2.3. NLP development under the exception model

The authors explore other copyright exceptions relevant to NLP development before delving into the TDM exception. The authors contend that aside from the TDM exception, NLP development benefits from the exception for temporary acts of reproduction, the personal use exception, the quotation right and the research exception established prior to the adoption of the DSM Directive.[47]

The key copyright exceptions pertinent to NLP development are outlined in Article 5 of the InfoSoc Directive. Case law consistently reiterates that exceptions and limitations to the reproduction right and the right of communication to the public are exhaustively enumerated in Article 5 of the InfoSoc Directive.[48] This does not imply that other directives are precluded from introducing copyright exceptions and

[46] *Senftleben, M.* Generative AI and Author Remuneration. International Review of Intellectual Property and Competition Law, 54, 2023, pp. 1535–1560. Available: https://doi.org/10.1007/s40319-023-01399-4 [last viewed 14.04.2024].

[47] For an in-depth discussion on the exceptions and their impact in the area before the DSM Directive's implementation, see *Eckart de Castilho, R., Dore, G., Margoni, T., Labropoulou, P. & Gurevych, I.* A Legal Perspective on Training Models for Natural Language Processing. Proceedings of the Eleventh International Conference on Language Resources and Evaluation (LREC 2018), Miyazaki, Japan, ELRA, 2018, pp. 1267–1274. Available: http://www.lrec-conf.org/proceedings/lrec2018/pdf/1006.pdf [last viewed 14.04.2024]; *Kelli, A., Tavast, A., Lindén, K., Vider, K., Birštonas, R., Labropoulou, P., Kull, I., Tavits, G., Värv, A., Stranák, P., Hajic, J.* The Impact of Copyright and Personal Data Laws on the Creation and Use of Models for Language Technologies. In: Selected Papers from the CLARIN Annual Conference 2019, *Simov, K., Eskevich, M.* (eds). Linköping University Electronic Press, 2020, pp. 53–65. Available: http://doi.org/10.3384/ecp2020172008 [last viewed 14.04.2024].

[48] Judgment of the Court of Justice of the European Union of 16 November 2016, case No. C-301/15, Marc Soulier, Sara Doke v. Premier ministre, Ministre de la Culture et de la Communication, para. 34. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=185423&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=164343 [last viewed 14.04.2024].

limitations. Instead, the concept is that exceptions and limitations should not derive from broad general principles. Nevertheless, these general principles (e.g., freedom of speech) can play a role in influencing the interpretation of copyright exceptions and limitations as stipulated by directives.

The InfoSoc Directive outlines mandatory exceptions, which EU Member States are required to implement, and optional exceptions, which Member States can choose to adopt or not, relevant to NLP development. The optional nature of several exceptions has led to fragmentation within the regulatory frameworks governing TDM in the EU prior to the DSM Directive. It remains unclear whether the applicability of the referenced copyright exceptions can be contractually restricted. Given the policy objectives underlying these exceptions, it could be argued that they possess a mandatory character, rendering any contractual terms that limit their application void.

The sole mandatory exception pertains to temporary acts of reproduction, as delineated in Article 5(1) of the InfoSoc Directive. This provision holds particular relevance to NLP development. Recital 9 of the DSM Directive notes that TDM activities not involving reproduction, or where reproductions are covered by this exception, should continue to be permissible. This facilitates certain NLP processes without infringing copyright laws, provided they do not exceed the scope of this exception.

The personal use exception[49] might benefit certain NLP developments, yet it comes with notable restrictions. Firstly, it cannot underpin large-scale activities. Secondly, it is unclear whether a language model developed under this exception can be utilized for other purposes, such as business.

Article 5(3)(d) of the InfoSoc Directive permits quotations for purposes like criticism or review if they pertain to a lawfully publicised work or subject matter. It stipulates that the source, including the author's name, should be cited unless impossible, and the use must align with fair practice and be proportionate to the intended purpose. The right to quotation, permitting the use of short excerpts from a work, could be considered a legal foundation for NLP development. However, EU case law[50] clarifies that quoting presupposes an intention to engage in a "dialogue" with the work. Given that NLP development does not entail such dialogue, the right to quotation does not provide a suitable legal basis for it.

Before adopting the TDM exception in the DSM Directive, the research exception outlined in Article 5(3)(a) of the InfoSoc Directive likely served as a legal basis for NLP development. This exception permits "scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved".

All exceptions must align with the three-step test. Internationally, this test is embedded within the Berne Convention (Article 9(2)), the TRIPS Agreement (Article 13), and the WIPO Copyright Treaty[51] (Article 10). The three-step test is articulated at the EU level in Article 5(5) of the InfoSoc Directive. The CJEU, drawing upon established jurisprudence, maintains that the exceptions aim to establish a "fair

[49] InfoSoc Directive Art. 5 (2) (b).

[50] Judgment of the Court of Justice of the European Union of 29 July 2019, case No. C-476/17, Pelham GmbH, Moses Pelham, Martin Haas v. Ralf Hütter, Florian Schneider-Esleben, para. 71. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216552&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=547686 [last viewed 14.04.2024].

[51] WIPO Copyright Treaty. Adopted in Geneva on December 20, 1996. Available: https://www.wipo.int/wipolex/en/text/295166#P86_11560 [last viewed 14.04.2024].

balance" between the rights and interests of authors, on the one hand, and the rights of users pertaining to protected subject matter, on the other.[52]

2.4. NLP development under the TDM exception

Text and data mining (TDM) is "any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations".[53] This legal definition offers a broad understanding of TDM activities, emphasizing their primary objective of generating new information. Although this definition provides a comprehensive framework, TDM activities involve a variety of techniques tailored to specific mining purposes, which may lead to potential legal complexities across different fields. Although the law groups "text" and "data" mining together, their technical processes may not necessarily be identical. While many researchers consider text mining a subset of data mining[54], the distinction lies in the sources they utilize to achieve their objectives. Data mining techniques draw upon diverse datasets, such as spatial data, network data, DNA sequence data, multimedia, and stream data, tailored to the specific objectives of the TDM activity.[55] Conversely, text mining focuses on narrower sources and predominantly relies on text analysis, serving as a fundamental activity for NLP development.

The DSM Directive introduced two TDM exceptions: the general-purpose TDM exception (Article 4) and the TDM exception for research (Article 3). In this article, these exceptions are collectively referred to as the TDM exceptions.

Text mining techniques are crucial for constructing language models. These techniques may rely on corpora, such as the *Universal Dependencies* treebanks[56] and the *Common Crawl* dataset[57], which are created through the collection, copying, structuring, and labelling of language data stored in various formats. Simultaneously, it remains challenging to directly align the scope of the TDM exceptions with the specific stage of NLP development outlined above. While certain activities within the NLP development stages may reasonably fall under the TDM exception, it is important to recognize that the entirety of the process cannot be exclusively accommodated by this exception.

The TDM exceptions comprise a myriad of legal intricacies. However, space limitations require a concentrated examination, which revolves around several key aspects: remuneration to rightsholders for the utilization of copyrighted works and related rights objects, the scope of the exception, the lawful source prerequisite, and the legal standing of models developed under the TDM exception for scientific research. These facets are chosen due to their integration and perceived significance in addressing the challenges inherent to the TDM exception.

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[52] Judgment of the Court of Justice of the European Union of 3 September 2014, case No. C-201/13, Johan Deckmyn, et al. v. Helena Vandersteen et al., para. 26. Available: https://curia.europa.eu/juris/document/document.jsf?mode=DOC&pageIndex=0&docid=157281&part=1&doclang=EN&text=&dir=&occ=first&cid=689582 [last viewed 14.04.2024].

[53] Article 2(2) of the DSM Directive.

[54] *Zong, C., Xia, R., & Zhang, J.* Text data mining. Vol. 711, Singapore: Springer, 2021, p. 712. Available: https://doi.org/10.1007/978-981-16-0100-2 [last viewed 14.04.2024].

[55] *Han, J., Pei, J., & Tong, H.* Data mining: Concepts and Techniques. 4th edition. Morgan Kaufmann: 2022, p. 752.

[56] Universal Dependencies (UD), version 2. Available: https://universaldependencies.org/ [last viewed 14.04.2024].

[57] Common Crawl repository. Available: http://commoncrawl.org/ [last viewed 14.04.2024].

Recital 17 of the DSM Directive clarifies that implementing the TDM exception for research purposes results in negligible harm to rightsholders and, therefore, does not require compensation. The scenario differs concerning the general-purpose TDM exception, as its regulation includes the opt-out right, enabling the exclusion of TDM activities.[58] Essentially, the opt-out right affords rightsholders the opportunity to obtain remuneration for TDM activities. The Artificial Intelligence Act (AI Act) also bolsters the potential right to remuneration. Article 53(1)(c) obliges providers[59] of general-purpose AI models[60] to establish a policy for adhering to Union copyright law, specifically to recognize and adhere to the opt-out right as delineated in Article 4(3) of the DSM Directive. Recital 107 of the AI Act elucidates that to augment transparency regarding the data utilized in the pre-training and training of general-purpose AI models, encompassing copyrighted text and data, providers of such models are required to draft and publicly release a sufficiently detailed summary of the content utilized for training purposes. This provision enables rightsholders to assert and uphold their rights. However, uncertainty persists regarding how the opt-out right can be exercised. For instance, is it sufficient for collective management organizations to announce that they do not permit the use of the copyrighted content of the rightsholders they represent? An adequate standard remains to be developed and tested in court.

It can be argued that, when Article 4(3) of the DSM Directive is combined with the transparency obligation established by the AI Act, it allows rightsholders to claim remuneration for the utilization of their copyrighted content under the general-purpose TDM exception. This could potentially disadvantage EU-based AI companies if the corresponding regulatory framework in other jurisdictions, such as the US and China, is structured differently – for instance, if it does not afford a remuneration right.

When analysing the scope of the TDM exceptions, it is evident that these exceptions primarily restrict the reproduction right and the right to make extractions. Nonetheless, TDM activities may also encompass the addition of annotations to data. The authors argue that the TDM exceptions should be construed broadly to permit such annotations and other adoptions dictated by technical necessity.

The TDM exceptions specify lawful access to data as a prerequisite for their application. The concept of lawful access is not as straightforward as it might initially appear. Recital 10 of the DSM Directive references instances where researchers have lawful access to content, for example, through subscriptions to publications or open access licenses. However, the terms of these licenses could explicitly exclude TDM activities. Article 7(1) of the DSM Directive stipulates that any contractual provision contrary to the TDM exception for research is deemed unenforceable. Recital 14 of the DSM Directive states that lawful access should also encompass access to content

[58] See, DSM Directive Article 4 (3).

[59] Article 3(3) of the AI Act defines "provider" as "a natural or legal person, public authority, agency or other body that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge".

[60] Article 3(63) of the AI Act defines "general-purpose AI model" as "an AI model, including where such an AI model is trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable of competently performing a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications, except AI models that are used for research, development or prototyping activities before they are released on the market".

that is freely available online. This raises the question of whether lawful access is possible for works communicated to the public without the rightsholder's consent. It is proposed in scholarly literature that "the requirement of lawful access should only cover the behaviour of the beneficiary of the exception and not extend to the status of the accessed source".[61] This approach could potentially facilitate TDM for NLP development and help avoid many legal uncertainties and practical problems. However, there are concerns regarding the compatibility of this approach with the three-step test. Lawful access typically necessitates a lawful source.

The final issue addressed in this section concerns the legal standing of models developed under the TDM exception for scientific research. One of the primary legal challenges revolves around the interpretation of what constitutes "scientific research", and which entities are eligible to perform TDM under this exemption. Ensuring fair access to language data for academic and commercial entities is vital for fostering fair competition and advancing progress in NLP research and applications. However, the lack of clarity surrounding this issue can hinder the full engagement of commercial entities and non-traditional research institutions in NLP development as they seek to avoid potential copyright infringement risks. Specifically, the question arises whether models created based on the TDM exception for research (Article 3 of the DSM Directive) can be utilized for business purposes. Recital (11) of the DSM Directive emphasises that "research organisations should also benefit from such an exception when their research activities are carried out in the framework of public-private partnerships".

Despite the policy objective of supporting public-private partnerships[62], it is essential to consider the entire regulatory framework surrounding TDM and model development. Additionally, the AI Act requires providers of general-purpose AI to enhance transparency regarding the use of copyright-protected data.[63] This enables rightsholders to monitor the usage of their copyrighted material and enforce their rights effectively.

If it emerges that content subject to an opt-out right was used by research organizations under the exception for text and data mining intended for research, rendering the opt-out right unenforceable, then the subsequent use of such a model by a private company could potentially conflict with copyright laws, such as the three-step test.

3. Legal challenges related to the output of NLP

3.1. Originality of prompts under copyright

The relationship between AI-generated content and prompts is fundamental to the operation of AI systems and their output generation. Prompts function as input cues that guide the content generation process, whether by providing explicit instructions, influencing the learning process through training data, or conditioning the generation of content based on contextual factors. Understanding this relationship

[61] *Margoni, T.* Saving research: Lawful access to unlawful sources under Art. 3 CDSM Directive? Kluwer Copyright Blog, 2023. Available: https://copyrightblog.kluweriplaw.com/2023/12/22/saving-research-lawful-access-to-unlawful-sources-under-art-3-cdsm-directive/ [last viewed 14.04.2024].

[62] For further discussion on the academia-industry cooperation, see *Kelli, A., Mets, T., Jonsson, L., Pisuke, H., Adamsoo, R.* The changing approach in Academia-Industry collaboration: From profit orientation to innovation support. Trames Journal of the Humanities and Social Sciences, 17(3), 2013, pp. 215–241. Available: http://doi.org/10.3176/tr.2013.3.02 [last viewed 14.04.2024].

[63] Recital 107 of the AI Act.

is essential for effectively using and interpreting AI-generated content across different applications. However, the legal status of prompts remains ambiguous. This issue is increasingly significant due to specialised marketplaces' active distribution of prompts today.[64]

Although prompts may be viewed as instructions for AI, whether they qualify for copyright protection remains uncertain. A core principle of copyright law is that protection is granted solely to works considered "original". Within the EU *acquis*, the criterion for copyright protection hinges on whether a work can be seen as the author's "own intellectual creation". The Court of Justice of the European Union (CJEU) has asserted that an original work results from intellectual creation. The author expresses his creative ability in an original manner by making free and creative choices such that the resulting shape reflects his personality.[65] At the same time, facts, ideas and utilitarian processes are excluded from copyright protection.[66] In that, the question of whether prompts are original under copyright law involves a nuanced analysis of creativity and human involvement.

While some prompts may be straightforward and purely functional, others may involve creative choices, linguistic nuances, or artistic elements. For example, prompts used in storytelling AI models may include specific character descriptions, plot outlines, or dialogue prompts that reflect creative input.

Another factor to consider is the degree of human involvement in creating prompts. If prompts are generated entirely by AI systems without human intervention, no copyright subsists in them.

An intriguing issue arises regarding whether the use of numerous prompts as input to an AI system could result in joint authorship with the AI. In the case concerning *Théâtre D'opéra Spatial*, the applicant explained that he "input numerous revisions and text prompts at least 624 times to arrive at the initial version of the image". The United States Copyright Office Review Board did not uphold the claim. The Board acknowledges that prompting can involve creativity and that some prompts may be protected as literary works. However, this does not mean that providing text prompts to *Midjourney* forms the generated images.[67] The authors argued that the issue of joint authorship with AI has not yet been resolved.

There is also a lack of consensus in addressing prompts from a contractual standpoint. For example, the terms of use (ToS) on *Prompt Marketplace* describe prompts as intellectual property (IP) objects without providing additional details while maintaining ownership rights for their creators (authors).[68] Furthermore, the marketplace imposes quality standards for prompts. As outlined in its Prompt

[64] E.g., Prompt Marketplace. Available: https://promptbase.com [last viewed 14.04.2024]; AI Prompt Marketplace. Available: https://promptrr.io [last viewed 14.04.2024]; AIFrog. Available: https://www.aifrog.io [last viewed 14.04.2024].

[65] Judgment of the Court of Justice of the European Union of 11 June 2020, case No. C-833/18, SI, Brompton Bicycle Ltd v. Chedech/Get2Get. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=227305&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1727690 [last viewed 14.04.2024].

[66] Article 9(2) TRIPS Agreement.

[67] U.S. Copyright Office, Letter 05.09.2023, Re: Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581). Available: https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf [last viewed 14.04.2024].

[68] PromptBase. Terms of Service. Available: https://promptbase.com/tandcs [last viewed 14.04.2024].

Submission Guidelines,[69] prompts are expected to offer value to buyers,[70] be original, and not overly simplistic or easily predictable. It is plausible that these quality requirements be utilized to assess prompt originality under copyright law. However, not all prompt marketplaces prioritize addressing the legal status of prompts from an intellectual property law perspective. The terms of service (ToS) of the AI Prompt Marketplace describe prompts as the digital content provided by the seller.[71] In this scenario, buyers acquire a license to use the prompts rather than ownership. This transition from creator to seller ownership raises questions about the basis of ownership and the seller's authority to grant usage licenses. Additionally, although the Digital Content Directive[72] does not directly address intellectual property issues, it implies that the digital content provided should not infringe upon any third-party rights, including intellectual property rights.[73] This implies that if prompts are subject to copyright protection, the seller must obtain appropriate authorization and uphold the author's moral rights. This task may pose challenges, especially when purchasing prompts through online marketplaces.

3.2. Legal framework for content generated by NLP

As a rule, content generated by NLP gives rise to the same issues as AI-generated content. Due to space limitations, not all aspects of NLP-generated content can be thoroughly addressed. Therefore, the article briefly touches upon ethical considerations and authorship issues.

AI-generated (including NLP-generated) content is becoming more common, but we need to figure out how to tell if it's made by humans or AI. This is applicable to different areas, including journalism, art, research and education. For example, fake news made by AI can be harmful, AI art raises questions about who made it, and using NLP content in schoolwork can be seen as academic fraud.[74] One could contend that AI applications, such as NLP, have already significantly impacted society. For example, a *Reuters* article highlighted that there exists a multitude of books where *ChatGPT* is credited as either an author or a co-author, underscoring the profound influence of AI on contemporary authorship and literary creation.[75] Similarly, AI-driven "trading

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[69] Prompt Submission Guidelines, PromptBase. Available: https://promptbase.com/prompt-guidelines [last viewed 14.04.2024].

[70] The principle of "if value then right" suggests that individuals or entities should only possess rights to something if they've added value to it or if the thing itself is inherently valuable. Works that need minimal human input are often considered less valuable, thus requiring minimal copyright protection. For further discussion, see *Dreyfuss, R. C.* Expressive genericity: trademarks as language in the Pepsi generation. Notre Dame Law Review, No. 65, 1989, p. 397 and *Lemley, M. A.* How Generative AI Turns Copyright Upside Down, 2023, pp. 12–13. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4517702 [last viewed 14.04.2024].

[71] Terms of service, AI Prompt Marketplace. Available: https://promptrr.io/terms-of-service/ [last viewed 14.04.2024].

[72] Directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services (Digital Content Directive) [2019] OJ L136/1. Available: https://eur-lex.europa.eu/eli/dir/2019/770/oj [last viewed 14.04.2024].

[73] Recital 54, Article 7 of the Digital Content Directive.

[74] *Cotton, D. R. E., Cotton, P. A., & Shipway, J. R.* Chatting and cheating: Ensuring academic integrity in the era of ChatGPT. Innovations in Education and Teaching International, 61(2), 2024, pp. 228–239. Available: https://doi.org/10.1080/14703297.2023.2190148 [last viewed 14.04.2024].

[75] *Bensinger, G.* Focus: ChatGPT launches boom in AI-written e-books on Amazon. 21 February 2023. Available: https://www.reuters.com/technology/chatgpt-launches-boom-ai-written-e-books-amazon-2023-02-21/ [last viewed 14.04.2024].

bots" have been deployed to supplant human roles in financial markets,[76] illustrating further instances of AI's expanding footprint across various sectors. This suggests that the advent of AI may render traditional roles obsolete, potentially displacing authors from the market. Consequently, legal scholars are actively seeking solutions to address these emerging ethical challenges and technological unemployment. This could serve as an additional argument to support the imposition of a general payment obligation on all providers of generative AI systems in the EU, as suggested by Senftleben.[77] The use of AI is not inherently unethical. Adopting a Luddite ideology as the primary ethical framework for AI use is problematic, as it would imply that even spell-checkers should be prohibited to enhance "real" creativity. Given the challenges in determining whether content is AI-generated, transparency regarding the role of AI in content generation is essential and should be established as a fundamental starting point. It is suggested in legal literature that there should be a mandatory legal obligation to declare if content is AI-generated.[78]

The topic of AI-generated content is continuously relevant. Research literature distinguishes between AI-assisted output and AI-generated output, with the latter typically falling outside copyright protection.[79] We are interested in the latter.

AI systems can independently generate content, triggering discussions regarding the ownership of such creations. In some cases, the ownership of AI-generated content may be attributed to the human creators who developed or trained the AI system, or to the rightsholders of works used to train the AI system. However, this may not always be straightforward, especially as AI systems become more advanced and independent (autonomous) in their decision-making processes.

In response to the growing use of AI in creative processes, the US Copyright Office (USCO) issued a notice of inquiry (NOI)[80] seeking input on various aspects related to AI-generated content. These include questions concerning ownership rights, transparency requirements, and the legal status of AI-generated outputs. The need for clarity in copyright registration for AI-generated works became apparent in the case of "Zarya of the Dawn", where the USCO cancelled portions of AI-generated artwork from the copyright registration.[81] This decision underscored the importance of establishing clear guidelines for registering AI-generated content and ensuring transparency in the copyright registration process. Similarly, in the case

[76] *Bloom, J.* Could AI 'trading bots' transform the world of investing? 1 February 2024. Available: https://www.bbc.com/news/business-68092814 [last viewed 14.04.2024].

[77] *Senftleben, M.* Generative AI and Author Remuneration. International Review of Intellectual Property and Competition Law, 54, 2023, pp. 1535–1560. Available: https://doi.org/10.1007/s40319-023-01399-4 [last viewed 14.04.2024].

[78] *Kamocki, P., Bond, T., Lindén, K., Margoni, T., Kelli, A., Puksas, A.* Mind the Ownership Gap? 2024 (forthcoming).

[79] It is argued in the literature that "AI-assisted output to qualify as a protected "work": the output is (1) in relation to "production in the literary, scientific or artistic domain"; (2) the product of human intellectual effort; and (3) the result of creative choices that are (4) "expressed" in the output". *Hugenholtz, P. B., Quintais, J. P.* Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output? IIC 52, 2021, p. 1212. Available: https://doi.org/10.1007/s40319-021-01115-0 [last viewed 14.04.2024].

[80] Notice of inquiry and request for comments. U.S. Copyright Office, Library of Congress. Federal Register, Vol. 88, No. 167, Wednesday, August 30, 2023. Available: https://www.govinfo.gov/content/pkg/FR-2023-08-30/pdf/2023-18624.pdf [last viewed 14.04.2024].

[81] U.S. Copyright Office, Letter 21.02.2023, Re: Zarya of the Dawn (Registration #VAu001480196). Available: https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [last viewed 14.04.2024].

of *Théâtre D'opéra Spatial* by Jason Allen[82], the applicant encountered challenges when attempting to register a work generated by the AI system *Midjourney*.[83] Despite the applicant's arguments about creative input, the USCO refused registration, emphasizing the requirement of human authorship and the necessity of disclosing AI-generated content.

The decision not to register AI-generated content due to the absence of human authorship underscores the complexities of determining ownership and copyright eligibility for such works. Meanwhile, an alternative avenue for resolving ownership issues is through contractual agreements. When users engage with AI services or platforms, they typically consent to the terms of service or end-user license agreements presented by the platform. These agreements often contain clauses that define the ownership of content produced using the AI service. For example, in *OpenAI's* Terms of Service[84], users retain ownership of the content they generate with *OpenAI's* services, while *OpenAI* may utilize this content for various purposes, including service enhancement. Users also have the option to decline *OpenAI's* use of their content to train its models.[85] Similarly, in *NotionAI's* Terms of Service, users retain ownership of the content they generate on the *NotionAI* platform. *NotionAI* respects users' rights to their content while leveraging it to improve their services.[86] However, users may have limited leverage when negotiating the terms of service provided by AI service providers. Furthermore, the absence of legal precedent in this area makes it challenging to anticipate how these agreements would function in practice.

In summary, navigating copyright ownership in the context of AI-generated content requires careful consideration of legal principles, technological capabilities, and ethical implications. Balancing the interests of human creators, AI entities, and other stakeholders is essential for developing robust and equitable frameworks that promote innovation while respecting rights and responsibilities.

Summary

The saying "US innovates, China replicates, and EU regulates" contains some truth. Europe's AI sector competes globally, and its stringent regulations, while ensuring a high level of IP protection, ethical standards and data protection, may not automatically translate into competitiveness. The lack of legal clarity in EU regulations introduces complexities, potentially hindering innovation in the EU compared to regions with more lenient policies.

The challenge for Europe lies in balancing rigorous standards with maintaining a competitive edge in the global AI landscape, ensuring it can innovate effectively while adhering to its values. This balance is crucial for Europe to remain a significant player in the international AI arena.

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[82] U.S. Copyright Office, Letter 05.09.2023, Re: Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial (SR # 1-11743923581). Available: https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf [last viewed 14.04.2024].

[83] Midjourney platform. Available: https://www.midjourney.com/home [last viewed 14.04.2024].

[84] OpenAI. Terms of use. Effective: January 31, 2024. Available: https://openai.com/policies/terms-of-use [last viewed 14.04.2024].

[85] OpenAI's right to utilize the user data potentially creates privacy concerns and trade secret safety.

[86] Notion AI Supplementary Terms. Available: https://www.notion.so/notion/Notion-AI-Supplementary-Terms-fa9034c8b5a04818a6baf3eac2adddbb [last viewed 14.04.2024].

Language data often includes copyrighted works and objects of related rights (performances, phonograms, excerpts from databases, etc.), posing significant challenges for its use in NLP development. Methods like web scraping and data sharing bring up contract violations and copyright infringement issues. This situation requires a nuanced equilibrium between respecting authors' rights and meeting the developmental needs of NLP practitioners.

There are two primary models for developing NLP applications: the contractual model and the exception model. Additionally, a hybrid model incorporating elements from both can be identified. Each model has its own advantages and disadvantages.

The contractual model offers potential solutions for challenges arising in commercial research contexts. The challenge with the contractual model for NLP development is not primarily about AI developers' reluctance to share profits – though that may often be the case – but more about the difficulty in identifying rightsholders or their sheer volume, given the extensive language data required. This makes it nearly impossible to negotiate agreements with all involved. Unlike the music industry, which benefits from established collective management organizations for licensing, no equivalent structures exist for licensing language data. Hence, the contractual model cannot be the sole path forward; alternative approaches are also necessary.

The exception model refers to NLP development based on copyright exceptions. Prior to the DSM Directive era, NLP development relied on exceptions provided in the InfoSoc Directive, such as exceptions for temporary reproduction, personal use, quotation, and research. The problem is that, except for the temporary reproduction exception (InfoSoc Art. 5(1)), other exceptions are optional for EU Member States, leading to fragmentation within the EU. Despite this, these exceptions remain relevant for NLP development.

With the DSM Directive, two TDM exceptions were adopted: the general TDM exception and the TDM exception for research purposes. Both TDM exceptions face legal uncertainties concerning the concept of lawful access, specifically whether good faith access from an illegal source is permissible as analysed by Margoni.[87] The authors are of the opinion that the three-step test likely restricts this possibility.

The primary challenge of the general TDM exception is the opt-out right, which allows rightsholders to explicitly reserve the use of their content, forbidding its use for TDM. Firstly, there are technical issues, such as determining how to make such a reservation in a manner compatible with Article 4(3) of the DSM Directive. Secondly, the very existence of the opt-out right gives rise to several ambiguities. It would have been more straightforward to state that rightsholders are entitled to remuneration and to establish a remuneration system accordingly.

Due to the opt-out right, reinforced by the transparency obligations in the AI Act, the development and use of NLP applications outside academia is shifting towards the contractual model. The contractual model of NLP incurs costs and uncertainties for developers. One way forward to enhance NLP use and development in the EU would be to allow NLP applications developed under the TDM exception for research to be used for commercial purposes. However, the issue is unclear, and it is most likely not permissible.

Bearing in mind the *Infopaq* case (where 11 consecutive words could constitute a copyrighted work) and the approach of the US Copyright Office, it can be argued

[87] *Margoni, T.* Saving research: Lawful access to unlawful sources under Art. 3 CDSM Directive? Kluwer Copyright Blog, 2023. Available: https://copyrightblog.kluweriplaw.com/2023/12/22/saving-research-lawful-access-to-unlawful-sources-under-art-3-cdsm-directive/ [last viewed 14.04.2024].

that, depending on their nature, some prompts are protected by copyright. The main issue is whether the creation and input of prompts could lead to joint authorship of NLP-generated content. The current theoretical framework and legal practice does not answer the question clearly.

The AI-generated output is currently considered outside the scope of copyright protection. Therefore, its legal status is primarily regulated by the AI service provider's terms of service.

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Compensation for Losses in Latvian Groups of Companies Law

Dr. iur. **Kaspars Balodis**
Faculty of Law, University of Latvia
Professor at the Department of Civil Law
E-mail: *kaspars.balodis@lu.lv*

The main purpose of the legal regulation of groups of companies, i.e. the Groups of Companies Law of Latvia, is to protect rights and legitimate interests of the dependent company, its creditors and minority shareholders. A controlling enterprise is entitled to pursue its own economic interests by exerting the decisive influence on a dependent company. There is no general prohibition for a controlling enterprise to induce the dependent company into entering transactions or carrying out measures that are disadvantageous to the dependent company. Disadvantageous transactions have to be reflected in the yearly dependency report submitted by the board of the dependent company. As a general principle, the controlling enterprise shall compensate the dependent company for losses arising from disadvantageous transactions or undertakings. If a group contract between the controlling enterprise and the dependent company exists, legal representatives (board members) of the controlling company are jointly responsible for the losses of the dependent company. If a group contract has not been concluded and a *de facto* group of companies exists, the controlling enterprise itself has to compensate for the losses of the dependent company. Besides the controlling enterprise, the legal representatives of this enterprise are jointly responsible.

Keywords: compensation for losses, controlling enterprise, dependent company, legal representatives of the controlling enterprise, disadvantageous transactions, other disadvantageous measures.

Contents

Introduction

In recent years, the role of groups of companies law has been gaining momentum in the Latvian legal system. Of particular importance are the provisions of the Groups of Companies Law[1] on compensation of losses, namely, the obligation of the controlling company and its legal representatives to indemnify the dependent company for losses incurred by the dependent company after the controlling enterprise induced the dependent company to enter into a disadvantageous transaction or to carry out other measure disadvantageous to the dependent company. The Latvian Groups of Companies Law been in force since 2000, but the provisions of this law, which were basically adopted from the provisions of the German Stock Corporation Act (*Aktiengesetz*) or for which the above-mentioned German regulation served as a model, have only gradually gained wider application in Latvia. The increasing practical importance of groups of companies is reflected, *inter alia*, by the increase in the number of groups of companies cases heard by the courts.

As emphasised by the Supreme Court of the Republic of Latvia (Senate), when interpreting the Groups of Companies Law, it should be taken into account that the origin of the provisions of this law reflects the influence of the German Stock Corporation Act (*Aktiengesetz*) and therefore the tradition of the application of German law is relevant for the correct understanding of the provisions of the Groups of Companies Law.[2] Furthermore, the legal literature rightly points out that a judge hearing a case concerning groups of companies law must be prepared for the parties to rely on the German groups of companies law in their arguments.[3]

Protecting the economic interests of a dependent company in its relationship with the controlling enterprise is one of the core functions of the groups of companies law. The right of a dependent company to obtain compensation for losses suffered from the controlling enterprise or, in certain cases, from its legal representatives is one of the most important legal means of ensuring the practical protection of those interests. This legal mechanism may also be used by the dependent company's creditors in bringing an action against the controlling enterprise. The relevant provisions of the Groups of Companies Law are quite complicated and the present article is devoted to the aspects of their application in Latvia.

1. Relations of the controlling enterprise and the dependent company: General overview

The dependent company's position under the influence of the controlling enterprise is the reason why the controlling enterprise is able to subordinate the dependent company to its own interests. As indicated in the Latvian groups of companies law literature, the common interests pursued by a group of companies are usually concentrated in the controlling enterprise, which is the beneficiary of

[1] Koncernu likums [The Groups of Companies Law] (23.03.2000). Available: https://likumi.lv/ta/id/4423-koncernu-likums [last viewed 15.04.2024].

[2] The Judgment of the Supreme Court (Senate) of the Republic of Latvia from 31 May 2022 in case No. SKC-44/2022, para. 11.3. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/komerctiesibas/citi [last viewed 10.04.2024].

[3] *Brants, E.* Prasības, kas izriet no koncernu tiesiskajām attiecībām [Claims arising from legal relations in groups of companies]. Jurista Vārds, 01.12.2020, No. 48(1158), p. 35.

the group's activities.[4] It is naturally acceptable that the controlling enterprise uses a dependent company to pursue its own economic interests for profit. In order to explain the legal mechanism that allows the controlling enterprise to benefit from the dependent company, including the benefits that arise as a result of transactions or arrangements that are disadvantageous to the dependent company, it is necessary to explore the concepts of controlling enterprise and dependent company, as well as the framework of the legal relationship between those entities.

A group of companies is an aggregate of a controlling enterprise and one or several dependent companies (Article 1, Section 1 of the Groups of Companies Law). A dependent company, as defined in Article 2, Section 3 of the Groups of Companies Law, is a company under the decisive influence of the controlling enterprise and is located in Latvia. According to the provisions of Article 1, Section 2 of the Groups of Companies Law, a controlling enterprise is an enterprise which has a decisive influence in one or more companies and is located in Latvia or abroad. Article 2, Section 4 of the Groups of Companies Law specifically states that this law, with the exception of the provisions on creditor protection, shall not apply where a natural person owns all the shares or stocks in one company.

The concept of an enterprise, which also determines a controlling enterprise, is defined in Article 1 of the Groups of Companies Law. According to Item 8 of the said Article, an enterprise is a commercial company within the meaning of the Commercial Law[5], or a natural person.

It should be noted that the concept of an enterprise is often defined and understood differently in different sub-branches of Latvian private law. Under the Commercial Law, an enterprise as a collection of tangible and intangible property and other economic benefits belonging to a merchant, is regarded as an object of law (Article 18 of the Commercial Law). In Latvia, the Groups of Companies Law is considered a part of commercial law. However, for practical purposes and for convenience of terminology, in the Groups of Companies Law the term "enterprise" refers to commercial companies and natural persons as subjects of law.

Commercial companies within the meaning of the Commercial Law are the following four types of companies regulated by that Law: limited liability company, joint stock company, general partnership, limited partnership. An individual merchant, i.e. a natural person registered in the Commercial Register for purposes of commercial activity, can also be a controlling enterprise in the sense of the Groups of Companies Law. Moreover, any natural person, regardless of its legally significant characteristics, may be a controlling enterprise within the meaning of the Groups of Companies Law.

The cause of the dependency is the decisive influence of the controlling enterprise over the dependent company. The decisive influence may be direct or indirect, depending on whether the controlling enterprise exercises that influence over the dependent company through another dependent company or without the mediation of another dependent company, in accordance with the provisions of Article 4 of the Groups of Companies Law. The basis for the exercise of decisive

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[4] *Strupišs, A.* Koncernu likuma darbības efektivitātes problēmas un to tiesiskie risinājumi [Effectiveness problems of the Group of Companies Law and legal solutions to them]. 2007, p. 3. Available: https://www.at.gov.lv/files/uploads/files/7_Resursi/Petijumi/lv_documents_petijumi_Koncerni.pdf [last viewed 10.04.2024].

[5] Komerclikums [The Commercial Law] (14.04.2000). Available: https://likumi.lv/ta/id/5490-komerclikums [last viewed 10.04.2024].

influence is either a group of companies contract between the controlling enterprise and the dependent company or the controlling enterprise's participation in the dependent company (Article 3 Section 1 of the Groups of Companies Law).

According to Article 3, Section 2 of the Group of Companies Law, there are three types of a group of companies contract: 1) a management contract; 2) a profit transfer contract; and 3) a management and transfer of profit contract. A group of companies based on any of those contracts is known as a contractual group of companies.

According to Article 3, Section 3 of the Groups of Companies Law, an enterprise has a decisive influence in a company on the basis of a participation if at least one of the following circumstances exists: 1) the enterprise has a majority of voting rights in the company; 2) the enterprise, as a shareholder of the company, has the right to appoint or remove a majority of the members of the company's executive or supervisory body; 3) the enterprise is a shareholder of the company and, exercising only its rights of a shareholder, during the accounting year has appointed the majority of members of the executive body or of the supervisory body of the company; or 4) the enterprise is a shareholder of the company and, on the basis of agreement with other shareholders, has sole control of the majority of voting rights in the company. If the participation criteria mentioned above are fulfilled, a *de facto* group of companies emerges.

The regulatory framework of the Groups of Companies Law described above indicates the extensive possibilities for the controlling enterprise to influence the dependent company in its own interests. It is evident that the Group of Companies Law applies to a wide range of legal relations in the field of commercial law. Furthermore, any shareholder of a capital company, i.e. limited liability company or joint stock company, or a member of a commercial partnership is to be regarded as a controlling enterprise in a dependent company if his participation in that company fulfils the characteristics of a decisive influence specified in the Groups of Companies Law.

2. Instructions from the controlling enterprise, disadvantageous transactions or measures as causes of loss

There is no general prohibition in groups of companies law for a controlling enterprise to induce a dependent company to enter into a transaction or take any other action that is disadvantageous to it. Nor is there a comprehensive prohibition on giving instructions to a dependent company that are detrimental to it.

For a group of companies based on a group of companies contract, i.e. contractual group of companies, as opposed to a *de facto* groups of companies, the law even mentions that the controlling enterprise may instruct the dependent company with respect to the management of the company.[6] Moreover, the instructions of the controlling enterprise may be such as to cause loss to the dependent company, provided that such instructions are in the interests of the controlling enterprise or in the interests of other companies which are merged with the controlling enterprise and the dependent company in a group of companies (Article 26, Section 1 of the Groups of Companies Law). In addition, the executive body of the dependent company is obliged to comply with those instructions, as stipulated in Article 26, Section 2, Clause 1 of the Groups of Companies Law. Article 26, Section 2 of the Groups of Companies Law provides, *inter alia*, that the right of the controlling enterprise to give

[6] See: *Windbichler, C.* Gesellschaftsrecht. 24. Auflage [Corporate Law. 24th edition]. München: C. H. Beck, 2017, § 33 Rn. 14.

instructions that cause loss may for the dependent company be limited by a group of companies contract (management contract or management and transfer of profit contract).

The obligation to compensate for losses in a contractual group of companies arises if the legal representatives of the controlling enterprise have not acted with the care of a proper and conscientious manager (Article 27, Section 1, Clause 1 of the Groups of Companies Law). However, the legal representatives of the controlling enterprise, as stated in Article 27, Section 1, Clause 2 of the Groups of Companies Law, may not, in particular, give instructions which may lead to the insolvency, administrative suspension or judicial liquidation of the dependent company.

In the case of a contractual group of companies, the Groups of Companies Law refers to instructions which cause losses for the dependent company. The provisions of the said law on liability for losses in a *de facto* group of companies mention a disadvantageous transaction or other disadvantageous measure induced by the controlling enterprise to the dependent company as a prerequisite for compensation for losses. The Supreme Court of Latvia (Senate), referring to the German doctrine of groups of companies law, has held that the basis for recovery of uncompensated losses from the controlling enterprise is any action (inducement) by the controlling enterprise to the dependent company to enter into a transaction or to carry out other measure disadvantageous to it.[7]

The provisions of the Groups of Companies Law do not explain what exactly constitutes a disadvantageous transaction or other disadvantageous measure. According to the doctrine of groups of companies law, a disadvantageous transaction is any transaction or arrangement which results in a reduction or jeopardization of the assets or income of the dependent company.[8] In determining whether a transaction is disadvantageous, it is relevant whether there is an objective disproportion between the performance and the consideration when compared to a transaction entered into by an independent third party.[9]

The inventory procedures of the assets of a commercial company, the interaction between balance sheet items and the nature of the commercial activity concerned are relevant to the determination of an disadvantageous transaction or measure.[10] The literature on Latvian groups of companies law refers, *inter alia*, to the following criteria for assessing the economic nature of corporate conduct: capital sufficiency, efficiency of economic or administrative measures, viability of the dependent company, compliance with the procedure for meeting creditors' obligations, possible ",siphoning" or "extracting" of assets from the dependent company.[11]

The case law further recognises that the disadvantage of a transaction is to be determined as of the time of the transaction, and that the standard of conduct of a proper and conscientious manager of a company, if the dominant company wishes

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[7] The Judgment of the Supreme Court (Senate) of the Republic of Latvia from 31 May 2022 in case No. SKC-44/2022, para. 12. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/komerctiesibas/citi [last viewed 14.04.2024].

[8] *Emmerich, V., Habersack, M.* Konzernrecht. 11. Auflage. München: C. H. Beck, 2020, § 25 Rn. 15; *Saenger, I.* Gesellschaftsrecht. 5. Auflage. München: Verlag Franz Vahlen, 2020, Rn. 948.

[9] *Emmerich, V., Habersack, M.* Konzernrecht, § 25 Rn. 15.

[10] *Grīnberga, I.* Kreditora interešu aizsardzība strīdos, kas izriet no koncernu tiesību pārkāpumiem [The protection of interests of creditors in disputes concerning violations of group of companies law]. Jurista Vārds. 20.09.2020, No. 38 (1148), p. 23.

[11] *Grīnberga, I.* Kreditora interešu aizsardzība, p. 25.

to exculpate itself or absolve itself of liability, is to be as of the time of the transaction or measure, and not at a later time.[12]

The principle that the influence of the controlling company which has had adverse consequences for the dependent company must be indemnified is intended to protect the dependent company itself, its minority shareholders and creditors.[13] As the Supreme Court (Senate) has recognised, the disadvantageous nature of the transaction and the loss resulting from the transaction are cumulative criteria which must be satisfied in order for the controlling enterprise to be liable for losses.[14]

It can be concluded that the prohibitions and restrictions on influencing a dependent company under the Groups of Companies Law are of relative nature, as a breach of them does not invalidate a legal transaction that is disadvantageous to the dependent company. However, instructions or inducement by the controlling enterprise may have certain legal consequences, namely, the incurrence of an obligation to compensate for losses. The details of the compensation for losses are discussed in the following sections of this article, pointing out the differences in the nuances of the liability in a contractual group of companies and in a *de facto* group of companies.

3. Compensation for losses in a contractual group of companies

Liability in a contractual group of companies is governed by Chapter IV of the Groups of Company Law, entitled "Management and liability, if a management contract or a management and transfer of profit contract are concluded". That title gives rise to the question whether the provisions of that chapter are applicable to profit-transfer contracts which do not contain management elements. As stated in the German groups of companies doctrine, which is of great importance for the correct understanding of the provisions of the Latvian Groups of Companies Law, the main difference between a management contract and a transfer of profit contract is that a transfer of profit contract, insofar as it is not combined with a management contract, does not confer on the controlling enterprise the right to give instructions to the dependent company.[15] Since the right of the controlling enterprise to instruct the executive body of the dependent company is directly linked to the existence of a management component in the group of companies contract, the provisions of Chapter IV of the Groups of Companies Law do not apply to a contractual group of companies which is based on a solely on a transfer of profit agreement. This exception should be borne in mind when discussing liability issues in a contractual group of companies.

As indicated above, the legal representatives of the controlling enterprise are obliged to exercise the care of a proper and conscientious manager when giving instructions to the executive body of the dependent company. In the event of a breach of that duty, the legal representatives of the controlling enterprise, as joint debtors, are obliged to indemnify the dependent company in accordance with the provisions of the Groups of Companies Law and, in the event of a dispute as to whether the instructions were given with due care and diligence, the burden of proof is on the said legal representatives.

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[12] The Judgment of the Supreme Court (Senate) of the Republic of Latvia from 22 December 2022 in case No. SKC-94/2022, para. 12.1. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/komerctiesibas/citi [last viewed 10.04.2024].

[13] *Hüffer, U., Koch, J.* Aktiengesetz. 11. Auflage. München: C. H. Beck, 2014, § 317 AktG Rn. 1.

[14] The Judgment of the Supreme Court (Senate) of the Republic of Latvia from 22 December 2022 in case No. SKC-94/2022, para. 12.1. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/komerctiesibas/citi [last viewed 10.04.2024].

[15] *Emmerich, V., Habersack, M.* Konzernrecht, § 12 Rn. 3.

As recognised in the doctrine of groups of companies law, the liability of the legal representatives of the controlling enterprise for the loss of the dependent company is based on the fact that, in a contractual group of companies, the management of the dependent company is effectively transferred in part to the controlling enterprise, and the legal representatives of the controlling enterprise, by giving instructions to the dependent company, in effect displace the latter's board of directors.[16]

The term "legal representatives" is understood in accordance with the provisions of the Commercial Law, namely, the board of directors of a limited liability company and a joint stock company, the members of a general partnership or the general partners of a limited partnership (for details, see Articles 91, 126, 221, 301 of the Commercial Law). By applying the findings of German legal doctrine accordingly, it follows that the legal representative's duty to act with due care and diligence also applies to an individual merchant, i.e. a natural person which has been entered in the commercial register (Article 74 of the Commercial Code), if an individual merchant is a controlling enterprise.[17]

Thus, in a contractual group of companies, the legal representatives of the controlling enterprise, and not the controlling enterprise itself, are liable for damages suffered by a dependent company as a result of instructions given by the controlling enterprise in breach of the duty of care of a proper and conscientious manager. It would be unreasonable for the legislature to have imposed liability for losses on the controlling enterprise, since, in a contractual group of companies, the controlling enterprise's decisive influence over the dependent company is established by contract, which, under the general rules of civil law, is a voluntary agreement. Moreover, the provisions of the Groups of Companies Law, as indicated above, provide for the right of the controlling enterprise even to impose instructions which are detrimental (disadvantageous) to the dependent company.

The legal structure of the liability of legal representatives in a contractual group of companies is similar to the liability of members of the board of directors for losses suffered by a capital company (limited liability company or joint stock company) under Article 169 of the Commercial Law, with the difference that the losses are not attributable to the company they represent, i.e. the controlling enterprise, but to the dependent company. Moreover, unlike the rules of Article 169 of the Commercial Law, the Groups of Companies Law does not provide for the possibility for legal representatives to exempt themselves from liability on the ground that they have acted in good faith within the framework of a lawful decision of a supervisory board.

It should be noted that, in addition to the legal representatives of the controlling enterprise, members of the executive and supervisory bodies of the dependent company are also liable for losses if they have acted in breach of their duties, in accordance with the provisions of Article 28 of the Groups of Companies Law. With regard to these persons, Article 28, Section 2 of the Group of Companies Law expressly states that the consent of the supervisory body of the dependent company to the actions of the members of the executive body does not exclude the obligation of liability. It is recognised in the groups of companies law literature that the executive body (the management board) of a dependent company will generally be liable for the impermissible execution of the instructions of the controlling enterprise, while the supervisory body (the supervisory board) should be liable for either failing to prevent the impermissible execution of the instructions or for having given its consent to it.[18]

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[16] *Emmerich, V., Habersack, M.* Aktien- und GmbH-Konzernrecht. 8. Auflage. München: C. H. Beck, 2016, § 309 AktG Rn. 4.

[17] See: *Koch, J.* Aktiengesetz. 18. Auflage. München: C. H. Beck, 2024, § 309 AktG Rn. 13.

[18] *Emmerich, V., Habersack, M.* Aktien- und GmbH-Konzernrecht, § 310 AktG Rn. 9, 21.

An action for compensation of losses may be brought not only by the dependent company itself, but also by each of its shareholders on its own behalf for the benefit of the dependent company pursuant to Article 27, Section 5, Clause 1 of the Groups of Companies Law. A claim may also be brought by a creditor of the dependent company to the extent that he is unable to obtain satisfaction of his claims from the dependent company (Article 27, Section 5, Clause 2 of the Groups of Companies Law). The right of shareholders and creditors to bring an action for compensation of losses is relevant because the dependent company, obeying the instructions of the controlling enterprise, might not wish to bring such an action.

Although the controlling enterprise of a contractual group of companies is not the debtor in respect of losses, the provisions of Article 27 of the Groups of Companies Law are also of great importance in a *de facto* group of companies, since, pursuant to Article 33, Section 4 of that Law, the provisions of the third, fourth, fifth, sixth and seventh paragraphs of Article 27 of the Groups of Companies Law apply respectively to a claim for compensation of losses against the controlling enterprise in a *de facto* group of companies.

Thus, in a contractual group of companies existing on the basis of a management, or management and sharing of profit contract, the controlling enterprise has extensive opportunities to give the dependent company instructions that are detrimental to the latter. The legal representatives of the controlling enterprise are obliged to indemnify the dependent company, but that obligation arises only if those representatives, in giving instructions to the executive body of the dependent company, have breached the duty of care of a proper and conscientious manager.

4. Compensation for losses in a de facto group of companies

The conditions for indemnification of a dependent company in the absence of a group of companies contract are governed by the provisions of Chapter V of the Groups of Companies Law. As mentioned above, in that case a *de facto* group of companies exists. In the light of what has already been said in the previous section, it should be noted that Chapter V of the Groups of Companies Law can be applied not only to a *de facto* group of companies but also to a group of companies bound by sharing of profit contracts. Such contracts are more likely to be the exception, however, as most group contracts tend to be management and transfer of profit contracts combining elements of both types of a group of companies contract.[19]

Although in a *de facto* group of companies there is no absolute prohibition for the controlling enterprise to induce a dependent company to enter into a transaction or other measure disadvantageous to it, the controlling enterprise shall abstain from exerting its decisive influence in this way if the dependent company is not compensated for the loss resulting from the disadvantageous transaction or other disadvantageous measure. If the controlling enterprise does not actually compensate for those losses by the end of the accounting year, or does not grant an adequate compensation claim, it is obliged to compensate for losses incurred by the dependent company (Article 33, Section 1, Clause 1 of the Groups of Companies Law).

In addition, pursuant to Article 33, Section 1, Clause 2 of the Groups of Companies Act, the controlling enterprise is also obliged to indemnify the shareholders of the dependent company against any loss suffered by them as a result of the conduct in question, irrespective of any loss suffered by them as a result of the loss suffered by the dependent company. In the latter case, it is not the dependent company's but

[19] *Emmerich, V., Habersack, M*. Konzernrecht, § 12 Rn. 2.

the shareholders' own individual losses, for example, a reduction in the dividend.[20] The so-called ",reflex losses" that affect shareholders because of the losses suffered by the dependent company as a result of a disadvantageous transaction or disadvantageous measure are, according to the capital preservation principle, attributed to the losses of the dependent company and cannot be claimed by the shareholders.[21]

In addition to the controlling enterprise itself, the legal representatives of the controlling enterprise who induced the dependent company to enter into a disadvantageous transaction or to carry out a disadvantageous measure are liable as joint debtors (Article 33, Section 3 of the Groups of Companies Law).

In accordance with Article 30 of the Groups of Companies Law, transactions entered into for the benefit or at the inducement of the controlling enterprise which are wholly or partly disadvantageous to the dependent company must be disclosed in the dependency report drawn up by the executive body of the dependent company. The dependency report has to be drawn up for each accounting year and approved together with the company's annual accounts. In the groups of companies law literature, the dependency report has been described as an instrument for controlling the actions of the controlling enterprise.[22]

According to the provisions of the Article 30 of the Groups of Companies Law, the dependency report must indicate, *inter alia*, the performance and counter-performance of the disadvantageous transactions, as well as the basis for the disadvantageous measures, the benefit derived therefrom and the loss incurred. The dependency report shall also indicate the measures carried out during the accounting year to effectively compensate the dependent company for the losses incurred, the amount of losses incurred during the accounting year and the right of compensation claim conferred on the dependent company to the extent that the losses have not been compensated during the accounting year.

Under Article 34 of the Groups of Companies Law, members of the executive body of a dependent company are liable in addition to the controlling enterprise and its legal representatives for losses suffered by the dependent company if, in breach of their duties, they have failed to disclose in the dependency report an disadvantageous transaction or a disadvantageous measure and the unreimbursed losses resulting therefrom, or failed to comply with the obligation to report those transactions and measures to the meeting of shareholders.

However, as stated in Article 33, Section 2 of the Group of Companies Law, the controlling enterprise does not have to compensate for losses if it proves that a proper and conscientious manager of an independent enterprise would have acted in the same way. The Supreme Court (Senate) has held that the legal structure of liability governed by the provisions of Article 33 of the Groups of Company Law is similar to that of Article 169 of the Commercial Code, as evidenced by the possibility of exculpation.[23]

A claim for compensation for losses against a controlling enterprise of a *de facto* group of companies may be brought not only by the dependent company itself, but also, by applying Article 27, Section 5 of the Groups of Companies Law accordingly, by each shareholder in his or her own name and for the benefit of the dependent

[20] *Emmerich, V., Habersack, M.* Aktien- und GmbH-Konzernrecht, § 317 AktG Rn. 13.

[21] *Emmerich, V., Habersack, M.* Konzernrecht, § 27 Rn. 9.

[22] *Rubene, A., Stabulniece, M.* Atbildība par atkarīgajai sabiedrībai nodarītajiem zaudējumiem [Liability for the losses of the dependent company]. Jurista Vārds. 12.11.2013, No. 46 (797),p. 38.

[23] The Judgment of the Supreme Court (Senate) of the Republic of Latvia from 18 January 2022 in case No. SKC-20/2022, para. 10. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?lawfilter=0&year=2022 [last viewed 15.04.2024].

company. Similarly, under the said provision of the Groups of Companies Law, a creditor may also bring an action to the extent that he or she is unable to obtain satisfaction of his or her claims from the dependent company. The Supreme Court (Senate) has held that if a creditor is able to justify why it would be unsuccessful or pointless to proceed against the dependent company, there is no need to proceed against the dependent company first.[24] Moreover, a creditor may seek damages in its own favour, as it would be unreasonable to expect him or her to proceed first against the dependent company in order to obtain satisfaction of his or her claims against the dependent company only afterwards.[25]

The manner of compensation of the loss suffered by a dependent company as a result of a disadvantageous transaction or other disadvantageous measure is not expressly regulated by the Groups of Companies Law and is therefore subject to the general provisions of the Civil Law[26] on compensation of losses, namely, the provisions of Article 1770 et seq. of the Civil Law. In any case, the existing special provisions of the Groups of Companies Law shall be observed, including the obligation of the controlling enterprise to compensate the losses voluntarily or to grant the dependant company an adequate compensation claim before the end of the accounting year.

German groups of companies law doctrine recognises that a controlling enterprise may compensate for the loss of a dependent company by granting the latter any benefit of a pecuniary nature, i.e. a benefit measurable in money, which is appropriate to "neutralise" the loss position on the balance sheet of the dependent company.[27] An appropriate remedy may also be the participation and assistance of the controlling enterprise in the cancellation of the dependent company's disadvantageous contracts, insofar as this is practically possible.[28] If, however, it becomes necessary to bring legal proceedings to recover losses, no one can prevent the dependent company from claiming a monetary compensation. This also applies where a compensation claim is brought by shareholder for the benefit of the company or by a creditor.

Thus, the provisions of Article 33 of the Groups of Companies Law, applied in conjunction with several provisions of Article 27 of the said Law, provide a sufficiently effective mechanism for the compensation of losses suffered by a dependent company as a result of a disadvantageous transaction or other disadvantageous measure entered into at the instigation of the controlling enterprise. The relevant provisions of the Groups of Companies Law also protect the interests of the shareholders and creditors of the dependent company. It should be noted that the obligation to indemnify the dependent company for losses incurred by it in a *de facto* group of companies is twofold. In particular, the primary obligation is for the controlling enterprise, by the end of the accounting year, to compensate the dependant company for losses resulting from a disadvantageous transaction or measure on a voluntary basis or to grant the dependant company a compensation claim. This legal mechanism

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[24] The Judgment of the Supreme Court (Senate) of the Republic of Latvia from 18 January 2022 in case No. SKC-20/2022, para. 10. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?lawfilter=0&year=2022 [last viewed 15.04.2024].

[25] The Judgment of the Supreme Court (Senate) of the Republic of Latvia from 31 May 2022 in case No. SKC-44/2022, para. 11.3. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/komerctiesibas/citi [last viewed 14.04.2024].

[26] Civillikums [The Civil Law] (28.01.1937). Available: https://likumi.lv/ta/id/225418-civillikums [last viewed 12.04.2024].

[27] *Emmerich, V., Habersack, M*. Konzernrecht, § 25 Rn. 53; *Saenger, I.* Gesellschaftsrecht, § 29 Rn. 950.

[28] *Koch, J*. Aktiengesetz. 11. Auflage. München: C. H. Beck, 2014, § 317 AktG Rn. 9.

is logical as it can be assumed that the controlling enterprise would normally not want to worsen the overall economic situation of the group of companies. If the controlling enterprise does not fulfil the obligation to compensate for losses voluntarily, the dependent company may enforce its claim in court.

Summary

A group of companies is an aggregate of a controlling enterprise and one or several dependent companies, the purpose of which is to operate in common economic interests defined by the controlling enterprise. There is no general prohibition in groups of companies law against the controlling company giving instructions or making inducements to a dependent company which have the effect of causing loss to the dependent company. However, the provisions of the Group of Companies Law protect, to the extent possible, the dependent company, its shareholders and creditors by mitigating the adverse effects of transactions entered into by the dependent company as a result of an instruction or inducement by the controlling company.

The legal ability of the controlling enterprise to influence the dependent company to improve or maintain its economic and financial position at the expense of the dependent company is not unlimited. A principle of groups of companies law is that the controlling enterprise is obliged to indemnify the dependent company for losses incurred by the latter as a result of a disadvantageous transaction or other disadvantageous measure at the direction or instigation of the parent. The prerequisites and essential aspects of the indemnification differ depending on whether the dependent company which suffers damage as a result of the conduct of the controlling enterprise is part of a contractual group of companies or a *de facto* group of companies.

Where a contractual group of companies exists on the basis of a management contract or a management and transfer of profit contract, the controlling enterprise has an expressly regulated right to give instructions to the executive body of the dependent company. In a contractual group of companies, the controlling enterprise itself is not liable for any loss suffered by the dependent company as a result of the instructions, but the legal representatives of the controlling enterprise are liable as joint debtors. Liability for losses arises only if the legal representatives have breached the duty of care owed by a proper and conscientious manager. In addition to the legal representatives of the controlling enterprise, the members of the executive and supervisory bodies of the dependent company are also liable under certain conditions.

In a *de facto* group of companies, i.e. in the absence of a group of companies contract, the controlling enterprise is not entitled to give direct instructions to the executive body of the dependent company, which is why the Group of Companies Law speaks of inducing the dependent company to enter into a transaction or carry out other measure disadvantageous to that company. In a *de facto* group of companies, the controlling company itself is liable, and, in addition to the controlling company, its legal representatives who induced the dependent company to enter into a transaction or to carry out other measure disadvantageous to it are also liable as joint debtors. As in a contractual group of company, the members of the executive and supervisory bodies of the dependent company are also liable under certain conditions. Moreover, in a *de facto* group of companies, the shareholders of the dependent company are entitled to claim the compensation for their own losses.

Any shareholder may also bring an action for damages against a dependent company in his or her own name but for the benefit of the dependent company. An

action for compensation of losses may also be brought by a creditor of the dependent company to the extent that he is unable to obtain satisfaction of his claims from the dependent company. Moreover, the creditor is not required to bring an action for the benefit of the dependent company and may claim the amount of damages in question directly in his favour. It would be unreasonable and contrary to the legitimate interests of the creditor to expect first to bring an action against the controlling enterprise or its legal representatives and then to be forced to wait for satisfaction from the dependent company.

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Direct Recall as an Instrument of Political Liability of Public Authorities Before Voters in the Republics of Poland and Latvia

Dr. hab. **Andrzej Jackiewicz**
University of Białystok
Associate Professor, Faculty of Law
E-mail: *jackiewicz@uwb.edu.pl*

Dr. hab. **Anna Rytel-Warzocha**
University of Gdańsk
Associate Professor, Faculty of Law and Administration
E-mail: *anna.rytel@prawo.ug.edu.pl*

The direct and participatory democracy is becoming increasingly popular in recent years in Europe. States are introducing new institutions into their constitutional systems, which, on the one hand, strengthen the ability of citizens to influence decision-making processes and, on the other hand, allow them to control the actions of public authorities. One of such institutions is a "recall", which provides citizens with the right to recall, by way of voting, the public authorities elected directly by citizens. The institution of recall may take either direct or indirect form. Nevertheless, only a "direct recall" that takes place at the request of citizens can fully satisfy their interests. The direct recall at the national level is a relatively rare institution, hence, Latvian solutions in this area that allow for the recall of parliament before the end of its term may be considered unique, whilst in Poland the institution of direct recall occurs at the local level. Polish experiences with the practice of recalls indicate that for this institution to function effectively, it is necessary to adopt appropriate legal regulations. For example, the high turnout threshold adopted in both countries, which determines the binding nature of the vote, may be a factor that significantly reduces the effectiveness of this measure. The authors present the current legal regulations concerning the institution of direct recall in both states, as well as provide their critical assessment.

Keywords: direct democracy, accountability of elected officials, direct recall, indirect recall, popular voting, Poland, Latvia.

Contents

Introduction

In recent decades, recall mechanisms have increasingly found their way into the constitutional orders of democratic states, attracting an increasing interest of academics. These countries include the Republic of Poland, where the Constitution of 2 April 1997 provides for the constitutional basis of recall at the local government level, as well as Latvia, which in 2008 introduced into its constitutional system a form of recall that is unique in the world, complimenting another mechanism already present there, namely, the recall of parliament by way of a referendum. The article is devoted to the mechanism of recall as it exists in the constitutional systems of Poland and Latvia. The controversy that is aroused by the effectiveness of this mechanism in Poland in comparison with the modest Latvian experience in this field provokes research questions concerning these institutions, including those that belong to the field of comparative law, although they function on different levels of public authority. Although the article compares the Polish experience at the local level and the Latvian experience at the national level, the authors believe that, despite this, conclusions can be drawn as to the role and functioning of the recall institution. The research aimed to assess the normative solutions of both recall models and to answer the question of whether, in the light of these findings and the constitutional practice, any conclusions can be constructed regarding the rationalisation of normative solutions in both countries. For this purpose, firstly, the authors will analyse the provisions of the Constitution of the Republic of Poland constituting the legal basis for the institution of recall in the Polish legal order, and then the provisions of the Local Referendum Act and, as far as required, other acts. Next, the data on the practice of using this institution will be presented. The model of the Polish recall thus constructed, together with the Polish experience, will then be compared to the mechanism of Latvian recall in terms of Art. 14 of the Latvian constitution, *Satversme*.

1. Terminological remarks

The analysis of the normative solutions should be preceded by comments of a terminological nature. There are no major doubts as to the very definition of the recall mechanism, which can be characterised as a political right of a certain group of people to recall bodies of public authority elected by universal suffrage.[1] The *ratio legis* of this institution is also relatively easy to identify. As A. Lijphart aptly observes, the essence of this institution is the possibility of early dismissal of those representatives who in the voters' opinion have betrayed the trust of voters and

[1] See, f. ex.: *Uziębło, P.* Demokracja partycypacyjna. Gdańsk, 2009, p. 50. The representatives of Western doctrine define recall similarly, see, f. ex.: *Zimmerman, J. F.* The Recall: Tribunal of the People. Albany, 2014, p. 9; *Macgregor Burns, J., Peltason, J. W., Cronin, T., Magleby, D.* Government by The People. New York, 2000, p. 27; *Qvortrup, M.* Hasta la Vista: a comparative institutionalist analysis of the recall. Representation, Vol. 47, No. 2, July 2011, p. 161.

have performed their duties improperly.[2] Hence, it allows for ongoing verification of the activities of individual representatives, as well as the entire assembly, although in today's world it is important to keep in mind that in some cases this may turn out to be a verification in the field of propaganda, disinformation and manipulation by means of social media. The mechanism of recall exists, however, in many versions (e.g. recall elections, referendum recall, representative recall) and, although it is not the purpose of this article to characterise them all, for the sake of further considerations two forms of recall should be distinguished. The first one is a "direct recall" initiated upon a relevant petition of a certain number of voters which results in a direct vote on recall before the end of the term of the elected body/official. The second one is an "indirect recall" initiated by a public authority according to the provisions of law, and only then voters can decide by voting.[3] The literature on recalls provides a number of arguments both for and against the institution of recall, pointing out the advantages and disadvantages of its different forms. Bearing this in mind, the legislator shall always carefully consider the very idea of recall, as well as the specific procedural solutions when introducing this institution into a given legal order.[4]

2. Constitutional regulation of recall in the Republic of Poland

The Constitution of the Republic of Poland of 2 April 1997[5] provides for two kinds of referendums depending on their territorial scope. The first category of national referendums includes three types of popular voting distinguished according to their subjective scope: a referendum on matters of particular importance to the State (Art. 125), a referendum on granting consent for the ratification of an international agreement that delegates the competence of organs of State authority concerning certain matters to an international organization or international institution (Art. 90, para. 3), and a confirmatory referendum that is a part of a procedure amending the Constitution (Art. 235, para. 6). The second category of local referendums is determined by Art. 170, which serves as a constitutional basis for the recall institution in a commune.

According to Art. 170, "members of a self-governing community may decide, by means of a referendum, matters concerning their community, including the dismissal of an organ of local government established by direct election. The principles of and procedures for conducting a local referendum shall be specified by statute". It should be pointed out that the Constitution does not limit in any way the issues that can be subject to a local referendum, stating only that they shall refer to matters concerning the self-governing community. The only limitation in this regard relates to the requirement that the subject of the referendum should concern the self-governing community perceived as a subject of public law and not the particular interests of

[2] *Lijphart, A.* Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries, New Haven, 1984, p. 200.

[3] *Qvortrup, M.* Hasta la Vista, p. 163. This classification is also used by U. Serdült and Y. Welp, who also propose another classification based on the recall function criterion; See: *Serdült, U., Welp, Y.* The leveling up of a political institution. Perspectives on the recall referendum. In: *Ruth, S., Welp, Y. and Whitehead, L.* Let the people rule? Direct democracy in the twenty-first century. Colchester, 2017, pp. 137–140.

[4] The arguments for and against the institution of a recall are comprehensively presented, *inter alia,* by *Zimmerman, J. F.* The Recall, pp. 78–90.

[5] The Official Journal of Laws „Dziennik Ustaw", No. 78, item 483, 1997. Available: https://sejm.gov.pl/prawo/konst/angielski/kon1.htm [last viewed 17.06.2024].

individual inhabitants or their groups – e.g. the initiators of such a referendum.[6] Despite the fact that the Constitution does not require that issues addressed to the referendum must fall within the scope of tasks and competencies of the given local government unit, such interpretation seems to be appropriate if we want to ensure the effective functioning of this institution.[7] The provisions of ordinary law should not limit the subjective scope of the local referendum. However, irrespective of the determination of the admissible subjective scope of the local referendum in Poland, a recall of a local authority has been explicitly mentioned in the Constitution as one of the matters that can be decided in a referendum.[8]

The above fact shows the special attention that the legislator pays to this institution. The institution of recall is an exceptional mechanism that results in the interruption of the term of office of public authority whose legitimacy to govern for a certain period has its source in democratic elections. If the mechanism of recall were not regulated in the Constitution, there would be reasonable doubts as to whether such a procedure is permissible at all. The authors of this paper believe that Art. 170 of the Polish Constitution provides for two different constitutional mechanisms. Firstly, there is a local "problem-based" referendum that allows inhabitants to decide on certain "matters", and secondly, there is a local referendum that allows deciding on "persons" and due to its distinct features, it may be referred to as a recall mechanism separate from the "problem-based" referendum. This, therefore, unequivocally confirms the appropriateness of indicating this mechanism *expressis verbis* in the Constitution.

The Constitution does not indicate at what level of self-government a local referendum may be organised, which reflects a rather open construction of the model of local government in Poland. The Constitution only determines that the commune shall be the basic unit of local government (Art. 164 para. 1). Meanwhile, it stipulates that other units of regional and/or local government shall be specified by statute. It follows from this provision that the legislator can decide on the number of tiers of local government in Poland, although a commune as the basic unit and at least one tier of the local government of a regional nature must be established by a statute. Nevertheless, there are no obstacles to establishing more local or regional tiers.[9] In 1998, several acts were adopted that established the basis for the current shape of the Polish local government. These were primarily the Act of 24 July 1998 on the Introduction of the Basic Three-Tier Territorial Division of the State,[10] the Act of 5 June 1998 on *Poviat* Local Government[11] and the Act of 5 June 1998 on Voivodeship Local Government.[12] The Act of 8 March 1990 on the Municipal Local Government[13] had already been

[6] Of course, in certain situations this may cause doubts whether the issue would concern the rights of a certain part of the population, but not all. In the absence of constitutional indications in this respect (but also in the absence of statutory ones), it should be acknowledged that the issue is a matter to be assessed by the authority administering the referendum. Furthermore, it is subject to the supervision of the *voivode*, who can issue a supervisory decision stating the invalidity of the resolution on holding the referendum. The supervisory decision is subject to appeal to the administrative court (Article 10 of the Act on Local Referendum).

[7] Cfr. Judgement of the Constitutional Tribunal of 26 February 2003, (K 30/02).

[8] *Banaszak, B.* Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary]. Warszawa, 2009, pp. 763–766.

[9] *Skoczylas, A., Piątek, T.* Komentarz do artykułu 164 [Commentary on Article 164]. In: Konstytucja RP. Komentarz T. II. *Safjan, M., Bosek, L.* (eds). Warszawa, 2016, pp. 889–891.

[10] Official Journal of Laws „Dziennik Ustaw", No. 96, item 603, 1998.

[11] Consolidated text: Official Journal of Laws „Dziennik Ustaw" item 511, 2019.

[12] Ibid., item 512, 2019.

[13] Consolidated text: Official Journal of Laws „Dziennik Ustaw" items 559, 583, 2022.

in force. It should be noted that although the process of shaping the Polish model of local self-government, which refers to interwar solutions, began in 1989, the fact that it is largely based on statutory laws caused it to be subject to further evolution.[14]

In the opinion of the authors, the referendum provided in Art. 170 may be carried out at any level of local government, even though the second sentence of this provision refers only to a local referendum, not mentioning a regional one. When constructing the institution of the referendum at the local level, the legislator referred this regulation to the communes envisaged by the Constitution, i.e. units of local self-government. Hence, the term "local referendum" appears. This formulation should not, however, be understood in a way that prohibits holding a referendum on other levels of self-government established by a statute. Firstly, there is no substantive justification for excluding such a possibility at other tiers of local government. Secondly, given the principle of self-government units' independence, understood in this context as the lack of subordination of a given category of units to higher-level units, granting only one category of local communities (municipalities) the right to decide their own affairs in a referendum, while depriving others of this right, could face the charge of arbitrariness in this regard and be considered in the context of the principle of equality, referring to the equal political rights of different categories of local communities. Moreover, as pointed out by A. Skoczylas and T. Piątek, such reasoning would be in contradiction with Art. 62, placed in the subchapter concerning political freedoms and rights, which generally provides for the right to take part in a referendum without any exclusions of a subjective nature.[15] In the opinion of the authors, a regional referendum and therefore a recall at the regional level is possible.[16] Yet, given the content of Art. 164, para. 2 of the Constitution, allowing the legislator to establish different units from commune units of the local and regional government, a more appropriate legislative solution would be to add to the content of Art. 170 the possibility to organize a regional referendum. It is worth pointing out that the law on local referendum, which is crucial in this matter, unnecessarily exacerbates the terminological doubts, recognising in Art. 6 that a local referendum includes a municipal referendum, a district referendum, and a voivodeship referendum.

The Constitution does not specify the number of tiers of territorial self-government and does not define the bodies of territorial self-government at those tiers. However, Art. 169, para. 1 prejudges the dual organisational structure of local government units, since it follows from this provision that units of local government shall perform their duties through legislative and executive organs. The key issue from the point of view of the recall mechanism, which follows from Art. 170, is the identification of those bodies which are established by direct election. According to Art. 169, para. 2, elections to legislative organs must be universal, direct, equal, and shall be conducted by secret ballot.[17] Regarding executive bodies, the Constitution is more

[14] *Jackiewicz, A.* Re-enactment of the territorial self-government in Poland during transformation. In: Jurisprudence and culture: past lessons and future challenges: the 5th International Scientific Conference of the University of Latvia: dedicated to the 95th Anniversary of the Faculty of Law of the University of Latvia, 10–11 November 2014, *Torgans, K., Pleps, J.* (eds). Riga, 2014, pp. 258–267.

[15] *Skoczylas, A., Piątek, T.* Komentarz do Art. 170, p. 948.

[16] See: *Jackiewicz, A.* The constitutional and statutory basis for the local referendum in Poland, In: Evolution of constitutionalism in the selected states of Central and Eastern Europe, *Matwiejuk, J., Prokop, K.* (eds). Białystok, 2010, pp. 181–182.

[17] Art. 169, para. 2 provides: "Elections to constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot. The principles and procedures for submitting candidates and for the conduct of elections, as well as the requirements for the validity of elections, shall be specified by statute."

flexible, stating in Art. 169, para. 3 that the principles and procedures for the election and dismissal of executive organs of units of local government shall be specified by statute. Therefore, the referendum on the dismissal of an organ of local government may concern the constituting bodies at all levels of local government, since each of these bodies, irrespective of the level at which it is appointed, is directly elected. It may also concern executive bodies, provided that the statute determines that they are directly elected.

3. Polish statutory regulations

The current model of local government in Poland provides for three levels of local government: municipalities (communes), counties (districts), and voivodeships. In the light of the current statutory solutions, the directly elected bodies, thus subject to the recall mechanism, including at the municipal level – legislative bodies (commune councils) and executive bodies (heads of communes, mayors, or town presidents depending on the commune's status, and in particular on the number of inhabitants), at the district level – district councils (which are legislative bodies) and at the voivodeship level – voivodeship assemblies (which are legislative bodies)[18].

The basic normative act regulating the institution of recall is the Act of 15 September 2000 on the Local Referendum.[19] In regard to issues not regulated by its provisions the Act of 5 January 2011 – Electoral Code[20] shall be applied. According to Art. 2 of the Act on Local Referendum, which refers to the referendum subject, the recall mechanism is a procedure that allows the inhabitants of the local government unit (constituting the local government community) to express their will, by way of voting, to recall the decision-making body of this unit or to recall the head of the commune (mayor, president of the city). Based on the provisions of the Act, two forms of recall can be distinguished – *communis opinio* defined as a direct recall and an indirect recall. The first form refers to the recall of a local authority in the form of a popular vote initiated by the members of the respective local government community, while the second form concerns the recall of a local authority also in the form of a popular vote, but on the initiative of another entity. The second one, in the light of the current statutory solutions, may only take place in a municipality concerning the executive body. Following the above-outlined research aims, further considerations have been focused on the instrument of a direct recall.

The analysis of the statutory provisions concerning the conduct of a recall shows a whole range of procedural solutions, which include various forms of limiting or hindering the use of this mechanism. According to Art. 4 and Art. 5 of the Act on Local Referendum, the recall of legislative authority of the local government unit can be decided before the expiry of its term of office only by way of a referendum initiated by at least 10% of residents of a municipality or a district, or by at least 5% of residents in case of a voivodeship. The initiative to start the recall can be supported by those who are entitled to vote in local elections. Regarding the municipal executive body, the recall can be initiated upon the request of the above-mentioned group of residents, but also upon the initiative of the municipal council. Notably, in all cases

[18] The executive bodies in the districts (*poviats*) and provinces (voivodships) – the management boards – are elected by the constituent bodies, hence, the recall mechanism cannot apply to them.

[19] Official Journal of Laws "Dziennik Ustaw", No. 88, item 985, 2000.

[20] Consolidated text: Official Journal of Laws „Dziennik Ustaw", item 1319, 2020.

the motion may be submitted after the lapse of 10 months from the date of the election of the authority or 10 months from the date of the last recall referendum and no later than 8 months before the end of its term of office. Given the 5-year term of office of self-government bodies, this means a time limitation excluding less than 1/3 of the whole term of office. This limitation can be justified by pragmatic reasons. On the one hand, it is aimed to prevent the recall of authorities whose term of office has just started, and. on the other hand, to prevent the recall of an authority whose term of office is about to expire anyway and the residents will have an opportunity to carry out political verification in the forthcoming elections.

According to Art. 22 of the Act on Local Referendum, the procedure for ordering a direct recall is initiated by the so-called recall initiator, which can be a group of citizens, a statutory field structure of a political party, or a social organisation with a legal personality. The eligible entity submits the application in writing to the election commissioner together with the required number of signatures of the inhabitants of the given unit of local self-government.[21] If the residents' application meets the requirements set out in the Act, the election commissioner decides to conduct a recall at the initiative of the residents (Art. 23 of the Local Referendum Act). The voting shall be held on a day of rest, no later than on the 50th day after the date of publication of the decision by the election commissioner on this matter (Art. 27 of the Local Referendum Act).[22]

The Act provides a detailed regulation of conducting the recall referendum campaign, which starts on the day of the publication of the decision of the election commissioner on calling the referendum and ends 24 hours before the voting day. The statutory provisions determine various types of restrictions in this regard. The Act also provides for the manner of financing the referendum, which must be transparent. As a rule, the recall referendum is financed from the budgetary funds of the local self-government unit, whereas the expenses related to the recall initiative are covered by the initiator's funds, and the Act extensively enumerates the sources from which the recall initiator cannot obtain funds, e.g. they can neither come from the state budget nor from abroad (Art. 43 of the Local Referendum Act).[23]

Recall voting is conducted and its results are determined by the appropriate territorial (voivodship, district, and municipal) referendum committees and regional referendum committees appointed for that purpose.[24] Under Art. 50 of the Act on Local Referendum, the members of territorial and regional referendum committees are appointed by the election commissioner from among persons (in equal numbers) indicated in writing by the executive body and the referendum initiator. The referendum committees cannot include councillors, persons who are members

[21] The judgement of the Provincial Administrative Court in Gorzów Wielkopolski of 8 March 2017 (ref. II SA/Go 19/17). The court indicated in it, *inter alia*, that: "An inhabitant of a local self-government unit supporting a referendum application shall provide on the card his/her name, surname, address of residence and PESEL registration number, as well as the date of giving support. They confirm these data with their signature. The incorrect or illegible provision of data which makes it impossible to verify its correctness may be the reason for rejecting the referendum application".

[22] *Jackiewicz, A*. The constitutional, pp. 184–185. On the procedure of initiating the recall referendum, also: *Uziębło, P.* Ustawa o referendum lokalnym. Komentarz [Local Referendum Act. Commentary]. Warszawa, 2008, pp. 102–112.

[23] *Jackiewicz, A*. The constitutional, pp. 185–187.

[24] Voting in the referendum shall be conducted in permanent and separate polling districts referred to in Art. 12 § 1 of the Act of 5 January 2011 – Electoral Code.

of or perform the function of the executive body of the local government unit, as well as the referendum initiator and its proxy.[25]

Of particular importance for the recall practice is the regulation contained in Art. 55, para. 2 of the Act on Local Referendum, which provides that the recall procedure is effective[26] if not less than 3/5 of the number of voters who have taken part in the election of the recalled organ take part in it. Other types of local referendums are binding if at least 30% of those eligible to vote take part.[27] Making the effectiveness of recall dependent on the turnout has its far-reaching practical consequences, which will be considered in the next section of the current paper.[28]

Immediately after drawing up the protocol on the referendum result, the territorial committee makes the results of the vote and the result of the referendum public by displaying one of the copies of the protocol in its seat. The announcement of the result of the referendum in which voters decided on the recall of the legislative body of a district or a voivodeship, means the end of the activities both of the legislative and executive authorities and the announcement of the result of the referendum conducted at the request of inhabitants in which they decided on the recall of the municipal bodies before the end of their term of office means the end of the activities of the bodies subject to voting.

The legal effect of the referendum in which the members of the local community voted in favour of the recall of the local authority, creates, under Art. 67, para. 4 of the Act on Local Referendum, the obligation of the Prime Minister to immediately appoint a person who will perform the functions of the recalled bodies until the appointment of the new one in early elections. Entrusting this task to the Prime Minister is a consequence of the fact that, according to Art. 171, para. 2 of the Constitution, he is the supervisory authority over local government.

4. Polish experience regarding the recall

From the beginning of the current term of municipal authorities in October 2018 until 3 April 2022, 63 referendums have been held on the recall of municipal executive bodies, municipal councils, or both of these authorities.[29] This can be perceived as distrust toward the elected local representatives. However, only 8 of them were binding due to the required turnout. In all these cases, the residents decided by a vast majority to recall the body subject to voting. The rate of binding and at the same time effective recall referendums is only 12.69%. The rest of them were not binding and did not cause any effects, because the turnout was lower than the required one. In the previous term of local government, from 2014 to 2018, there were 60 recall procedures, of

[25] A territorial commission is composed of 6 to 16 persons while a local commission is composed of 6 to 10 persons.

[26] Local Referendum Act, in order to determine the binding effect of an election, uses the unfortunate term "valid" (*ważne*), which the Constitution refers to the holding of a referendum in accordance with the law. The Constitution uses the term "binding" (*wiążące*) to assess whether a referendum has legal effect. The authors also use such a term to refer to a Local Referendum Act.

[27] See more: *Kryszeń, G.* Referendum jako instytucja demokracji bezpośredniej [Referendum as an institution of direct democracy]. Białystok 2020, s. 160–162.

[28] See also: *Rytel-Warzocha, A.* Referendum lokalne w Polsce w świetle aktualnych regulacji prawnych i proponowanych zmian [Local referendum in Poland in the light of current legal regulations and proposed changes]. Przegląd Prawa Konstytucyjnego, No. 2, 2020, p. 88.

[29] Referenda on recall since their introduction in 1990 until 2014 are presented in: *Piasecki, A.* Ewolucje referendum w sprawie oddziaływania organu samorządu terytorialnego [Evolution of the referendum in the impact of the local government body]. Homo Politicus, Vol. 12, 2017, pp. 153–164.

which only 4 were binding and at the same time resulted in the successful recall of municipal bodies, which constituted 6.66%, and thus an even smaller fraction than in the current term. Yet often, this is not the result of a lack of trust in the direct recall mechanism, but a deliberate choice by residents who do not want the contested body to be recalled.

Despite such low effectiveness of the local recall mechanism, citizens use this procedure relatively often, therefore it can be concluded that a recall is a necessary mechanism of political control available to the members of local communities. Unfortunately, the current solutions provided in the Local Referendum Act make the turnout to be the axis of decisions made in the framework of the recall procedure. The analysis of detailed results of individual recalls confirms that regardless of the turnout achieved, i.e. whether the referendum result is binding or not, the overwhelming majority of votes are cast by dissatisfied inhabitants of the municipality who are voting for the dismissal of executive or legislative bodies. Therefore, the only chance to retain the positions is often the "low turnout game". In such a case, the referendum campaign primarily focuses on encouraging voters to stay at home, often accusing the referendum initiators of political adventurism and desire to destabilise the municipality, rather than presenting substantive arguments. As a consequence, the residents who support those who govern the municipality remain at home, while those who support their dismissal participate and vote for their recall. Paradoxically, those residents who support the rulers and go to vote against their recall, *de facto* contribute to their disadvantage, as they increase the turnout required for the recall to be considered binding. Meanwhile, in practice such votes cannot keep those in power in office, since the results of local government recall unequivocally show that those who are dissatisfied and want those in power to be dismissed are more motivated to vote under these procedures. Therefore, Art. 8a of the Local Referendum Act, according to which a recall, like all other local referendums, cannot be ordered on the day on which elections to the *Sejm* of the Republic of Poland and the Senate of the Republic of Poland, elections to the President of the Republic of Poland, elections to the European Parliament in the Republic of Poland, elections to decision-making bodies and executive bodies of local government units take place[30] should be assessed critically. The legislator shall be aware that organising a recall on the same day as an election will affect the turnout and thus the binding result of the referendum. In the light of experience demonstrating the far-reaching motivation of the dissatisfied, it confirms that the turnout is the key issue for the referendum and in the case of a recall for the existence of local government bodies.[31]

At the county (*poviat*) and voivodship level, the institution recall has not been applied in practice. There are several reasons for this. Firstly, this is due to the much greater involvement necessary to collect signatures. to the second reason is the specificity of the tasks and competencies of *poviats* and voivodeships, which are more distant from the matters with a decisive impact upon lives of the inhabitants of these entities, and therefore generate less public opposition that could turn into an initiative for the dismissal of the decision-making bodies. Thirdly, such initiatives are demobilised by the turnout required by the provisions of the Local Referendum Act, which is more difficult to achieve due to the aforementioned range of matters falling within the competence of these self-government units. It should be also emphasised that the "face" of the self-government authorities at those

[30] This does not apply to municipal early elections or by-elections.

[31] *Jackiewicz, A*. The constitutional, pp. 189–191.

levels are the executive bodies, i.e. the *poviat* board and its chairperson, as well as the voivodship board and its chairperson (called Marshal) who cannot be subject to the recall procedure, as they are not appointed through direct elections.

5. Recall in the Latvian constitutional system

The normative regulation and the experience with the use of the recall mechanism in Poland permit the authors to assess this mechanism as necessary, relatively popular, and having a great constitutional potential, but at the same time not very effective. This justifies the search for constitutional solutions enabling its improvement. The comparative studies show that the institution of recall is becoming more and more popular, finding its place in the legal systems of an increasing number of contemporary states, either at the constitutional or statutory level. These countries include Latvia, where the direct recall mechanism is not without controversy,[32] was introduced by the Constitutional Amendment Act of 8 April 2009.[33] It is significant that the biggest controversy concerning issues related to the number of voters entitled to initiate a referendum and the majority needed to make the referendum for the recall effective.[34] The mechanism of direct recall was introduced to Art. 14 of *Satversme*, which provides that at least one-tenth of all voters have the right to request a referendum on the dismissal of the *Saeima*. The Latvian solution is rare in that it concerns the dismissal of the entire representative collegiate body at the national level.[35] It should be noticed that since its adoption in 1922, the *Satversme* has provided for the institution of a referendum ordered by the President of the State on the dissolution of the parliament,[36] which can be qualified as an indirect form of recall.[37] Introduced into the Constitution in 2009, the direct recall is thus an alternative procedure for bringing about a referendum in which the sovereign can decide on the continuation or discontinuation of the term of office of the representative body.

Similar to the Polish procedure of recall initiated by the inhabitants of a self-government unit, also the Latvian Constitution provides for temporal limitations, limiting the time in which a recall can be launched, according to Art. 14 sentence 3 of the *Satversme*, the right to announce a referendum on the recall of *Saeima* cannot be exercised within one year from the convening of parliament, within one year

[32] *Jackiewicz, A*. Recall na Łotwie [Recall in Latvia]. Przegląd Prawa Konstytucyjnego, No. 2, 2018, pp. 73–75; *Rodina, A., Pleps, J.* Constitutionalism in Latvia: Reality and Developments. In: New Millennium Constitutionalism: Paradigms of Reality and Challenges, Yerevan, 2013, p. 453.

[33] Recall can be found in Europe (apart from Latvia, in Switzerland, Germany, Romania, Liechtenstein, Poland, and as of 2015 also in Ukraine and the United Kingdom), North America (very popular at state and local levels in the United States, and in the Canadian province of British Columbia), Asia (Taiwan, South Korea, among others) and Africa (Ethiopia, Kenya, Uganda).

[34] *Urdze, S*. Latvia. In: Constitutional Politics in Central and Eastern Europe. From Post-Socialist Transition to the Reform of Political Systems, *Fruhstorfer, A., Hein, M*. (eds). Wiesbaden, 2016, p. 427.

[35] Apart from Latvia, such a procedure at the state level only exists in Liechtenstein, where, according to Art. 48, para. 3 of the Constitution of the Principality of Liechtenstein, 1500 citizens entitled to vote or four municipalities based on resolutions of the municipal assemblies may demand a referendum on the dissolution of the Landtag.

[36] A popular vote is organised when the President of the Republic proposes the dissolution of the *Saeima*. However, if in the referendum more than a half of votes is cast against the dissolution of the parliament, then the President shall be deemed to be removed from the office and the *Saeima* shall elect a new President. See more: *Ruus, J*. Democratic participation at the local level in post-soviet states. In: Local Direct Democracy in Europe, *Schiller, T.*, (ed.). Wiesbaden 2011, p. 273.

[37] In Latvia, they do not refer to this procedure as a recall, reserving this exclusively for the mechanism provided for in Article 14, the subject of this study.

before the end of the term of parliament, within the last six months of the term of the President of the State, as well as within less than six months from the previous referendum on the recall of parliament.[38]

The procedural rules for collecting signatures, as well as other norms concerning the recall mechanism, are contained in the Act of 31 March 1994 on National Referendums, Legislative Initiative, and European Citizens' Initiative.[39] The procedure is quite similar to that determined by Polish law. The application is submitted to the Central Electoral Commission within 12 months after the registration of the group initiating the recall, which can be created by political parties or groups of at least 10 voters. There is, however, a rather important complication, as all signatures must be officially certified (e.g. by a notary public or by the office competent for the place of residence). Significant facilitation in collecting signatures is the possibility, introduced as of 1 January 2015, to collect signatures online via the governmental system of electronic services (or another one, which would ensure identification of signatures and protection of personal data).[40] The correctness of the collected signatures is assessed by the Central Electoral Commission, which also checks the formal admissibility of the recall. If constitutional and statutory requirements are met, the Central Electoral Commission orders the recall referendum for a Saturday, falling no earlier than one month and no later than two months from the date of publication of the decision in the official gazette. The role of the Central Electoral Commission and the procedure at this stage, in general, correspond to the role of the Polish National Electoral Commission and the procedure of the recall local referendum in Poland.[41]

Similar to the Polish recall model, the Latvian law contains quite extensive and detailed statutory regulation of the referendum campaign (Chapter VI of the Act). The Act defines the duration of the campaign (including the "information silence" on the day of the recall voting and the preceding day), the places where it may be conducted, the entities which are entitled to conduct the campaign, and those which are not, the permissible ways of conducting the campaign, and quite strictly defined its financing (including, among others, financial sources, limits, liability).

Almost identical to the Polish model of recall, the effectiveness of Latvian recall is also dependent on the turnout, which must be at least two-thirds of those voting in the previous election to the *Saeima*. Admittedly, this refers to national elections, i.e. those that usually attract more interest, but it should be borne in mind that both in Latvia and Poland (3/5), the required turnout threshold is related to the turnout in the election in which the body contested in the recall was elected. At the same time, the Polish experience with a recall suggests that the turnout threshold required of *Satversme* may prove to be too high. The parliament is recalled if a majority of voters vote in favour (Art. 14 of the *Satversme*)[42].

The constitutional practice in Latvia has not verified the normative solutions yet, although there is a visible desire for the development of direct democracy mechanisms. Still, it should be noted that, although the number of referendums held

[38] In case of the mechanism for dissolving the *Saeima* in a referendum ordered by the President – i.e. indirect recall (Art. 48), the *Satversme* does not provide for any restrictions.

[39] Par Tautas Nobalsošanu, Likumu Ierosināšanu un Eiropas Pilsoņu Iniciatīvu, "Latvijas Vēstnesis", 47(178) of 20 April 1994.

[40] Before 1 January 2015 (the entry into force of the amendment to the law), the state-funded the process of collecting signatures.

[41] *Jackiewicz, A*. Recall, pp. 77–78.

[42] Ibid., p. 78.

in the country is increasing, it does not correspond to the voters' involvement as the turnout is relatively low which makes referendums ineffective.[43] In this respect, the results of the referendum held on 23 July 2011 on the dissolution of parliament, the Latvian version of an indirect recall, can be used as an example. There were as many as 94.5% of valid votes cast in favour of the dissolution of the *Saeima* (650.5 thousand eligible voters), 5.48% of voters were against (37.8 thousand) and 0.2% of all votes were invalid (1.5 thousand). Significantly, the turnout was 44.73% of all eligible voters.[44] As the turnout in the elections to the *Saeima* of the 10th term was 62.63%, the necessary threshold for the effective use of the Latvian direct recall would be around 41.73%. This means that the turnout achieved in the indirect recall procedure in 2011 would be also sufficient for the effective use of direct recall. However, the one-time use of recall in Latvia in the indirect form makes it necessary to treat these results with far-reaching caution when assessing the turnout threshold required by the Constitution for direct recall.

Summary

The normative regulation of the direct recall mechanism, which exists in the Polish legal system only at the local level (in fact only at the municipal level), shows far-reaching similarities to the recall mechanism that exists in Latvia and is unique in the world, referring to the parliament *in pleno*. The recall procedure in both cases provides for similar solutions as regards the initiation of the recall, its order, the information campaign, and the vote itself. The key issue in both cases is that the effectiveness of the recall mechanism depends not only on the outcome of the vote but also on the turnout. Both in Poland and Latvia, the required turnout threshold has been dependent on the turnout in the last election of the body to which the specific recall mechanism applies. Taking into account the Polish experience of local self-government units in this respect, the turnout threshold indicated in *Satversme* should be treated as quite demanding, placing high demands on initiators to justify the need to recall parliament and mobilise voters. It should be taken into account, however, that the unique Latvian version of the recall concerns the focal point of the political scene in the parliamentary system of government. On the one hand, it justifies the expectations of extensive voter interest, while on the other hand, it raises concerns regarding questionably justified attempts to destabilise the system of government. Therefore, the provided turnout threshold seems to be warranted. The referendum on *Saeima's* dismissal conducted on the initiative of the head of state in 2011, although it was an example of an indirect recall, has shown that such a turnout is possible in the Latvian political and constitutional reality.

[43] *Karklina, A.* Rights of the Entirety of Citizens in Legislative Process in Latvia. Curentul Juridic, Vol. 57, No. 2, 2015, p. 71; *Jarinovska, K.* Popular Initiatives as Means of Altering the Core of the Republic of Latvia. Juridica International, No. XX, 2013, pp. 152–159.

[44] See more: *Jackiewicz, A.* Referendum w sprawie rozwiązania parlamentu na Łotwie z 2011 roku [Referendum on the dissolution of the Latvian Parliament, 2011]. Przegląd Prawa Konstytucyjnego, No. 5, 2017, pp. 85–100.

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Examining Ukraine's EU Candidate Status: (When) Does the Accession Process Turn from Political to Legal?

Dr. iur. **Christoph Schewe**
University of Applied Sciences Kiel-Altenholz/Reinfeld
Professor
E-mail: *schewe@fhvd-sh.de*

Dr. iur. **Arnis Buka**
Faculty of Law, University of Latvia
Docent at the Department of International and EU Law
E-mail: *arnis.buka@lu.lv*

Dr. iur. **Edmunds Broks**
Faculty of Law, University of Latvia
Docent at the Department of International and EU Law
E-mail: *edmunds.broks@lu.lv*

This article explores the nature of the notion "candidate country status" in the context of EU accession. In particular it enquires whether the candidate status, which was granted to Ukraine by the European Council on 23 June 2022, has any actual legal implications or is the whole accession process up to the point where accession agreement is signed entirely devoid of legal consequences. Legal doctrine seems to generally answer this question in the affirmative, explaining that the candidate status was a rather political concept bearing primarily symbolic relevance. However, the example of Ukraine, which was granted candidate status much more rapidly than a number of other countries before it, challenges to explore the topic in more depth, in particular by delving into the CJEU's existing case law on candidate status and the possibility of challenging the granting of candidate status through litigation in the CJEU.

Keywords: EU candidate country, European Council, accession to the EU, enlargement of the EU, Ukraine, Court of Justice of the European Union.

Contents

Introduction

A frequent comparison of Brexit-analyses illustrating the process and consequences of the United Kingdom leaving the European Union (EU) was the analogy of a divorce.[1] Hence, one may be tempted to adopt this wider image though reversing its central aspect by asking, is EU-accession somehow comparable to getting married? Indeed, accession to the EU has the aim of creating a (life-long[2]?) union which is supposed to bring mutual benefits and also obligations. Without entering too deeply into this comparison and avoiding the slippery grounds of discussing a marriage with 27, one may nevertheless be tempted to raise a related question: Is an accession candidate, who had well founded hopes for EU-accession, in a similar legal situation as a fiancée who was promised marriage? In this case, it is inspiring to let thoughts travel in space and time across the various EU member states jurisdictions: frequently different legal orders governed that (under certain circumstances) an abandoned fiancée could bring a claim for certain (also immaterial) damages.[3] Somewhat similar to this question, this essay seeks to answer the question, whether anything may be found or constructed under EU law or international law that provides rights to a membership-aspirant whose hopes for accession have (unduly) been frustrated. More precisely, due to the current political focus and the impressive recent advances in the accession process,[4] this article will concentrate on the example of Ukraine.

On 23 June 2022, Ukraine was granted candidate status by unanimous agreement between the leaders of all 27 EU Member States. Given the Russian aggression and the ongoing war, this decision seems to have raised more attention than the granting of the candidate status to other states, such as Albania, Bosnia and Herzegovina or – simultaneously with Ukraine – to Moldova. However, this attention also brings

[1] E.g.: *Poole, S.* Don't Say Divorce, Say Special Relationship: The Thorny Language of Brexit. Available: www.theguardian.com/books/2017/apr/07/brexit-language-divorce-special-relationship-negotiation-britain-eu [last viewed 12.01.2024]; see already before Brexit: *Tatham, A. F.* 'Don't Mention Divorce at the Wedding, Darling!': EU Accession and Withdrawal after Lisbon. In: EU Law After Lisbon, *Biondi, A. et al.* (eds). Oxford University Press, 2012, p.152.

[2] Initially, the Treaties did not provide any provision regulating the leave of a Member State; *see Dörr, O.* Art. 50 EUV, para. 1–7. In: Das Recht der Europäischen Union: EUV/AEUV [The law of the European Union: EUV/TFEU], *Grabitz, E., Hilf, M., Nettesheim, M.* (eds). Beck, 2021.

[3] Under German law, withdrawal from an engagement may still entail legal consequences for the other person, see §§ 1297 BGB. Available: www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5468 [last viewed 12.01.2024]; however, the former § 1300 BGB in Germany, formally abrogated only in 1998 went considerably beyond, hereon a rather informal overview of the background and legal history of this norm: *Felz, S.* Geplatztes Heiratsversprechen: Das doppelt verfassungswidrige Kranzgeld [Bursted wedding-promise: A wreath money which is doubly unconstitutional]. Available: www.lto.de/recht/feuilleton/f/kranzgeld-verloebnis-heirat-ehe-schadensersatz-frau-unbescholten-verfassungswidrig/ [last viewed 12.01.2024].

[4] *Lorenzmeier, S.* Der Beitritt der Ukraine zur EU: Rechtliche und politische Fragestellungen, Ukraine-Krieg und Recht (UKuR) [The EU-Accession of the Ukraine: Legal and Political Questions, Ukraine and the War]. Beck, 2022, p. 390.

forward questions about the implications of this decision as a first step on the road to EU accession for the *candidate*, the EU and its Member States.

In this regard, one may distinguish between two dimensions, firstly, a political and secondly a legal dimension. While the first reflects rather unbinding perspectives for the actors, a legal dimension would imply rights and obligations which at some point might become the object of judicial disputes. The vast majority of publications on this aspect limits itself to stating that the accession process is political,[5] i.e. concerns the first dimension. Hence, not much[6] has been written on potential legal implications of the candidate status. However, with regard to the public attention, candidate status gets, it appears questionable whether the status is purely symbolic. This would mean that the respective decisions would merely be seen as something like a marketing event or a "beauty contest" bearing almost no binding relevance.

This paper aims at analysing the implications of the "candidate" status, striving to distinguish between the two dimensions and indicate whether it is possible to identify aspects in this concept that might be classified as legal. If the overall candidate status does not bring legal rights for the aspirant, it still brings forward the question whether the following accession process turns from political to legal, and if so, at what point? Furthermore, would it be helpful for the applicant to bring a disputed legal aspect to the Court of Justice of the European Union (CJEU)? Or, returning to the analogy of a wedding, whether a frustrated fiancée could claim for compensation – would there be any equivalent for a candidate country?

The authors will address these questions in two sections. Firstly, the article will provide an overview of the accession process (1.1.), and hereafter, explain the relevance of association agreements for a potential accession (1.2.) for indicating what legal elements an accession process might generally entail. On this basis, the exact procedure of becoming a candidate will be discussed (1.3.), and any potential legal implications of the candidate status analysed (1.4.). Under the assumption that there might be legal elements, the second section will discuss the prospects of a (hypothetical) claim brought to the CJEU.

While these questions may have been somewhat neglected in the past due to the political character of negotiations and the relative theoretical relevance of this aspect, this could be different in the case of Ukraine, for two reasons. Firstly, more than the applications of other states, for Ukraine, EU membership would bring significant advantages when defending against the Russian aggression and thus makes a fast accession more pressing. Secondly, Ukraine differs considerably from other applicants, insofar as (among a range of other aspects) its president Zelensky, due to the practical importance of effectively countering Russia, has developed a straightforward style, that, also with regard to the geo-political importance of the country may bring in additional weight in negotiations. Accordingly, these aspects may render the perspective less obvious that Ukraine would remain a stoic observer when potential obstacles to accession arise, that previously had not been on the agenda.

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[5] *Ohler, C.* Art. 49 EUV para. 3, 2021.

[6] *Šarčević, E.* EU-Erweiterung nach Art. 49 EUV: Ermessensentscheidungen und Beitrittsrecht, Europarecht [EU Enlargement and 49 TEU: Decisions implying Discretion and the Law regarding Accession]. Nomos, 2002, pp. 461–479; see *Zeh, J.* Recht auf Beitritt? Ansprüche von Kandidatenstaaten gegen die Europäische Union [Right to Accession? A Right of Candidate States vs. the EU]. Baden-Baden, Nomos, 2002.

1. How does a state become a candidate

1.1. Accession requirements

On a very broad and general basis, accession is dealt with in Article 49 of the Treaty on the European Union (TEU), which stipulates:

> *Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.*
>
> *The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.*

With Article 49 TEU, there is only one norm in EU primary law regulating accession,[7] however so short that it governs the process almost rudimentarily.[8] This provision implicitly structures the accession process in either two[9] or three phases[10]. The difference is, whether one counts a first phase, which concerns the application – being dealt with in the first paragraph of Article 49; the second, the pre-candidate-phase; and the third – the accession-phase, i.e. accession negotiations (Article 49(2) TEU). At first glance the first paragraph only once seems to explicitly refer to substantive law, namely to the values enshrined in Article 2 TEU. However, since its codification with the Lisbon Treaty, the last sentence, "The conditions of eligibility agreed upon by the European Council shall be taken into account" opens the pre-candidate-phase to further substantive requirements. Differing from Article 49(1) TEU, which involves the EU's institutions and refers to the procedure of accessions, paragraph 2 leaves the substantive conditions of the accession to "… an agreement between the Member States and the applicant State".

Apart from adjusting procedures within the EU, the fifth enlargement with 12 states applying for EU membership brought a general practical need to equip these aspiring members in order to cope with the political, legal and economic reality in the EU.[11] Accordingly, the Copenhagen European Council, which was dealing with

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[7] *Kochenov, D., Janse, R.* Admitting Ukraine to the EU: Article 49 TEU is the 'Special Procedure'. EU Law Live, 30 March 2022. Available at SSRN: https://ssrn.com/abstract=4083111 or http://dx.doi.org/10.2139/ssrn.4083111 [last viewed 12.01.2024].

[8] *Ohler, C.* Art. 49 EUV para. 3, 2021.

[9] *Terhechte, J.* Art. 49 EUV, Para 21. In: Kommentar zu EUV, GRC und AEUV [Commentary on TEU, CFR and TFEU], *Pechstein, M., et al.* (eds). Mohr Siebeck: 2017.

[10] Pechstein explains both in Enzyklopädie Europarecht [Encyclopedia of EU Law], Vol. 1, § 21, Baden-Baden, Nomos, 2022, p. 1157, para. 11; seemingly, also: *Ohler, C.* Art. 49 EUV para. 3, 2021.

[11] From the perspective of Estonia as one of the accession states: Estonia's way into the EU. Available: https://eu.mfa.ee/wp-content/uploads/sites/19/2018/09/Estonias_way_into_the_EU.pdf [last viewed 12.01.2024].

the upcoming accession, agreed in 1993 (and later in the Madrid European Council in 1995),[12] that applicant countries need to fulfil certain requirements. Only later, these Copenhagen Criteria – which in the fifth enlargement had been applied without being codified – were formally introduced with the Lisbon Treaty Article 49(1) sentence 4 TEU. They require states to have stable institutions in order to guarantee democracy, the rule of law, human rights and respect for and protection of minorities. With regard to economic aspects, aspirants should have a viable market economy, the ability to cope with competitive pressure and market forces within the Union and also, to be able to meet obligations relating to the objectives of political, economic and monetary Union.

Furthermore, they have to adopt the *acquis communautaire*, i.e. effectively implement the rules, standards and policies that make up the body of EU law. The extent of this latter requirement has continuously grown and already in prior accessions, the *acquis* comprised around 90 000 pages that needed to be translated and to be incorporated into the national legal systems.[13] This mere detail illustrates that practical requirements by far exceed what one might expect when reading the minimalistic wording of Art. 49 TEU.[14] Furthermore, it illustrates that, with the growing bulk of EU law – including case law of the CJEU – fulfilling requirements is becoming increasingly demanding for aspirants.[15]

1.2. Preparing accession: Association Agreements and the Ukraine

Usually, the application for membership in the EU is anticipated, planned and prepared. An important method to structure the pre-accession has been the use of association and partnership agreements.

a. Association Agreements

Article 217 (also 198–204, 37) of the Treaty on the Functioning of the European Union (TFEU) deals with so-called association agreements, i.e. those, which go beyond mere trade agreements and in addition include a range of other policy areas. Commonly, they aim to achieve closer relations – contingent on the type of agreement – by fostering development and facilitating political, societal and economic transformation in the partner states. However, association agreements may take different forms depending on the respective state. These can include free trade agreements, like the European Economic Area (EEA), development association, e.g. with African states, or constitutional association with former Member States' colonies.[16] A particular form known as accession-association, focusses on the prospect

[12] Europäischer Rat Kopenhagen, 21./22.6.1993. Schlussfolgerungen des Vorsitzes [European Council Copenhagen 21/22.6.1993, conclusions of the presidency], S. 13 des Umdrucks, SN 180/1/93. Available: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/de/ec/72924.pdf [last viewed 12.01.2024].

[13] European Commission. Translation: where do we stand after completion of the fifth enlargement? MEMO/07/76. Brussels, 23 February 2007. Available: https://ec.europa.eu/commission/presscorner/detail/de/MEMO_07_76 [last viewed 12.01.2024].

[14] The reach of the Simmental decision illustrates the reach of the impact of EU law for Member States. See: *Beutel, J., Broks, E., Buka, A., Schewe, C.* Setting Aside National Rules that Conflict EU law: How Simmenthal works in Germany and in Latvia. In: New Legal Reality: Challenges and Perspectives. University of Latvia Press, 2022, pp. 123–142.

[15] European Commission. Guide to the Main Administrative Structures Required for Implementing the Acquis May 2005. Available: http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/adminstructures_version_may05_35_ch_public_en. pdf [last viewed 12.01.2024].

[16] *Vöneky, S., Beylage-Haarmann, B.* Art. 217 AEUV, para. 1–3. In: Das Recht der Europäischen Union: EUV/AEUV [The Law of the EU: TEU/TFEU], *Grabitz, E., Hilf, M., Nettesheim, M.* (eds). Beck: 2021.

of EC/EU accession and was first applied in 1981, when preparing the accession of Greece. Since then, this method has been consistently utilized, and further elaborated association agreements played a significant role in facilitating the accessions of enlargements in 2004, 2007 and 2013.[17]

Accompanied by economic and financial support, these initiatives aim at bringing about a conducive environment for fostering democratization, promoting cooperation in legal matters, enhancing justice and home affairs, and intensifying political dialogue. A related form of association agreements is encompassed by the EU Neighbourhood Policy, which, among other initiatives also includes the Eastern Partnership.[18] Association agreements are concluded as binding international treaties, bringing forth rights and obligations for all parties involved. The procedure is governed by Art. 218 TFEU and involves the three institutions, the Commission, the Council and the European Parliament.

b. The EU-Ukraine Association Agreement

Closer institutionalized relations between the EU (then European Community (EC)) and Ukraine have been in place since 14 June 1994, when the Partnership and Cooperation Agreement (PCA) replaced an earlier agreement the EC had concluded with the USSR. On 9 September 2008, an agreement was signed and on 7 May 2009 Ukraine became a member of the Eastern Partnership. Even though negotiations on the conclusion of an Association Agreement had been relatively advanced, the former Ukrainian President Janukovich on 21 November 2013 decided to "freeze" the process.[19] Furthermore, as he also denied the signing of the Association Agreement, this led to protests and the beginning of the Euro-Maidan. Instead, he seemed to consider signing an agreement aimed at joining Eurasian Economic Community – the Customs Union between Russia, Belarus, and Kazakhstan.[20]

Notwithstanding this intense and precarious political conflict, on 21 March 2014 the "political part" of the Association Agreement was signed and has been applied since December, 2015. On 1 January 2016, Ukraine became a member of the Deep and Comprehensive Free Trade Area (DCFTA)[21] and since 11 June 2017 an agreement on visa-free travels has been applied.

The Association Agreement[22] between Ukraine and the European Union encompasses 1200 pages and is organized into 7 titles or chapters. The primary objective is to facilitate a gradual rapprochement between the Parties, which involves

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[17] *Vöneky, S., Beylage-Haarmann, B.* Art. 217 AEUV. See also *Majkowska-Szulc, S., Wierczyńska, K.* European Neighbourhood Policy and EU Enlargement. In: The Oxford Handbook of International Law in Europe. Oxford University Press, 2023.

[18] See information on the Eastern Partnership on the website of the Council of the EU. Available: https://www.consilium.europa.eu/en/policies/eastern-partnership/#candidate [last viewed 12.01.2024].

[19] Generally, on the agreement, see: *Lorenzmeier, S.* Das Assoziierungsübereinkommen EU – Ukraine und der Krieg. Ukraine-Krieg und Recht (UKuR) [The Association Agreement EU-Ukraine and the War. Ukraine and the War]. Beck, 2022, p. 104.

[20] *See Schewe, C., Aliyev, A.* The Customs Union and the Common Economic Space of the Eurasian Economic Community: Eurasian Counterpart to the EU or Russian Domination? German Yearbook of International Law, Vol. 54, 2011, p. 565.

[21] EU-Ukraine Deep and Comprehensive Free Trade Area (DCFTA). Available: https://www.eeas.europa.eu/sites/default/files/tradoc_150981.pdf [last viewed 12.01.2024].

[22] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. Available: www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2014045&partyid=NL&doclanguage=en [last viewed 12.01.2024].

establishing common values and fostering close and privileged links.[23] Additionally, the Agreement aims to enhance Ukraine's association with EU policies and increase its participation in various EU programs and agencies. One of the key features of the Agreement is the provision of an appropriate framework for an elevated political dialogue in all areas of mutual interest, ensuring a comprehensive and dynamic relationship between the Parties.

In contrast to the preceding association agreements with the Central European states that foresaw an accession perspective, this was not the case for the EU-Ukrainian Association Agreement. One important reason is that in the Netherlands there were concerns regarding the impact of the Association Agreement; a consultative referendum was undertaken prior to the ratification of the Ukraine's Association Agreement, in which 61% of votes were against the Approval Act. Against this backdrop, the Netherlands requested modifications and a peculiar compromise was worked out in the European Council. This compromise, did not commit the EU to grant Ukraine EU candidate status, or provide security guarantees, military support or financial aid, or free movement to Ukrainians within the EU.[24]

1.3. The procedure to become a candidate

As already noted, the founding treaties say very little on the accession process and even less on the seemingly important step of that process, i.e., on how a State becomes a candidate. Article 49 TEU spells out only that "[t]he applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament". Thus, the process starts with an application to the Council[25], which in the case of Ukraine was submitted on 28 February 2022, just four days after the start of Russia's invasion.[26]

After receiving the application, the Council forwarded it to the European Commission and invited it to prepare an Opinion on Ukraine's capacity to meet the accession criteria.[27] The Commission then provided Ukraine with two questionnaires: one on political and economic criteria and another on EU *acquis* chapters. On 17 June 2022 on the basis of Ukraine's replies to the questionnaires the Commission issued a favourable opinion that Ukraine be granted the candidate

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[23] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, Article 1(2). Available: www.consilium.europa.eu/en/documents-publications/treaties-agreements/ratification/?id=2014045&partyid=NL&doclanguage=en [last viewed 12.01.2024].

[24] *Wessel, R.* The EU solution to deal with the Dutch referendum result on the EU-Ukraine Association Agreement. European Papers, Vol. 1, No. 3, 2016, pp. 1305–1309. Available: www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement [last viewed 12.01.2024]; *Baczynska, G., Bartunek, R. J.* EU agrees Dutch demands on Ukraine deal to avoid present for Russia. Available: https://www.reuters.com/article/us-ukraine-crisis-eu-rutte-idUSKBN14416I/ [last viewed 12.01.2024].

[25] That is the Council of Ministers, which in the TFEU and the TEU is referred to simply as "the Council" – not to be confused with the European Council, i.e., the meeting of the Heads of State and Government of the Member States.

[26] Article 49 TEU also stipulates that: "The conditions of eligibility agreed upon by the European Council shall be taken into account". Thus, the Article clarifies that the accession requirements are not always uniformly fixed but may be adjusted according to the peculiarities of the situation.

[27] The Opinion assesses not only the Copenhagen criteria, but also Ukraine's administrative capacity as well as the country's efforts to implement its Association Agreement, including obligations under the Deep and Comprehensive Free Trade Area. See *Veebel, V.* Relevance of Copenhagen criteria in actual accession: Principles, methods and shortcomings of EU pre-accession evaluation. Studies of Transition States and Societies, 3(3), 2011, pp. 3–23.

status.[28] The European Parliament similarly endorsed Ukraine just days after the Commission.[29] With both the Commission and the Parliament supporting Ukraine, the European Council on 23 June 2022 granted the candidate status to Ukraine.[30]

1.4. Implications of being granted the candidate status

The European Council granted the candidate status to Ukraine in a document designated as "Meeting Conclusion", which is not a legal act in the context of Article 288 TFEU. Although the European Council is an EU institution[31] Article 15(1) TEU explicitly states that the European Council does not exercise legislative functions. Also Article 263 TFEU states that acts of the European Council are subject to judicial review by the CJEU only if they are "intended to produce legal effects *vis-à-vis* third parties" which, as shown in section 2 of the current article, is unlikely in the case of Conclusions.[32] Thus, the European Council deciding "to grant the status of candidate country to Ukraine" seems to lack the hallmarks of a legal act that would create rights or obligations or could be challenged before the CJEU.[33]

Likewise, the Commission's Opinion technically is cast as a "Communication to the European Parliament, the European Council and the Council". Communications again are not intended to produce legal effects *vis-à-vis* third parties and therefore are not subject to judicial review under Article 263 TFEU. The same applies to the Resolution of the European Parliament which endorsed Ukraine's candidacy. Thus all three – the European Council's Conclusions, the Commission's Communication and Parliament's Resolution – fall into the category of EU's "soft law" and as such have no legally binding force.[34]

They do, however, generate considerable practical implications. First and foremost, granting the candidate status is a powerful signal of solidarity and support to Ukraine. Being a step closer to EU membership gives a notable boost to morale of both the army, and of the civilian population – a significant asset for a country at war. Secondly, becoming a candidate encourages Ukraine to undertake much needed domestic reforms on issues such as corruption, independence of the courts, effective

[28] European Commission, Commission Opinion on Ukraine's application for membership of the European Union, Brussels, 17.6.2022, COM(2022) 407 final. Available: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/Ukraine%20Opinion%20and%20Annex.pdf [last viewed 12.01.2024]. In terms of methodology, the Opinion is a mix of formalism and substantive evaluation of the accession requirements.

[29] European Parliament resolution of 23 June 2022 on the candidate status of Ukraine, the Republic of Moldova and Georgia (2022/2716(RSP)), (2023/C 32/01). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0249 [last viewed 12.01.2024].

[30] European Council Conclusions, 23 and 24 June 2022. Available: https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf [last viewed 12.01.2024].

[31] See Article 13 of the TEU.

[32] The legal conundrum created by the Dutch referendum rejecting the Association Agreement between the European Union, its Member States and Ukraine demonstrates that the European Council, when it wants to create legally binding effects, may frame its action as Member States acting outside the scope of the EU. See *Wessel, R.* The EU solution to deal with the Dutch referendum result on the EU-Ukraine Association Agreement. European Papers, Vol. 1, No. 3, 2016, pp. 1305–1309. Available: https://www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement [last viewed 12.01.2024].

[33] *Ohler, C.* Art. 49 EUV para. 3, 2021.

[34] On EU's soft law, see: *Peters, A.* Soft Law as a New Mode of Governance. In: The Dynamics of Change in EU Governance, *Diedrichs, U., Reiners, W., Wessels, W*. (eds). Edward Elgar Publishing, 2011, pp. 423–424*; Snyder, F.* The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques. The Modern Law Review, 56(1), 1993, p. 32.

administration and many other areas. The accession process will create considerable pressure on the Ukrainian government from the civil society, media and from the EU to rapidly proceed with reforms required by the EU. Thirdly, being a candidate opens a much wider access to EU funding and support.

The above described process leading up to the granting of the candidate status also serves as a point of reference for the upcoming accession negotiations. The accession criteria, the Commission's questionnaire and also its Opinion all form the basis of the initial to-do list for the candidate - it is the first time when the candidate is presented with a somewhat detailed sketch of what requirements it must satisfy before becoming a Member State. Subsequently this sketch is filled in with much more detail in the so-called screening of the *acquis* process, in which the candidate together with the Commission undertakes an in-depth examination of *acquis* thereby for the first time learning the details of what it is expected to do before joining the EU.

Thus, the process of becoming a candidate seems to be lacking tangible legal structures or legal implications. The outline of the process is indeed regulated by a legal norm, i.e., Article 49 TEU. However, the stages of that process – the application, Commission's opinion, consent of the European Parliament and the European Council's Conclusions are in essence political acts or steps of internal decision making rather than legal acts that would create rights or obligations. Certainly one may suggest that any action of the EU's institutions must comply with general principles of law.[35] Thus legal certainty, legitimate expectations or *estoppel* or *venire contra factum proprium* in principle would impose restraints on what EU's institutions may do. For example, the Commission arguably should not impose new criteria that were not initially required of Ukraine or increase the required standard, which it previously has accepted as being good enough.

However, such arguments by and large seem to be moot, because the process for transitioning from a candidate to a member is negotiation. Within negotiations Ukraine certainly may also use legal arguments, such as *estoppel*, to advance its interests. But in practical terms *estoppel* or other general principles would serve only as a bargaining chip, rather than a basis for an actual legal claim in the CJEU. EU law does not provide for rights or obligations stemming from the candidate status. There is no right to become a candidate; and being a candidate does not grant a right to become a Member State. Although the EU is thoroughly a legal creature with a tendency to increasingly legalize all its doings, all that takes place before the Accession Agreement is inherently a political process with a few formalized stages which in themselves hardly create rights and obligations.

2. Bringing the candidate status before the CJEU

Although section 1.4 has already outlined the legally non-binding nature of the candidate status, it is worth looking further at the CJEU's position both on soft law generally and on the case law relating to the candidate status.

The general approach of the CJEU regarding the range of norms that can be legally challenged in Luxembourg, is a relatively broad one. As the usage of "soft law" instruments by the EU institutions increased through time, the developments in

[35] *See Tridimas, T.* The General Principles of EU Law. Oxford University Press, 2006; *Lenaerts, K., Gutiérrez-Fons, J. A.* The Constitutional Allocation of Powers and General Principles of EU law. Common Market Law Review, Vol. 47, No. 6, 2010, pp. 1629–1669.

the case law of the CJEU have followed.[36] The CJEU has emphasized that the binding effects of a measure must not be limited to the formal designation of the act. Instead, it should be assessed in accordance with objective criteria. Those criteria, according to the CJEU, include the contents of the measure, the context in which the measure was adopted and the powers of the institution which adopted the measure.[37] Thus, all these criteria must be taken into account: regarding the content, whether the act in question imposes mandatory obligations; as regards context, whether the act is intended to produce binding legal effects and whether the issuing authority intended it to have such effects; and, as regards the powers, whether the issuing authority has been given such powers.[38]

Generally, this broad approach has been used also in the context of the EU's action in the field of international law – as far back as the famous ERTA case, in which the Commission challenged the decision of the Council of the EU on the negotiation and conclusion by the Member States of the international treaty under the auspices of the United Nations Economic Commission for Europe. Despite the fact the Council of the EU claimed that the application was not admissible as the decision in question did not constitute a legislative act in form, substance or object, the CJEU was willing to review it.[39]

However, in the context of the accession process so far the case law of the CJEU indicates restraint and reluctance to elaborate on the legally binding dimension of the accession process. Thus the CJEU in Mattheus/Doego clearly stated that the Court cannot "determine the content" of the accession, i.e., the CJEU cannot establish in its case law a binding set of criteria defining the requirements for a country to be admitted to the EU. It clarified that the legal conditions for accession should be defined in the context of the accession procedure as specified by the Treaties "without it being possible to determine the content judicially in advance".[40]

Similarly the concept of the candidate country features in the case law of the CJEU very seldomly. In fact, only a few indirect references can be identified, mostly by parties of the case. For example, in the Korkmaz several applicants sought before the General Court a partial annulment of the Commission's Report concerning Turkey's progress towards accession and, *inter alia*, argued that Turkey was failing the obligations of a candidate country.[41] The Court did not elaborate on the concept of the "candidate country" and found the application inadmissible on other grounds.[42] In another case, the Hungarian government used the status of a candidate country to argue that on the basis of being a candidate Serbia must be considered a safe country of origin, but CJEU did not take this argument into account.[43]

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[36] See, e.g., *Korkea-aho, E.* National Courts and European Soft Law: Is Grimaldi Still Good Law? Yearbook of European Law, Vol. 37, 2018, pp. 470–495. Available: https://academic.oup.com/yel/article/doi/10.1093/yel/yey008/5259665?searchresult=1 [last viewed 12.01.2024]

[37] Judgement of 13 February 2014 of the Court of Justice of the European Union in case C-31/13 P Hungary v. Commission, especially para. 55.

[38] Ibid.

[39] Judgement of 31 March 1971 of the Court of Justice of the European Union in case 22/70 Commission v. Council.

[40] Judgment of 22 November 1978 of the Court of Justice of the European Union in case 93/78 Mattheus/Doego Fruchtimport, para. 8.

[41] Judgment of 30 March 2006 of the General Court in case T-2/04 Korkmaz and others.

[42] Ibid.

[43] Judgment of 22 June 2023 of the Court of Justice of the European Union in case C-823/21 Commission v. Hungary, para. 36.

Perhaps the best chance for the CJEU to meaningfully interpret the concept of the candidate country was in Spain v. Commission[44]. In this case the CJEU had to interpret the following phrase in the preamble of Regulation (EU) 2018/1971: "… regulatory authorities of third countries competent in the field of electronic communications where those third countries have entered into agreements with the Union to that effect, such as European Economic Area or European Free Trade Association States and *candidate countries* (emphasis added) [...]"[45]. The dispute in this case was whether the regulation should also apply to Kosovo, which is not an official EU candidate country. The CJEU held that the reference to "candidate countries" in regulation was merely illustrative and that, accordingly, Kosovo should be among the countries covered by this regulation, too.[46] However, even in this case, the CJEU did not take the opportunity to clarify the nature of the candidate status.

Considering the uncertainty of the concept of "candidate" one may wonder whether it would be possible to challenge the European Council's decision to grant candidate status before the CJEU? The short answer seems to be – unlikely. It is true that the Lisbon Treaty established the European Council as an institution of the European Union and the measures adopted by the European Council "no longer escape the review of legality provided for in Article 263 TFEU"[47]. However, this may happen only if the measure in question would meet the above discussed criteria of a legally binding act. In the context of the decision on the candidate status it seems that, firstly, the content of the decision itself does not impose mandatory obligations and, secondly, the context of this decision (more precisely, the intent of the European Council) is not aimed at giving the decision a legally binding effect.

Regarding the non-mandatory nature of the European Council's decision – obviously, it cannot impose obligations on Ukraine without its consent. Similarly, the European Council's decision is unlikely to create obligations for other EU institutions without these obligations being spelled out in the TEU or the TFEU. The whole communication between the EU institutions in the context of the accession is not entirely regulated by Article 49 TEU or any other article of the treaties and lacks transparency. Therefore it is hard to estimate the exact impact of the decision to grant the status of a candidate country on other EU institutions. Yet it seems that the European Council's decision does not impose mandatory obligations on anyone, and it does not even mark the beginning of the accession negotiations.

As for the intent of the European Council, it is hard to imagine that by granting the candidate status the European Council would see itself making a definite commitment to the membership of the candidate and thus giving up conditionality – EU's most effective tool in the accession process. Also it could be argued that state representatives within the European Council, if necessary, can distinguish between their actions that are intended to create legally binding effects and non-binding ones. For example, to make something legally binding, state representatives could choose

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[44] Judgment of 17 January 2023 of the Court of Justice of the European Union in case C-632/20 P Spain v. Commission.

[45] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No. 1211/2009; OJ 2018 L 321, p. 1.

[46] Judgment of 17 January 2023 of the Court of Justice of the European Union in case C-632/20 P Spain v. Commission; see, in particular, para. 56.

[47] See, e.g., the decision of 28 February 2017 of the General Court in case T-193/16 NG v. European Council, para. 44 and the case law mentioned there.

to act as "the Heads of State or Government of the Member States of the European Union, meeting within the European Council" (which *de facto* would mean creation of a separate international agreement).[48]

Even if one assumes the possibility to challenge the decision on the candidate country status in the CJEU substantively, the question remains who has the *locus standi* in such cases. According to Art. 263(2) of the TFEU, theoretically, any of the Member States could challenge that decision. According to Art. 263(4) of the TFEU, natural and legal persons have a right to start proceedings only against acts that are "of direct and individual concern to them", which the decision on the candidate status clearly is not. The only exception here is Ukraine itself - although Ukraine is not the explicit addressee of this decision, yet possibly it would satisfy the "direct and individual concern" test, especially taking into account recent move towards broader *locus standi* in the CJEU position in Venezuela v. Council.[49] But, even if the Member States or Ukraine itself could challenge the decision on candidate country status, it is very unlikely that they will have motivation to do it (perhaps only in the rare case of a radical change in government policies).

Overall, the current assessment of the CJEU case law does not provide a clear answer not only on the legal consequences of candidate status, but also on the distinction between the legal and political elements of the accession process as a whole. The CJEU has recognized in several cases that the promises made by a country during accession negotiations must be fulfilled by that country.[50] However, in all these cases, the legally binding nature of the accession negotiations stemmed from the subsequent Accession Treaty and the provisions contained therein, which contained a reference to the accession negotiations that had taken place.[51] Thus, the only clear threshold after which the accession process indeed turns from political to legal seems to be the Accession Treaty.

Summary

The notion of the "EU candidate country" is primarily a non-legal concept, which accordingly does not entail specific rights for the candidates to further advance towards full membership. Still, it formally acknowledges that the application for membership in the EU has been accepted and considered as admissible. Accordingly, it brings along political prestige, which may entail considerable benefits.

Or, returning to the analogy with a fiancée: the (marital) candidate may not derive precise rights to marriage, however, by officially creating a deeper bond between the partners which is openly accompanied by plans, promises and perspectives for the future, this bond may nevertheless impress third persons and actors. However, both partners remain aware that this future still remains conditional to the fulfilment of the reciprocal expectations.

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[48] See *Wessel, R.* The EU solution to deal with the Dutch referendum result on the EU-Ukraine Association Agreement. European Papers, 2016, Vol. 1, No. 3, pp. 1305–1309. Available: https://www.europeanpapers.eu/en/europeanforum/eu-solution-deal-dutch-referendum-result-on-the-eu-ukraine-association-agreement [last viewed 12.01.2024].

[49] Judgment of 22 June 2021 of the Court of Justice of the European Union in case No. C-872/19 P Venezuela v. Council.

[50] E.g., judgment of 26 February 2016 of the Court of Justice of the European Union in joined cases T-546/13, T-108/14 and T-109/14 Šumelj and others (on Croatia); judgment of 21 December 2021 of the Court of Justice of the European Union in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 Euro Box Promotion and Others (on Romania).

[51] Ibid.

The process of becoming a candidate is only partially spelled out in Article 49 TEU and in practice is more complex and ambiguous. The documents adopted by the EU institutions within this process hardly create rights or obligations that could be adjudicable – at best, they are steps of internal decision making, which supposedly result in the self-commitment of these institutions.

CJEU case law on the concept of the candidate country is almost non-existent. It is highly doubtful that the decision to grant the candidate country status could be challenged in the CJEU as the decision lacks legally binding content – it does not come with mandatory obligations and the intent of the European Council does not aim to make the decision legally binding. Moreover, it is questionable who has a right to start such action in the CJEU and who has an interest to challenge the granting of candidate status. Nevertheless, there is no *expressis verbis* evidence in the case law of the CJEU that would confirm that the CJEU sees the candidate country status only as a political will and forfeits any possible legal dimensions of that status.

The ambivalent nature of the candidate country status prompts a more extensive critique of the accession process as a whole. To enhance transparency of the accession process and to ensure predictability, it is essential to clearly define the roles of EU institutions involved, particularly emphasizing the European Council's role. Although conditionality of accession, which allows the EU to ensure that the candidate implements all the reforms required by the EU, is an essential part of the accession process, absence of legally spelled out details leaves the process potentially susceptible to obstruction tactics where the candidate fulfils accession requirements, yet still is denied membership. Increased transparency would benefit not only the political actors but also the wider public.

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Domestic Violence in the Focus of Estonian Penal Policy and Implementation of the Law in the Light of the Istanbul Convention Requirements

Dr. iur. **Silvia Kaugia**
Faculty of Law, University of Tartu
Department of Criminal Justice
Chair of Comparative Jurisprudence
E-mail: *silvia.kaugia@ut.ee*

Domestic violence is a multi-faceted phenomenon, encompassing social, psychological, medical and, certainly, legal aspects. Depending on the existing legal framework, it is the lawyers who have the possibility and even the duty to assist and protect the victim and to apply various sanctions against the perpetrator. The decision on the Principles of Criminal Policy until 2030, adopted by the Estonian Parliament, formulates the goal of the penal system as supporting law-abiding lifestyles and thus ensuring that the norms based on the values of our society are implemented, violations are responded to and conflicts are resolved fairly. These are goals that, if realised, could also contribute to reducing domestic violence in society. Estonia has ratified the Istanbul Convention and has made amendments to national legislation in accordance with the requirements of the Convention. Dealing with cases of domestic violence is nevertheless relatively problematic, especially from the perspective of the victim. The predominance of the settlement procedure or the practice of out-of-court restorative justice and conciliation in domestic violence cases, in the opinion of this author, tends to support the position of the perpetrator of violence.

Keywords: violence, domestic violence, penal policy, implementation of the law, the Istanbul Convention.

Contents

Introduction

Violence against women and girls is one of the most systematic and widespread human rights violations worldwide. EU countries are no exception. Regrettably, one in three women have experienced physical or sexual violence, mostly perpetrated by intimate partners. Every second woman has experienced sexual harassment. During the COVID-19 pandemic, there was a significant increase in the number of reported cases of physical and mental violence against women. According to reports, in some countries the number of calls to domestic violence hotlines has quintupled. Likewise, cyber-violence is on the rise, particularly against young women and women in public life, such as journalists and politicians. Women also face violence in the workplace: around a third of women in the EU who have undergone sexual harassment experienced it in the workplace. The EU and its Member States are working in different areas to end gender-based violence, protect victims and punish perpetrators.[1]

For the purposes of this article, the meaning of domestic violence will comply with the definition contained in the Istanbul Convention[2] (hereinafter referred to as "the Convention").[3] Domestic violence is a multi-faceted phenomenon, encompassing social, psychological, medical and certainly legal aspects. The latter has an important role to play: depending on the existing legal framework, it is the lawyers who have the possibility, and indeed the duty, to assist and protect the victim and to apply various sanctions against the perpetrator. In addition to the law, the lawyer is assisted in this task by his or her own (professional) understanding of the dangers of family violence, the effective methods of dealing with it and the effectiveness of existing legislation in addressing the problem.

Domestic violence is a human rights problem that undermines people's right to liberty, security, dignity, mental and physical integrity and non-discrimination. Violence causes great suffering to the victim and his or her loved ones, as well as damage to society (medical costs, loss of working capacity, loss of quality of life, etc.).

Violence is often a recurring phenomenon: a violent family pattern is acquired in childhood and can be repeated from generation to generation.[4]

The problem of domestic violence is also acute in Estonia, being fuelled by the high level of alcoholism among the population, a relatively tolerant attitude towards violence and stereotypical attitudes and perceptions of the role of women in the family.

According to the Ministry of Justice, the number of domestic violence crimes registered in Estonia has fallen in the last three years. See Table 1.

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[1] ELi meetmed naistevastase vägivalla lõpetamiseks [EU action to end violence against women]. Available: https://www.consilium.europa.eu/et/policies/eu-measures-end-violence-against-women/#directive [last viewed 23.01.2024].

[2] Naistevastase vägivalla ja perevägivalla ennetamise ja tõkestamise Euroopa Nõukogu konventsioon [Council of Europe Convention on preventing and combating violence against women and domestic violence]. RT II, 26.09.2017, 1.

[3] Domestic violence (also called intimate partner violence) includes all acts of physical, sexual, psychological and economic violence that occur within the family, in the home, or between current or former spouses or partners, regardless of whether the perpetrator lives or has lived in the same living space as the victim. Council of Europe Convention on preventing and combating violence against women and domestic violence Art. 3. Istanbul, 11V.2011. Available: https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/violence-against-women/Conv_VAW_en.pdf [last viewed 23.01.2024].

[4] *Gustafsson, M. et al.* Intimate Partner Violence and Children's Memory. Journal of Family Psychology, (27) 6, lk 937, 2013.

Table 1. Registered domestic violence crimes 2017–2022[5]

2017	2018	2019	2020	2021	2022
2632	3607	4119	3987	3760	3244

Source: Crime in Estonia 2022.

Domestic violence was the most common form of domestic violence. The typical perpetrator of domestic violence is a man in his 40s. The youngest perpetrator of domestic violence in 2022 was a 13-year-old boy and the oldest was an 84-year-old man. The vast majority of violence was committed against women and girls. In domestic violence cases involving minors, 74% of victims were girls and 26% boys. In domestic violence crimes committed as a parent, 68% were committed by fathers and 32% by mothers, whereas 45% by boys and 55% by girls. The number of homicides and attempted homicides related to domestic violence increased by four, with seven cases recorded in 2022. It is noteworthy that while domestic violence crimes accounted for 13% of all crimes, domestic violence crimes accounted for 46% of violent crimes in 2022.[6]

More important than dealing with the consequences of violence, including domestic violence, is the prevention and deterrence of all violence.

In Estonia, a resolution of the *Riigikogu* has been adopted, entitled "Basic principles of criminal policy until 2030".[7] Paragraph 3 of this document states that "criminal policy shall aim to prevent, respond to and reduce the harm caused by crime, in partnership with education, health, social, cultural, sporting and financial sectors, and with communities, local authorities, the voluntary and private sectors. The purpose of the system of sanctions is to support law-abiding lifestyles and thereby ensure that the values-based norms of our society are enforced, violations are dealt with and conflicts are resolved fairly".

Placing this decision of the *Riigikogu* in the context of domestic violence, it is inevitable to point out the objectives of the Convention formulated in Article 1 of the Convention: to prevent violence against women and domestic violence, to develop a comprehensive framework, policies and measures to protect and assist all victims of violence against women and domestic violence, and to support and assist organisations and law enforcement agencies to cooperate effectively and adopt a holistic approach to eradicating violence against women and domestic violence. Chapter 5 of the Convention is devoted to substantive law. It includes an injunction to Contracting Parties to take the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrators of the offence. Acts that should be criminalised are also mentioned. Private law measures relate, for example, to the dissolution of forced marriages, but also to the determination of the rights of the child and the parent. In the context of the Convention, the term "measures of public law" refers to legislative measures in the field of criminal law.

The aim of the article is to present the possibilities of the Estonian legal system to deal with the prevention of domestic violence cases and the protection of victims,

[5] Domestic violence crime not included in Estonia's crime statistics for 2023.

[6] Kuritegevus Eestis 2022. Justiitsministeerium [Crime in Estonia 2022. Ministry of Justice]. Available: https://www.kriminaalpoliitika.ee/kuritegevus2022/perevagivald-ja-ahistamine/ [last viewed 23.01.2024].

[7] Kriminaalpoliitika põhialused aastani 2030. Justiitsministeerium [Fundamentals of criminal policy until 2030. Ministry of Justice]. Available: file:///C:/Users/skaugia/Downloads/kriminaalpoliitika_pohialused_aastani_2030%20(1).pdf [last viewed 24.01.2024].

as well as the punitive measures and alternative punishments applied in Estonia in domestic violence cases. The analysis is based on the respective requirements of the Istanbul Convention for States Parties.

1. Private law and public law measures to domestic violence in the Estonian legal system

Private law measures relate mainly to civil law. In civil law, provisions protecting the rights of victims of domestic violence can be found in particular in the Law of Obligations Act and the Family Law Act. In order to protect the rights of the victim, the appropriate measures may vary from the possibility of establishing joint custody of the child and contact arrangements through the civil courts to claims under the law of obligations for physical injury or mental harm through the Law of Obligations Act[8] § 1043. In the Estonian Penal Code, domestic violence is theoretically covered by all criminal offences that do not presuppose specific circumstances or a specific subject.

1.1. Private law measures

1.1.1. Guardianship and visiting rights

Article 31(1) of the Convention obliges States Parties to take measures to ensure that cases of violence falling within the scope of the Convention are taken into account when determining custody and visiting rights. Cases of violence committed by one parent against a child or against another parent must be taken into account. Article 31(2) also obliges States Parties to take measures to ensure that the exercise of visitation and guardianship rights does not jeopardise the rights and safety of victims and children.

Guardianship and visiting rights are areas of civil law in Estonian law, specifically family law. They are governed by the Family Law Act (PKS).[9] In Estonian law, the relationship between a child and his or her parent consists of custody (PKS § 116), rights of access (PKS § 143) and maintenance (PKS § 96).

Parental custody means that a parent has the duty and the right to care for his or her minor child. A parent's rights of custody include both personal rights and rights of access to the child. Parental custody can be limited or withdrawn entirely on legal grounds. Subsection 134 (1) of the PKS provides for situations in which the limitation of a parent's right of custody comes into question: endangerment of the child's physical, mental or emotional well-being or of the child's property through abuse of parental authority, neglect of the child, failure of the parents to fulfil their responsibilities, the conduct of a third party and the unwillingness or inability of the parents to prevent the danger. Withdrawal of the right of custody comes into question if other measures have failed or if there are reasons to assume that their application is not sufficient to prevent the risk (PKS § 135(2)). Case law has clarified that a previous offence committed by a parent is not sufficient to deprive him or her of custody. However, the combination of a criminal lifestyle, imprisonment and the avoidance of caring for the child while at liberty can lead to the removal of custody of the child.[10]

The right of communication is defined in § 143(1) of the Constitution as the right of the child to communicate personally with both parents and the corresponding

[8] Võlaõigusseadus [Law of Obligations Act]. RT I, 06.07.2023, 116.
[9] Perekonnaseadus [Family Law Act]. RT I, 22.12.2021, 15.
[10] RKTKm 3-2-1-142-13, p. 18.

right and obligation of the parents to communicate personally with the child. In the interests of the child, the court may restrict the right of access or the enforcement of earlier decisions on this matter, but may also terminate the exercise of the right of access or the enforcement of earlier decisions on this matter (PKS § 143(2)). In the best interests of the child, the court also has the power to authorise, prohibit or restrict a third person from communicating with the child (PKS § 143(4)). The court may also order the child to communicate with the parent in the presence of a suitable third person (PKS § 143(3^1)).

In the light of the above, Estonian family law has made it possible to take domestic violence into account in matters of custody and rights of access. In the context of rights of custody, the Supreme Court has explicitly emphasised that, although both parents could participate in the organisation of the child's life, this is precluded by a conflict with the child's best interests and a risk to the child's safety.[11] Similarly, the best interests of the child must also be taken into account in matters of the right of communication, so allowing a parent who is violent towards the child to communicate with the child is also contrary to the best interests of the child. It cannot be in the best interests of the child to be looked after by a parent who has been violent towards the other parent. Violence by one parent against another also indicates a threat to the child's safety and affects the child mentally.

1.1.2. Forced marriage

Article 32 obliges Contracting Parties to the Convention to take measures to ensure that forced marriages can be annulled, annulled or dissolved in such a way as not to impose unreasonable financial or administrative burdens on the victim. The criminalisation of forced marriage is dealt with in Article 37(1), which provides that Contracting Parties shall adopt such legislative or other measures as may be necessary to ensure that the intentional coercion of an adult or a child to marry is criminalised. The second paragraph of the same provision states that the intentional luring of an adult or a child into the territory of a Contracting Party or into the territory of a State in which he or she does not reside for the purpose of forcing him or her to marry must also be criminalised.

The civil law consequences of forced marriages are governed by the Family Law Act (PKS).

Paragraph 9(1)(5) of the Civil Code provides that the court may declare a marriage null and void in an action for annulment if the marriage was contracted under the influence of fraud, threat or violence. An action for annulment of a marriage may be brought by a spouse who has entered into the marriage under the influence of fraud, threat or violence (§ 12(1)(2) of the PKS). Therefore, the victim of a forced marriage can bring an action for annulment of the forced marriage before the courts in Estonia. The annulment of the marriage has the effect of nullity of the marriage from the outset (PKS § 14(1)).

1.1.3. Options for bringing a civil action

The right of victims to compensation for the offences provided for in the Convention is set out in Article 30(1), which obliges States Parties to adopt measures to ensure that victims are able to claim compensation from the perpetrators of the offences. The second paragraph prescribes state compensation, which is awarded to victims

[11] RKTKm 2-17-507/51, p. 16.

who suffer serious bodily injury and damage to health, and to the extent not covered by compensation from other sources.

In Estonia, a victim has the right to bring a civil action in both civil and criminal proceedings. According to § 38(1)(2) of the Code of Criminal Procedure[12], the victim has the right to bring a civil action in criminal proceedings through the investigating authority or the prosecutor's office. The prerequisites for filing a civil action in criminal proceedings are set out in § 38^1(1) of the Criminal Procedure Code. The first paragraph of this provision makes it clear that a victim may bring a claim, if it is aimed at restoring or remedying the victim's situation damaged by the act which is the subject of the criminal proceedings, if the factual circumstances on which the claim is based substantially correspond to those of the offence being prosecuted and if such a claim could also be examined in civil proceedings. The second paragraph of the provision states that, in addition, the injured party in a civil action may also bring a claim for damages against a public authority which could have been brought before an administrative court.

The acquittal of a person in criminal proceedings does not exclude his civil liability under the general offence of tort/delict.[13] Thus, a victim who is acquitted in criminal proceedings, can bring an action against the injured party in civil proceedings. The claim referred to in the Convention is a non-contractual claim. First and foremost, there is unlawful damage. Section 1043 of the Law of Obligations Act stipulates that a person who has unlawfully caused damage to another person, i.e. the injured party, must compensate the damage if he or she is guilty of causing the damage or liable for causing the damage in accordance with the law.

The Victim Support Act[14] (OAS) in § 7(1) provides that state compensation shall be paid to victims of a crime of violence committed on the territory of the Republic of Estonia. Victims of trafficking in human beings or sexually abused minors are entitled to this benefit regardless of whether they have a legal basis for staying in the Republic of Estonia (OAS § 9(2)(5)). In other cases, a legal basis for staying in the Republic of Estonia is required in order to receive benefits. According to Section 8(1) of the OAS, an offence of violence is an act committed directly against the life or health of a person, punishable by criminal law, which results in the death of the victim, serious injury to his or her health or a disorder lasting at least four months. Thus, the circle of beneficiaries of state compensation for victims of violent crime is limited to situations where there is a serious consequence. The OAS also provides for compensation for the cost of psychological assistance, but this does not apply, for example, in the case of psychological assistance provided in the framework of a women's support centre service to a victim of trafficking, a victim of violence against women or a sexually abused minor (OAS § 6^1 lg 2^1). In the case of discrimination, which may occur, for example, in the provision of a social service, it is possible under Estonian law to apply to the Chancellor of Justice for conciliation. It is also possible for anyone to apply to the Chancellor of Justice for a review of whether a public authority, a local authority or body, a legal person governed by public law, or a natural or legal person governed by private law exercising public functions, complies with the principle of guaranteeing fundamental rights and freedoms and with the principle of good administration. These possibilities are provided for in § 19(1) and (2) of the Chancellor of Justice Act.[15]

[12] Kriminaalmenetluse seadustik [Code of Criminal Procedure]. RT I, 06.07.2023, 49.
[13] *Tampuu, T.* Lepinguvälised võlasuhted [Non-contractual debt relations]. Juura: Tallinn, 2012, lk 206.
[14] Ohvriabi seadus [Victim Support Act]. RT I, 06.05.2020, 22.
[15] Õiguskantsleri seadus [Chancellor of Justice Act]. RT I, 26.05.2020, 11.

1.1.4. Convergence ban

Article 29(1) and (2) of the Convention obliges States Parties to provide victims with adequate civil remedies both against the perpetrators of the offence and against public authorities that have failed to take preventive and protective measures. Civil remedies against perpetrators include restraining orders, injunctions to stop, refrain from or desist from doing something, and libel and defamation actions. The latter should offer protection to victims in cases of stalking and sexual harassment where the committed acts are not covered by the criminal law of the State Party.

In the Estonian legal system, the court has the right to decide on the imposition of a restraining order in both criminal and civil proceedings. Pursuant to subsection 141^1(1) of the Code of Criminal Procedure, at the request of the prosecutor's office and on the basis of a preliminary investigation judge or a court order, a suspect or accused in a crime against the person or against a minor may be prohibited from staying in places designated by the court, from approaching persons and from communicating with them in order to protect the privacy and other personal rights of the victim. Paragraph 1^2 of the same provision also allows for the imposition of a restraining order by order of the prosecutor's office in an urgent case and without the consent of the victim. Section 544(1) of the Code of Civil Procedure[16] similarly provides that a court may apply a restraining order or other measures to protect a person's private life or other personal rights on the basis of Section 1055 of the Law of Obligations Act.

With regard to the restraining order, § 1055(1) of the Law of Obligations Act provides that if the unlawful act of causing damage is continuous or if a person is threatened with it, the victim or the person who was threatened with it may demand that the conduct causing damage or the threat of it cease. The second sentence of the provision specifies that the prohibition of the approach of the person causing the damage to another person, i.e. a restraining order, applies in the case of bodily injury, damage to health, invasion of privacy or other violation of personal rights. In civil proceedings, the application of a restraining order presupposes the filing of a request to that effect, but in criminal proceedings this is not necessary in the case of an urgent situation. According to § 310^1(1) of the Code of Criminal Procedure and § 544(1) of the Code of Civil Procedure, the period of application of the prohibition of approach is three years.

Section 331^2 of the Penal Code provides for a financial penalty or imprisonment of up to one year as a sanction for violation of a restraining order, if the violation has caused a threat to the life, health or property of a person, or if the violation is repeated.

Chapter 55 of the Code of Civil Procedure, which deals with the use of restraining orders and similar measures to protect personal rights, does not explicitly refer to intimate partner violence. Also § 1055 of the Law of Obligations Act, to which § 544(1) of the Code of Civil Procedure refers, does not contain such a reference. However, it has been clarified in the case law of the Supreme Court that according to the Law of Obligations Act § 1055(2), a person does not have the obligation to tolerate communication that exceeds any reasonable limit, including the obligation to tolerate repeated violence with aggressive, threatening and degrading text messages.[17] Thus, in Estonia it is possible to use a restraining order in both civil and criminal proceedings, its violation is punishable and the application of restraining orders has been used in court practice in cases of intimate partner violence.

[16] Tsiviilkohtumenetluse seadustik [Code of Civil Procedure]. RT I, 22.12.2021, 23.
[17] RKTKm 2-18-1221, p-d 1 to 25.

1.2. Public law measures

1.2.1. Psychological violence

Article 33 obliges States Parties to criminalise psychological violence, i.e. an act seriously impairing the mental integrity of a person committed by coercion or threats. The word "serious" used in the article is not defined, hence, it is left to the legislation and jurisprudence of the Contracting States to define. However, according to the Explanatory Memorandum, the provision also refers to repeated conduct and not just a one-off event. While Article 33 itself obliges States Parties to criminalise psychological violence, Article 78(3) leaves the possibility for States Parties to provide for non-criminal sanctions instead of criminal sanctions. However, the punishment must be effective, proportionate and dissuasive.[18]

In Estonian criminal law, psychological violence falls at least partly within the scope of § 120 of the Penal Code[19] (KrK), i.e. threatening. In the case of § 120 of the Penal Code, harm to the mental integrity of another person is not an element of the offence, but the legal interest that is attacked by threats is the physical and mental well-being of a person, i.e. the health of a person.[20] If the act of which the person is threatened is actually committed, the perpetrator is liable for the act committed, i.e., for example, assault within the meaning of § 121 of the Penal Code or manslaughter within the meaning of § 113.[21]

The alternative of harm to health in § 121(1) of the Penal Code also comes into question in the criminalisation of psychological violence. The possibility that an act causing harm to the health of another person may also constitute psychological influence has been mentioned.[22]

According to § 1(2) of the Rules on the Forensic Medical Examination of Injuries to Health[23], a health impairment is a disturbance of the anatomical integrity of the organs and tissues of an organism or of their physiological functions, as well as a disease or other pathological condition that arises as a result of a mechanical, physical, chemical, biological, psychological or other factor. Therefore, injury to health caused by mental violence falls within the scope of application of § 121(1) of the Penal Code. Speech impediment and neurotic phobia, for example, have been identified in the legal literature as health impairments that can be caused in this way.[24]

1.2.2. Stalking

Article 34 of the Convention obliges States Parties to criminalise stalking. It defines stalking as an intentional act against another person, in which the other person is repeatedly threatened and which causes the other person to be concerned for his or her safety. This definition of stalking encompasses both physically, such as

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[18] Seletuskiri Euroopa Nõukogu naistevastase vägivalla ja perevägivalla ennetamise ja tõkestamise konventsiooni juurde [Explanatory memorandum to the Council of Europe Convention on preventing and combating violence against women and domestic violence], lk 36. Available: https://www.enu.ee/lisa/611_Istanbuli%20seletuskiri.pdf [last viewed 26.01.2024].

[19] Karistusseadustik [Penal Code]. RT I, 06.07.2023, 40.

[20] *Kurm, M.* KarSK § 120/1. *Sootak, J., Pikamäe, P.* Karistusseadustik. Kommenteeritud väljaanne [Comments on the Penal Code]. 2021. Available: https://karistusseadustik.juuraveeb.ee/ [last viewed 26.01.2024].

[21] Ibid., § 120/6.

[22] Ibid., § 121/3.1.

[23] Tervisekahjustuse kohtuarstliku tuvastamise kord [Procedure for forensic identification of damage to health]. RT I, 29.12.2014, 12.

[24] *Kurm, M.* KarSK § 121/3.1.

showing up at the victim's place of work or school, and cyber stalking, such as in chat rooms or through social media. Stalking is understood to be directed at the victim, but States Parties to the Convention have left the possibility to extend the definition of stalking to people in the victim's social environment, such as the victim's family, friends and colleagues. Also, in the case of stalking, Article 78(3) leaves the possibility for States Parties to apply non-criminal sanctions to stalking.[25]

In Estonian law, stalking is criminalised through three provisions: section 120 of the Penal Code (threatening), section 137 of the Penal Code (private stalking) and section 157^3 of the Penal Code (harassing stalking).[26]

Subsection 120(1) of the Penal Code criminalises threatening to kill, to inflict bodily harm or to cause substantial damage to or destruction of property, if there is reason to fear that the threat will be carried out. Subsection 137 (1) of the Penal Code criminalises the surveillance of another person by a person who has no legal right to do so, for the purpose of collecting data on that person. Subsection 157^3 (1) of the Penal Code criminalises repeated or continuous contact with, surveillance of, or other interference with the private life of another person against his or her will, if the purpose or effect of such interference is to intimidate, humiliate or otherwise substantially interfere with the private life of another person, unless there is an offence provided for in Section 137 of the Penal Code.

1.2.3. Physical violence

Article 35 obliges States Parties to the Convention to take the necessary measures to ensure that the intentional use of physical violence against another person is punishable. The scope of Article 35 also covers physical violence which results in the death of the victim. The purpose of the provision is to oblige the criminalisation of physical violence irrespective of the context in which it is committed.

In Estonian criminal law, physical violence is criminalised by the provisions of Chapter 9 of the Penal Code. This is a chapter on offences against the person, which covers both fatal and less serious offences. In particular, Estonian law corresponds to what is described in Article 35 of the Convention in §§ 121 and 118 of the Penal Code.

The first of these criminalises harm to the health of another person and bodily harm causing pain. Injury to health is defined as a disturbance of the anatomical integrity of the organs and tissues of the body or of their physiological functions, as well as a disease or other pathological condition resulting from a mechanical, physical, chemical, biological, mental or other agent. Physical abuse causing pain is an act, however described, which consists of affecting the body in a socially unacceptable way, but without causing harm to health.[27] Examples of painful physical abuse include hitting, arm twisting and biting.[28]

Paragraph 121(2) of the Penal Code sets out the most serious offences in the first paragraph: injury to health lasting at least four weeks, commission of the offence in

[25] Seletuskiri Euroopa Nõukogu naistevastase vägivalla ja perevägivalla ennetamise ja tõkestamise konventsiooni juurde [Explanatory memorandum to the Council of Europe Convention on preventing and combating violence against women and domestic violence], lk 37. Available: https://www.enu.ee/lisa/611_Istanbuli%20seletuskiri.pdf [last viewed 26.01.2024].

[26] Karistusseadustiku ja välismaalaste seaduse muutmise seaduse (millega viiakse Eesti õigus kooskõlla Istanbuli konventsiooniga) eelnõu seletuskiri [Explanatory memorandum to the draft Act amending the Penal Code and the Aliens Act (which brings Estonian law into line with the Istanbul Convention)], lk 11–12. Available: https://eelnoud.valitsus.ee/main#7JQ01TRq [last viewed 27.01.2024].

[27] *Kurm, M.* KarSK § 121/4.1.

[28] RKKKo 3-1-1-48-08, p 8.

a close or dependent relationship, repeated commission of the same offence. Under Estonian law, it is possible to prosecute a person for physical violence irrespective of the context in which the violence was committed. It is violence in intimate relationships and violence against women that is the subject matter of the Convention, which is why it is also important that according to § 58(4) of the Penal Code, the commission of an offence in an intimate relationship is an aggravating circumstance that is taken into account in sentencing under § 56(1) of the Penal Code.

1.2.4. Sexual harassment

With regard to sexual harassment, Article 40 of the Convention states that Parties shall take such legislative or other measures as may be necessary to ensure that unwanted verbal, non-verbal or physical conduct of a sexual nature, which is intended to or has the effect of violating the dignity of a person, or which creates an intimidating, hostile, discouraging, degrading or offensive environment, is subject to criminal or other legal measures.

This provision covers several forms of sexual harassment. Verbal conduct is taken to mean words and vocalizations communicated orally or in writing by the perpetrator. Non-verbal conduct, on the other hand, refers to any communication by the perpetrator that does not consist of words or vocalizations, i.e. facial expressions, hand gestures, symbols, etc. Physical conduct is sexual conduct by the perpetrator that may or may not involve the perpetrator touching the body of the victim. In order to fall within the definition of sexual harassment, the conduct must be of a sexual nature and directed at violating the dignity of the victim. The latter clarification is intended to cover also conduct the individual acts of which are not punishable.

Estonian Penal Code § 153^1 is entitled sexual harassment. The offence is defined as an intentional act of a physical sexual nature committed against the will of another person, with an intent to degrade the person's human dignity, with an object or effect degrading to the person. The provision covers two alternative acts: an act of physical intercourse against the person's will of a sexual nature, and the same act of sexual intercourse with a degrading consequence for the victim.[29]

An act of a sexual nature is any activity related to the human body that is normally intended to induce or increase sexual arousal and gratification[30] and in which the infringement of the right to sexual self-determination is sufficiently important.[31] Verbal and non-verbal sexual harassment is not covered by this provision of the Penal Code. If verbal or non-verbal sexual harassment is of sufficient intensity that it can be regarded as a threat within the meaning of Section 120 of the Penal Code, then it is also criminalized.

1.2.5. Sexual violence

Article 36(1) of the Convention provides a list of descriptions of acts relating to sexual violence, the deliberate commission of which must be criminalised by the States Parties. These acts include: the introduction of a part of the body or object into another person's vagina, anus or mouth without the consent of the other person as an act of a sexual nature; committing acts of a sexual nature on another person without his consent; forcing another person to engage in acts of a sexual nature with a third person without their consent. Subsection (2) of the provision clarifies that consent must be given voluntarily as a result of a person's free will and is assessed in

[29] *Kurm, M.* KarSK. § 153^1/3.2.
[30] Ibid., § 141^1/3.2.a.
[31] Ibid., § 141^1/3.2.b.

the context of the circumstances involved. In the case of the acts of sexual violence described in the Convention, the emphasis is precisely on the lack of consent.

In Estonian law, the legal definition of rape is provided by § 141 (1) of the Penal Code. According to this provision, rape is the act of entering into sexual intercourse with a person against their will by violence or by taking advantage of a condition in which the person was unable to resist or understand what had happened. The definition of rape mentions the lack of consent, or involuntariness, as an element of composition. Violence refers to threats and harm to another person's health or abuse that causes pain. § 17(1) of the Penal Code states that a person who, when committing an act, does not know the fact that corresponds to the composition of the offense, does not commit the act intentionally and is therefore liable only in the cases provided for by law for an offense committed by negligence. Rape by negligence has not been criminalised in Estonian law.

Article 36(3) of the Convention also contains an obligation to criminalise sexual violence committed against former or current spouses or partners. This has been done successfully in Estonian law. According to § 58 clause 4 of the Penal Code, an aggravating circumstance of punishment is the commission of an offense against a person who is in service of, or under economic dependence on the offender, as well as against a former or current family member of the offender, a person living with the offender or a person who is otherwise dependent on the offender in a family way.

In Estonian law, the acts described in Article 36(1) of the Convention are criminalized. The legal definition of consent used in Estonian law for offences against sexual self-determination corresponds to the definition of consent in Article 36(2) of the Convention. The existence of consent is assessed in Estonian law according to objective circumstances.[32] At the same time, the offences in the Estonian Penal Code have not emphasised the lack of consent as a basis for considering the act to be sexual violence as much as it has been done in the Convention.

2. Penal measures and punitive alternatives in domestic violence cases applied in Estonia

When applying punitive measures, it is very important to establish whether an act qualifies as domestic violence. There is only one section of the Estonian Penal Code that distinguishes between family violence and other violence: according to § 121(1) of the Penal Code (KarS), a perpetrator may be punished with up to one year's imprisonment for physical abuse of another person; Subsection (2) of the same section includes, as an aggravating circumstance, the commission of an act in a close or dependent relationship, which may result in imprisonment for up to five years. In both cases, the alternative to a prison sentence is a financial penalty, and neither case precludes either the termination of proceedings on the basis of opportunism nor the total non-parole of a prison sentence.

An analysis of the Estonian court files for 2012–2018 revealed that of the qualified domestic violence cases under § 121 of the KarS, which were resolved in settlement proceedings, 69% were resolved by imposing a suspended prison sentence, 14% by replacing the sentence with socially useful work, 10% by actual imprisonment and 7% by imposing a financial penalty.[33]

[32] *Kurm, M.* KarSK § 141/3.5.2.

[33] *Kaugia, S.* Kuidas suhtuvad Eesti elanikud ja kohtunikud lähisuhtevägivalda [How Estonian residents and judges view intimate partner violence]. Riigikogu Toimetised [Proceedings of the *Riigikogu*], 42, 2020, lk 196.

The analysis of criminal cases resolved through settlement proceedings was intentional, as over the years, domestic violence cases in Estonia have mostly been resolved in settlement proceedings. According to the results of a survey conducted among the Estonian people in 2019, 30% of the respondents found that the sentences in domestic violence criminal cases are extremely lenient and 41% that the sentences are rather lenient; 24% of respondents could not answer, 1% felt that the penalties were too severe and 5% that the penalties were right.[34]

Estonian Criminal Policy[35] contains references to penal alternatives and restorative justice, the essence of which is the reconciliation of the parties. While, on the one hand, the application of a prison sentence to domestic perpetrators raises doubts, restorative justice methods are not always considered a suitable alternative in cases of domestic violence. Although restorative justice is currently a "fashion topic" in Estonia, the scientific literature already in 2014 expressed the view that "the implementation of mediation is an easier way to process cases, but on the other hand, the suitability of mediation in each specific case must be carefully considered. It is important that the prosecutor meets with the parties and makes sure that their consent is sincere, avoiding that the victim gives consent because he has been threatened by the perpetrator".[36] Estonia's renowned attorney-at-law Tambet Laasik has noted the following: "The second main prerequisite for the implementation of restorative justice is the desire of the person who caused the damage to take responsibility and make good the damage. This, too, is problematic, although the perpetrator's desire for reconciliation is very understandable, because instead of taking responsibility, it allows him to be relieved of his responsibility. In criminal proceedings, reconciliation results in the termination of criminal proceedings without a conviction. From the point of view of the perpetrator, this is a jackpot for which one can pretend to have a little regret. Especially for a perpetrator with personality disorders, this is an easy way to escape punishment without correcting his behaviour".[37]

In the case of the implementation of the conciliation procedure, it is possible to renew the criminal proceedings within 6 months if the perpetrator does not fulfil the obligations imposed on him or her or commits a new intentional crime against the victim (Code of Criminal Procedure § 203^1(5)). Unfortunately, this condition does not constitute a guarantee for the end of violence or the fulfilment of obligations: the revelation of the violation presupposes that the relevant information reaches the law enforcement authority either through the relevant notification of the perpetrator, the victim or a third party. In that regard, it can be stated that what is at issue in the present case is not so much a defect in the procedural rules as it is the quality of the implementation of the measures. The prerequisite for the implementation of punitive alternatives is that a new violation by the perpetrator is detectable. Alas, there is no reason to believe that this assumption always corresponds to reality.

When it comes to resolving civil disputes between parties to domestic violence, there are also several problem areas in Estonia here. Attorney-at-law T. Laasik has pointed out that when conducting civil proceedings, the victim of domestic violence

[34] *Kaugia, S.* Kuidas suhtuvad Eesti elanikud ja kohtunikud lähisuhtevägivalda. Riigikogu Toimetised, 42, 2020, lk 196.

[35] Kriminaalpoliitika põhialuste aastani 2030 heakskiitmine [Approval of the fundamentals of criminal policy until 2030]. RT III, 13.11.2020, 6.

[36] *Valma, K., Surva, L., Hääl, H.* Lepitusmenetlus perevaidlustes [Conciliation procedure in family disputes]. Juridica 1, 2014, lk 96–97.

[37] *Laasik, T.* Leppimise kriitika. ERR. Arvamus [A critique of reconciliation. Estonian Public Broadcasting. Opinion] 15.04.2020. Available: https://www.err.ee/1077539/tambet-laasik-leppimise-kriitika [last viewed 25.01.2024].

is not guaranteed the opportunity to participate in civil proceedings without physical contact with the perpetrator. To date, no corresponding amendment has been introduced into the Code of Civil Procedure, but the use of family mediation services in criminal cases concerning the procedure of communication and custody of a child has been made mandatory. However, this amendment is contrary to Article 48 of the Istanbul Convention, ratified by Estonia, which prohibits, among other things, obliging a person suffering from domestic violence to alternative resolution of disputes, including conciliation and mediation. The family mediation service is a mandatory alternative to civil proceedings in civil courts for resolving issues of child welfare and custody. This means that if either party decides to separate the family or separate from a violent partner in order to protect their child or children, it is not possible to turn to a civil court to start proceedings in Estonia, only first it must be proved that an agreement on the family mediation service could not be reached. The obligation to meet with a family mediator may lead to repeated meetings with the perpetrator in addition to the meetings that accompany the court proceedings later.[38]

Summary

Domestic violence is not a self-resolving problem, yet, unfortunately, it cannot be argued that Estonia has the necessary support system and sufficient legal protection for persons suffering from domestic violence. Although the introduction of legal requirements arising from the Istanbul Convention into Estonian law has to some extent been realised, it still seems more general and not directly aimed at victims of domestic violence. Provisions have been incorporated into private and public law laws that are expressly mentioned in the Convention, but in laws they are often excluded from the general context.

On the other hand, the fact that Estonia has supplemented and amended the provisions criminalising stalking for the very purpose of complying with the Convention is a positive development. In Estonian law, stalking within the meaning of the Convention is criminalised by three provisions of the Penal Code: § 120 (threatening), § 137 (private stalking) and § 157^3 (harassing stalking). In the area of criminal law, Estonian law also complies with the requirement to criminalise psychological violence laid down in Article 33 of the Istanbul Convention. Since psychological violence is defined in the Convention as an act seriously damaging the mental integrity of a person, committed by coercion or threats, psychological violence is at least partly covered by Section 120 of the Penal Code. Since Estonian law also recognises the possibility of causing damage to another person's health through mental influence, mental violence is also criminalised in Estonian law by the alternative of damage to health in § 121(1) of the Penal Code. The Estonian legal system also meets the requirements of the Convention with regard to the criminalisation of physical violence. Section 121(1) of the Penal Code (KarS) criminalises harm to the health of another person and physical abuse causing pain. The second paragraph of the same provision lays down the aggravating circumstances of the first paragraph: impairment of health lasting at least four weeks, commission of the offence in a close or dependent relationship, repeated commission of the same offence.

The criminalisation of sexual harassment in line with the Convention on the Protection of All Persons from Enforced or Involuntary Sexual Harassment has not yet been implemented in Estonia. Namely, Article 40 of the Convention requires

[38] *Laasik, T.* Lähisuhtevägivalla kohtupraktikast: kuidas edasi? [From the jurisprudence of intimate partner violence: how to proceed?]. ERR Arvamus 31.05.2020. Available: https://www.err.ee/1096122/tambet-laasik-lahisuhtevagivalla-kohtupraktikast-kuidas-edasi [last viewed 26.01.2024].

the criminalisation of physical, verbal and non-verbal sexual harassment. In this context, physical sexual harassment refers to sexual conduct by the perpetrator, which may or may not involve the perpetrator touching the body of the victim. Verbal sexual harassment, on the other hand, refers to words and vocalizations communicated orally or in writing by the perpetrator. Non-verbal sexual harassment refers to any communication by the perpetrator that does not consist of words or vocalizations, i.e. facial expressions, hand gestures, symbols, etc. Currently, § 153^1(1) of the Penal Code defines sexual harassment as an intentional physical act of a sexual nature committed against the will of another person with an intent to degrade his or her human dignity and with an object or effect degrading to his or her human dignity. This wording is therefore narrower than the requirements of the Convention.

In the opinion of the author, domestic violence is treated in the Estonian legal order similarly to any other violence, without taking into account the specifics of domestic violence. Consequently, the vast majority of domestic violence cases are resolved in a settlement procedure and restorative justice is also used in the case of domestic violence. The requirements arising from the Istanbul Convention, *inter alia*, for law enforcement agencies, are aimed at protecting victims of domestic violence. The author holds that the settlement procedure, restorative justice and conciliation tend to support the position of the offender: as neither the state nor the local authorities have the means or resources to separate the victim and the perpetrator once the proceedings have been concluded and a decision taken (the perpetrator returns home to his/her family), there is a real risk that the victim will not be adequately protected and that domestic violence may continue.

The implementation of such procedural measures does not guarantee the victim's sense of security and does not limit the perpetrator's sense of impunity. This, in turn, is an important reason why, in many cases, the possibility of renewing criminal proceedings does not materialise and the cycle of violence is not interrupted. Differences between the experience of people suffering domestic violence and the legal system's assessments of the situation may lead to a lack of substance in the alternatives to punishment and may hinder the assessment of the suitability and effectiveness of the measures. The measures may not be ineffective, but if their implementation is not accompanied by effective monitoring, the assessment will be directed not so much at the measure applied as at the half-finished version of the measure applied.

Developing a coherent system and cooperation is crucial to effectively prevent and tackle domestic violence. A prerequisite for the creation of such a system could be a law on domestic violence that defines the role and tasks of key institutions and professionals in preventing violence, intervening in time and precluding serious cases. The Domestic Violence Act would create the essential conditions for dealing with cases of domestic violence in a holistic manner, would lay down rules of conduct (legal provisions) on how to arrive at effective solutions, which include detecting and preventing domestic violence as early as possible, providing victims and perpetrators of violence with a comprehensive package of assistance.

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Towards Greater Freedom of Expression for Judges. The Rejection of a Culture of Judicial Silence and Its Benefits for Liberal Democracy*

Dr. **Mateusz Wojtanowski**

Faculty of Law, Administration and Economics, University of Wrocław
Assistant Professor at the Department of Legal Theory and Philosophy of Law
E-mail: *mateusz.wojtanowski@uwr.edu.pl*

The current study asserts that the rejection of a culture of judicial silence is beneficial to the architecture of liberal democracy, as judicial expression outside a courtroom assists in maintaining a balance between its components. On the one hand, this can create defence mechanisms against the alienation of the law from society (which appropriately appreciates the democratic component), while on the other, it aids in the actualization of the constitutionally determined role of the judiciary within the political system (safeguarding the liberal element). The discussion, which is essentially based on an analysis of international soft law, commences by examining two areas pertaining to judicial expression outside a courtroom: public discussion on the law and generally understood social life involvement. Subsequently, the limits of judges' expression during such activities are analysed, and three proposals for their definition are put forward. As a next step, the paper highlights the diversity of judges as relevant to the problem at hand. The work concludes by outlining its findings, which also include the potential risks associated with the proposed project.

Keywords: freedom of expression of a judge, soft law, liberal democracy, public sphere, civil law tradition, CEE countries, Poland, constitutional crisis.

Contents

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Introduction

The traditional belief posits that "judges speak through their judgments". This phrase can be seen as a banner for the notion of a culture of judicial silence, which implies a very restrictive perspective on the judges' freedom of expression. The legitimacy of such a culture is based on the reference to unquestionable judicial standards, albeit read in a peculiar manner. Specifically, in relation to the question of whether a judge may speak, they are considered as *erga omnes* arguments or conversation stoppers. Here, I refer to such standards of judicial conduct as the requirements of independence, political neutrality, impartiality or maintaining the dignity of judicial office. The following motives are also sometimes absolutized, resulting in a very limited picture of judicial expression: the need to avoid being disqualified from proceedings, the requirement to maintain professional secrecy, the necessity of transmitting specific information through official channels and the inability to engage in discussion under equal conditions in public discourse. The culture in question is also linked to such themes in the discourse on the role of judges as the comparison of a judge's vocation with priesthood, or the perception of a judge as monastic in many of its qualities.[1]

Meanwhile, "[J]udges are increasingly inclined to speak to the media, to partake in social media and to express their views in matters related to society".[2] It is even possible to come across the argument in the literature that "A traditional and, until recently, official view was that judges must not become involved in public discourse outside of courtroom. Today, however, this approach has changed".[3] I would say that this traditional approach has currently been challenged, but it is difficult to assert that there is a consensus on this issue in the Euro-Atlantic countries. A debate still continues in the relevant area and this article aims to contribute to it. The paper seeks to argue that the rejection of a culture of judicial silence is beneficial to the architecture of the liberal democratic state. This rejection means giving judges greater freedom of expression outside a courtroom (understood as a metaphor for strictly professional activities) – essentially, to strengthen a judge's expression in two types of activity: participation in public discussion on the law, and generally understood social life involvement. The limitations of the article preclude providing an extensive analysis of the concept of liberal democracy, but Britannica's account can be taken as a point of departure: '[A] form of democracy in which the power of government is limited, and the freedom and rights of individuals are protected, by constitutionally established norms and institutions".[4] For our purposes, it is essential

[1] Referred to in UNODC, Commentary on the Bangalore Principles of Judicial Conduct (2007), para. 31. Available: https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf [last viewed 28.04.2024].

[2] *Seibert-Fohr, A.* Judges' Freedom of Expression and Their Independence: An Ambivalent Relationship. In: The Rule of Law in Europe. Recent Challenges and Judicial Responses, *Elósegui, M., Miron, A., Motoc, I.* (eds). Springer, 2021, p. 100.

[3] *Kakhidze, T., Jimsheleishvili, M., Chitashvili, I.* Limits of Freedom of Expression of Judges. Tbilisi, Transparency International Georgia, 2021, p. 15. Available: https://transparency.ge/en/post/limits-freedom-expression-judges [last viewed 28.04.2024].

[4] *Munro, A.* Liberal Democracy. In: Britannica (27 June 2023). Available: www.britannica.com/topic/liberal-democracy [last viewed 28.04.2024]. The need to supplement political power with a stabilizing framework is also often referred to as constitutionalism (*Sajó, A.*, Limiting Government. An Introduction to Constitutionalism. Central European University Press, 1999) or rule of law (*Tamanaha, B. Z.* On the Rule of Law. History, Politics, Theory. Cambridge, 2004, pp. 114–122). The relationship between the concepts of liberal democracy, constitutionalism and the rule of law is not the subject of this article.

to highlight the duality of logics that liberal democracy seeks to unite. It consists, firstly, of a political power with a democratic mandate and, secondly, of a stabilizing expert factor, closely tied to the field of law (i.e. mainly judges and civil servants of public administration). One can speak here, respectively, of a democratic component and a liberal component within the architecture of liberal democracy. The former is designed to reflect the expectations of the public towards social institutions, while the latter is to ensure adherence to constitutional axiology that limits government and protects individual freedoms and rights.

I would like to assert that the rejection of a culture of judicial silence is beneficial to the structure of liberal democracy, as judicial expression outside a courtroom assists in maintaining a balance between the previously mentioned components. Throughout this paper, I will contend that properly conducted rejection of a culture of judicial silence serves as a safeguard against the domination of both the liberal and the democratic elements. On the one hand, this can create defence mechanisms against the alienation of the law from society (which appropriately appreciates the democratic component), while on the other, it aids in the actualization of the constitutionally determined role of the judiciary within the political system (safeguarding the liberal element).

International soft law established under the auspices of the United Nations, the Council of Europe and other institutions will form the basis of the suggested redefinition of the judge's freedom of expression. The subject of the work is soft law, which does not mean that the importance of other documents (e.g. recent ECHR case law) is undermined. A familiar theme in jurisprudence is the problematic status of the materials concerned. According to Anthony Aust "There is no agreement about what is "soft law", or indeed if it really exists".[5] Within the context of this study, I consider the relevant international soft law to be a valuable resource for comprehending the historical experiences of the Euro-Atlantic countries and for identifying patterns of the liberal democratic politico-legal culture.[6] However, the literature has pointed to the risk that these documents present a perspective that privileges the viewpoint of judges, since the actors who develop soft law are often judges themselves.[7] In my opinion, it is true that some passages of the relevant documents can be seen as a manifestation of judicial nostalgia for supremacy (the desire to wholly eliminate politicians from judicial councils serves as an example[8]). Also relevant are the diagnoses of critical jurisprudence that intake of Western legal patterns in the countries of Central and Eastern Europe (CEE) can lead to their perception

[5] *Aust, A.* Handbook of International Law. Cambridge University Press, 2010, p. 11.

[6] The term "politico-legal culture" refers to the political morality of a given society, which provides a fundamental axiological framework for law-related practices. It is crucial to differentiate this concept from juristic culture, which encompasses the knowledge and skills of a lawyer in a strictly professional context, primarily relating to legal interpretation. See: *Jabłoński, P., Kaczmarek, P.* The Limits of Juristic Power from the Perspective of the Polish Sociological Tradition. Berlin: Peter Lang, 2019, pp. 17–21.

[7] *Leloup, M., Kosař, D.* Sometimes Even Easy Rule of Law Cases Make Bad Law. ECtHR (GC) 15 March 2022, No. 43572/18, Grzęda v. Poland. European Constitutional Law Review, Vol. 18, 2022, pp. 774–775. Available: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/sometimes-even-easy-rule-of-law-cases-make-bad-law/A62008F4A8E2B774D7A4BAC4CB8E209D [last viewed 28.04.2024]. For discussion of externally motivated influence over judicial reform in CEE, with a focus on Romania, see: *Parau, C. E.*, The Drive for Judicial Supremacy. In: Judicial Independence in Transition, *Seibert-Fohr, A.* (ed.). Springer, 2012.

[8] CCJE, Opinion No. 10 on Council for the Judiciary in the service of society (2007), para. 23. Available: https://rm.coe.int/168074779b [last viewed 28.04.2024]; IAJ, The Universal Charter of the Judge (1999, thoroughly revised in 2017), Art. 2–3. Available: https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf [last viewed 28.04.2024].

as something foreign and imposed[9] or even artificial, as declared by elites rather than actually internalized by society.[10] Nevertheless, I believe that in the context of the problem analysed in this paper soft law provides important takeaways to be gleaned. In any case, it ought to be considered as a tool for argumentative discourse, with its validity stemming from persuasive reasoning rather than predetermined authority.

As for the original motivation for writing this text, it was prompted by the cultural patterns of expression of a judge in Poland. One could argue that Polish legal culture serves as a noteworthy example of embracing the culture of judicial silence. It will not be controversial to suggest that tendencies towards restricted judicial expression were rife in Poland prior to the constitutional crisis that began in 2015.[11] Polish judges interviewed about responding to the constitutional breakdown were able to say that "We are not trained to talk to the public"; "[W]e were told the only way to express your idea is the written verdict".[12] The primary basis of such views had been a very strict – not to say oppressive – reading of Article 178(3) of the Constitution of the Republic of Poland (1997), which states that "A judge shall not belong to a political party, a trade union or" – and this clause is crucial here – "perform public activities incompatible with the principles of independence of the courts and judges".[13] I think that the situation described above contributed to the imbalance within the liberal-democratic framework of this state. Nevertheless, it could be argued that other CEE countries can face similar problems due to the diagnosis of their hyper-positivist or ultra-formalist legal style and ideology.[14] Furthermore, the observations within the article can hold relevance to continental Europe as a whole, as illustrated by the reluctance of continental judges to proclaim that "the real source of judicial power is the public acceptance of the moral authority and integrity of the judiciary".[15] I interpret this instance during the drafting of the Bangalore Principles of Judicial Conduct[16] as a symbolic rejection by continental judges of the notion that the sources of judicial power are social. Finally, as this paper draws on the liberal-democratic tradition, it may be considered relevant to that tradition as a whole, despite the customary belief that common law judges are better equipped to handle the problems discussed here. Accordingly, four provisional circles can be delineated, each successive one narrower than the previous one, with the relevance of the problem of the culture

[9] *Mańko, R.* Delimiting Central Europe as a Juridical Space: A Preliminary Exercise in Critical Legal Geography. Acta Universitatis Lodziensis. Folia Iuridica, Vol. 89, 2019, p. 77.

[10] Cf. *Sulikowski, A.* Postliberal Constitutionalism. The Challenge of Right Wing Populism in Central and Eastern Europe. Routledge, 2023, pp. 15–23.

[11] Cf. *Kryszkiewicz, M.* Interview with *Skuczyński, P.*, Polish legal scholar – Nie będzie powrotu do kultury milczenia [There will be no return to a culture of silence], published in Dziennik Gazeta Prawna, 8 November 2022, where the term "culture of silence" was used in relation to the communication behaviour of Polish judges before the constitutional breakdown.

[12] Cited after: *Matthes, C.-Y.* Judges as activists: how Polish judges mobilise to defend the rule of law. East European Politics, Vol. 38, No. 3, 2022, p. 478. Available: https://www.tandfonline.com/doi/full/10.1080/21599165.2022.2092843 [last viewed 28.04.2024].

[13] According to Bogusław Banaszak, a renowned Polish constitutionalist, the relevant provision was violated when a judge expressed support or opposition for: a specific solution put forward by a political party, a candidate for a state position, or a method of exercising powers by a public authority. The provision was also purportedly breached when a judge engaged in public activities for a particular charitable organization (*Banaszak, B.* Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary]. Warsaw, C.H. Beck, 2012, pp. 892–895.

[14] *Mańko, R.* Delimiting Central Europe, p. 76.

[15] Commentary on the Bangalore Principles, p. 8 (drafting history part).

[16] Bangalore Principles of Judicial Conduct. 2002. Available: https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf [last viewed 28.04.2024].

of judicial silence increasing with each successive circle, *ex hypothesi*: 1) liberal-democratic states; 2) states following the civil law tradition; 3) CEE states; 4) Poland.

The discussion commences by examining two areas pertaining to judicial expression outside a courtroom: public discussion on the law and generally understood social life involvement. Subsequently, the limits of judges' expression during such activities are analysed, and three proposals for their definition are put forward. As a next step, the paper highlights the diversity of judges as relevant to the problem at hand. The work concludes by outlining the findings, which also include the potential risks associated with the proposed project.

1. Judicial expression outside a courtroom

1.1. Public discussion on the law

1.1.1. Discourse over regulations or policies affecting the judiciary

In the course of the discussion on the participation of judges in the public debate on the law, four problems will be examined. The first issue pertains to the involvement of judges in the discourse over regulations or policies affecting the judiciary. As stipulated in para. 9 of Magna Carta of Judges, "The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)".[17] An earlier CCJE document, its Opinion No. 3, para. 34 noted that "[J]udges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system".[18] The Commentary on the Bangalore Principles points out that the presence of judges in the specified area is advisable even though the political implications are very plausible:

> *There are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge. However, even on these matters, a judge should act with great restraint (para. 138).*

Summarizing this issue, there exists a need for judges to partake in discussions regarding the structure and function of the judiciary, as well as the status of judges. This is not just a matter of strictly legal questions (concerning legal provisions), but of shaping the relevant policies accordingly. The issue discussed is widely covered in international soft law, which is to be associated with the concept of the external independence of the judiciary. The engagement of judges in the discussion of matters that directly impact them serves precisely to make this idea reality.

1.1.2. Widely understood legal education

The next area of public discussion of the law is widely understood legal education. According to para. 4.11.1 of the Bangalore Principles, 'Subject to the proper performance of judicial duties, a judge may write, lecture, teach and participate

[17] CCJE, Magna Carta of Judges (Fundamental Principles) (2010). Available: rm.coe.int/2010-ccje-magna-carta-anglais/168063e431 [last viewed 28.04.2024].

[18] CCJE, Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002). Available: https://rm.coe.int/16807475bb [last viewed 28.04.2024].

in activities concerning the law, the legal system, the administration of justice or related matters". In fact, as identified in the Commentary on the Bangalore Principles, there are two problems here. In para. 157 of this document we find the subject of strictly legal education (educating future officials and attorneys), while the preceding paragraph refers to the participation in legal education of community at large. It is worth quoting this paragraph in its entirety:

> *A judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, both within and outside the judge's jurisdiction. Such contributions may take the form of speaking, writing, teaching or participating in other extrajudicial activities. Provided that this does not detract from the discharge of judicial obligations, and to the extent that time permits, a judge should be encouraged to undertake such activities (para. 156).*

In this regard, the Non-Binding Guidelines on the Use of Social Media by Judges from 2019 points out that such undertakings may include the use of social media in addition to other forms of communication (para. 8).[19] Significantly, within the Commentary on the Bangalore Principles, the subject of legal education of the public appears in the context of explaining the social benefits of judicial independence (para. 44) and the judiciary's role in the government's structure (para. 152, *in fine*). It is thus about explaining the significance of judges in the framework of a liberal democracy. Also worth mentioning is Principle 10 of the Istanbul Declaration on Transparency in the Judicial Process from 2020: "The judiciary should initiate and/or support outreach programmes designed to educate the public on the role of the justice system".[20] The explanation of this principle correctly emphasizes the need for judges to take proactive measures. This issue was also previously raised in CCJE Opinion No. 7 (2005), where attention was drawn to the need for additional channels of contact with the public. In light of its para. 15,

> *This is no longer to be limited to delivering decisions; courts should act as 'communicators' and 'facilitators'. The CCJE considers that, while courts have to date simply agreed to participate in educational programmes when invited, it is now necessary that courts also become promoters of such programmes.*[21]

In contemporary society, diverse sectors such as media and politics propagate their own views on the law and judicial inaction can result in significant costs.

1.1.3. Problem of weaknesses in the law

The next issue is pointing out weaknesses in the law (both in regard to existing laws and proposed legislation). According to the Commentary on the Bangalore Principles, para. 139 "A judge may participate in a discussion of the law for educational purposes and point out weaknesses in the law". Further the relevant paragraph delves into the matter of proposed legislation (*ex ante* dimension of weaknesses in the law):

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[19] UNODC, Non-Binding Guidelines on the Use of Social Media by Judges (2019). Available: https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/Social_Media_2020.pdf [last viewed 28.04.2024].

[20] Republic of Turkey Court of Cassation, Istanbul Declaration on Transparency in the Judicial Process (2020). Available: https://www.unodc.org/res/ji/import/law_on_administration_of_justice/istanbul_declaration_implementation/istanbul_declaration_implementation.pdf [last viewed 28.04.2024].

[21] CCJE, Opinion No. 7 on justice and society (2005). Available: https://rm.coe.int/1680747698 [last viewed 28.04.2024].

> *In certain special circumstances, a judge's comments on draft legislation may be helpful and appropriate, provided that the judge avoids offering informal interpretations or controversial opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of Government policy should relate to practical implications or drafting deficiencies and should avoid issues of political controversy. In general, such judicial commentary should be made on behalf of a collective or institutionalized effort by the judiciary, not of an individual judge (para. 139).*

It seems that two points can be extracted here. Firstly, the relevant topic must be approached from an appropriate perspective (that aligns with the judge's competence: see section 2 of the current article). Secondly, the question arises as to whether an individual judge can afford to raise the issue in question, or if it would be more fitting for an institutional voice to do so.

1.1.4. Challenge of responding to a constitutional crisis

As a final aspect, the challenge of responding to a constitutional crisis should be noted. On the one hand, this is a specific area, perhaps at a different level from those previously mentioned. On the other hand, this problem may also be related to the expertise of the judges, which is of benefit to the public. A decade ago, there appeared to be insufficient consideration of the matter in question. However, it has now been tackled in several documents. For example, the Report of the Special Rapporteur on the independence of judges and lawyers of 2019 reads: "In situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy' (para. 102).[22] Nonetheless, I would like to defend today's soft law from the possible allegation of opportunistically altering its standpoint for the purposes of political battles against illiberalism. The vigorous commitment to the judiciary's independence (presented, however, in more general terms), persistently remained throughout. For example, according to CCJE, Opinion No. 3, para. 16: "Each individual judge should do everything to uphold judicial independence at both the institutional and the individual level'. This suggests that even in cases of the system's collapse, the individual judge should serve as a donjon.

To summarize this section, two fundamental functions can be attributed to the participation of judges in public discussions on the law. The first concerns the relationship of the judiciary to the public (which relates to the proper recognition of the democratic element in liberal democracy). In this case, it is about "translating" the law to the so-called ordinary citizens, to render the obscure principles of legal

[22] Special Rapporteur on the independence of judges and lawyers, Report on freedom of expression, association and peaceful assembly of judges, 2019. Available: https://digitallibrary.un.org/record/3806309/files/A_HRC_41_48-EN.pdf?ln=en [last viewed 28.04.2024]. See also the following illustrations: ibid., paras 61 and 90; CCJE, Opinion No. 25 on freedom of expression of judges (2022), paras 60 and 61. Available: https://rm.coe.int/opinion-no-25-2022-final/1680a973ef%0A%0A [last viewed 28.04.2024]; IAJ, The Universal Charter of the Judge, preamble; ENCJ votes to expel Polish Council for the Judiciary (KRS) (ENCJ site, 28 October 2021). Available: https://www.encj.eu/node/605 [last viewed 28.04.2024]. Cf. Judgement of 23 June 2016 of the European Court of Human Rights [GC] in case Baka v. Hungary, No 20261/12, paras 125 and 168. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-163113%22]} [last viewed 28.04.2024]; Judgement of 5 October 2015 of the Inter-American Court of Human Rights in case López Lone et al. v. Honduras, para. 173. Available: https://www.corteidh.or.cr/docs/casos/articulos/seriec_302_ing.pdf [last viewed 28.04.2024]. Meanwhile, not everything is clear in the light of the above material. The uncertainty consists of whether the duty of a judge to face a constitutional crisis, which is commonly referenced, is of a legal or ethical nature.

discourse easier to digest and comprehend by explaining their objectives, e.g. by showing the principle of judicial independence as beneficial to citizens. The second function pertains to the interplay between the judiciary and political power (which concerns the need to safeguard the liberal element of the system). The participation of judges in the public discussion of the law – the presence of their voice – has the potential to promote the preservation of the constitutionally defined role of the judiciary as contributing to a system of checks and balances.

1.2. Social life involvement

Having considered the public debate on the law, I turn to the problem of the participation of judges in society in a broader sense. Acts of international soft law strongly emphasize the importance of this problem, indicating that the judge should be in touch with the life and problems of his or her community. I believe that even domestic legal cultures within which quite distinct views are currently held may find some cautious inspiration in the materials referred to below. Merely asserting that judges should be responsive without equipping them with appropriate institutional preparations (i.e. recognition of the need to interact with the public) is not a viable solution. The advantages cannot be attained without incurring certain expenses and hazards.

To begin with, Basic Principles on the Independence of the Judiciary (1985) stated in para. 8, as a first soft law document, that "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly;". Nevertheless, this document goes on to note that the relevant rights must be confronted with appropriate judicial standards: "provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".[23] This presents the challenge of striking the appropriate balance between the two dimensions of a judge's identity – as a member of the community and as an official. According to para. 1.2 of the Bangalore Principles, "A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate". However, the Commentary on the Bangalore Principles makes a concerted effort to reject an absolutist interpretation of these words. After quoting the clerical associations with the profession of judge (cited in the introduction to this paper), it was stated there that:

> *While a judge is required to maintain a form of life and conduct more severe and restricted than that of other people, it would be unreasonable to expect him or her to retreat from public life altogether into a wholly private life centred on home, family and friends. The complete isolation of a judge from the community in which the judge lives is neither possible nor beneficial (para. 31).*[24]

[23] Basic Principles on the Independence of the Judiciary. 1985. Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary [last viewed 28.04.2024].

[24] A similar structure – a linguistically vague rule that can be read very strictly and a note that embraces a rather moderate interpretation – can also be found in the European Charter on the statute for judges (1998). Available: https://rm.coe.int/16807473ef [last viewed 28.04.2024]. According to para. 4.3 of this document, "Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence". However, the explanatory note adopts an interpretation of this rule that aims to prevent judge from becoming "a social and civic outcast".

The authors of the referenced document seem to suggest that the judge's isolation pattern is more of a tribute to an institutional fiction than something that is actually achievable. Importantly, they do not stop there, pointing out that contact with the community is also necessary for the proper functioning of justice: "Indeed, knowledge of the public is essential to the sound administration of justice. A judge is not merely enriched by knowledge of the real world; the nature of modern law requires that a judge "live, breathe, think and partake of opinions in that world"" (para. 32).[25] A similar point is also present in para. 27 of the CCJE, Opinion No. 3, ("Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality") and in para. 9 of the concluding remarks of the ICJ document entitled "Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly" ("[T]he administration of justice, while based on the law and the evidence before a judicial decision-maker, should nevertheless be informed by awareness and engagement with the community and society").[26]

It is worth emphasizing the way in which the argumentation is structured in the documents referred above. This is not to say that contact with the public is postulated "despite the exercise of a judicial function" (because of the importance of the private dimension of the judge's identity). On the contrary, it is precisely "because of the exercise of a judicial function". It can be argued that the contact with the public proves to be useful in the course of performing the tasks described in the previous point – when judges explain the logic of the law to non-lawyers. However, it is striking that international soft law underlines the importance of participation in social life for strictly professional activities. The ICJ conclusion quoted above points to the importance of awareness and engagement with the community and society for the administration of justice (as based on evidence and interpretation of the law). The Commentary on the Bangalore Principles also states that "Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in the light of common sense and experience. Therefore, a judge should, to the extent consistent with the judge's special role, remain in close contact with the community" (para. 32). The same paragraph contains a suggestion that the impact of the judge goes beyond the context of individual cases and may involve and influence important social issues:

> *Today, the judge's function extends beyond dispute resolution. Increasingly, the judge is called upon to address broad issues of social values and human rights, to decide controversial moral issues and to do so in increasingly pluralistic societies. A judge who is out of touch is less likely to be effective (para. 32).*

It is therefore not unfounded to say that participation in social life is useful for judges, among other things, in determining factual state and interpreting the law (especially in the course of extra-linguistic reasoning).

To conclude this point, judges' involvement in social activities enhances their awareness of the viewpoint of the ordinary citizen, leading to greater responsiveness both in the interpretation of the law and in public discussions. This is a valuable contribution to meeting democratic expectations. It is also worth adding that

[25] Here, reference to Opinion 1998-10R of 18 November 1998 of the Supreme Court of Wisconsin, Judicial Conduct Advisory Committee.

[26] ICJ, Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly (2019). Available: https://www.icj.org/wp-content/uploads/2019/02/Global-JudgesExpression-Advocacy-SRIJL-2019-Eng.pdf [last viewed 28.04.2024].

recognizing the importance of the judge's awareness of different social opinions and expectations does not mean that he or she must always succumb to these influences. However, even if the law should reject social expectations, the judge should be aware of their existence (e.g., in order to be able to refer to them in the justification of the sentence).

Regarding participation in social life, one specific issue that deserves a digression is the involvement of judges in social media. Importantly, this phenomenon was at early stage when such classics as the Bangalore Principles and CCJE Opinion No. 3 were written. Nevertheless, according to the Use of Social Media by Judges, older soft law material is relevant to the issue of "digital life" (para. 2). The above document identifies both risks and opportunities associated with the use of social media by judges. It should be stressed that the latter also exist. As Mustafa Saldırım put it:

> *[S]ocial media, despite all its risks, can create opportunities for judges and justice institutions in terms of improving the public's understanding of justice, recognising the importance of judicial duty and understanding individual rights. Judges, individually and collectively, should take advantage of these opportunities offered by social media.*[27]

2. The limits of judges' expression outside a courtroom

Making claims that judges should participate in public discussions on the law and engage with the social fabric of their community require reflection on the limits of expression in these domains. Therefore, I will offer three propositions that may be useful in this context.[28] My aim, however, is not to abstractly delineate the boundaries of the judges' activity, but rather to provide torches to help navigate the areas concerned. Furthermore, these proposals are not mutually exclusive.

2.1. Public vocabulary

Firstly, it is worth recalling the division between the public sphere and the private sphere, assuming that they are related with separate vocabularies in the sense of Richard Rorty, i.e. they are distinct symbolic universes with dissimilar discourse standards. As Paweł Jabłoński put it: "Private and public dictionaries are two different universes, constructed with different goals in mind. The goal of the former dictionary is self-creation, while the latter is a tool in social benefit".[29] From this perspective, the judge should be guided by the requirements of the public vocabulary. Proposing own visions of ideal life or "axiological fantasies" that reflect the judge's personal autonomy is not the point here. Instead, the goal is to provide practical guidance that can be embodied in social institutions. In this context, the aspirations defined by Bernard Yack as "longing for total revolution" and "demand that our autonomy

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[27] *Saldrim, M.* Freedom of Expression of the Judge Within the Framework of Court of Cassation Codes of Conduct (2023, typescript of the speech from the conference: The Judge's Freedom of Expressing His/Her Thoughts and Its Problems, Maltepe University, Istanbul, 19.09.2023, translated by Seda Dural). See also: The Use of Social Media, para. 10, where the distinction between institutional and individual use of social media is presented.

[28] Notwithstanding, they may also prove to be useful in the strictly professional sphere.

[29] *Jabłoński, P.* Towards Post-Analytical Theory of Law. On the Consequences of Richard Rorty's Metaphilosophy. In: A post-analytical approach to philosophy and theory of law, *Bator, A., Pulka, Z.* (eds). Peter Lang, 2019, p. 106.

be embodied in our institutions"[30] can be seen as a negative point of reference. The presentation of utopian political projects has its place in the architecture of liberal democratic society (to mention the Rortian "agents of love" as being able to perform this function[31]) but, in my opinion, judges are not in that role. There is no question that the public dictionary criteria refer – *nomen est omen* – to the judge's engagement in the public discussion of the law. However, to some extent they also apply to general participation in social life. If a judge misbehaves in the private sphere, he or she may be subject to disciplinary action or disqualification from the proceedings. The judge represents a unique profession, as he or she continues to embody an institution even outside his or her professional sphere.

2.2. The reasonable observer test

The second proposition is the reasonable observer test, which has gained significant traction in international soft law.[32] This approach is based on the analysis of expression from the viewpoint of an idealized observer. It is therefore, firstly, a perspective "external" to the judge. Secondly, this viewpoint is enhanced by a set of normative guidelines intended to heighten the test's objectivity.[33] The basic idea behind the reasonable observer test is that it is the public perception of a judge's expression, rather than his or her intentions, which holds significance.[34] The test aims to establish whether a judge abides by judicial standards such as impartiality, political neutrality and independence. The instrument in question is therefore relevant not only to the public debate on the law, but also to a broadly understood participation in social life. This is because such participation also has the potential to compromise the aforementioned standards.

2.3. Focus on procedural law issues

The third proposal refers to the division between substantive and procedural law issues. Against this background, there is a call for the judge to speak rather on the latter (or, to put it more generally, the judge should not speak of the ends of society but of the means by which those ends are to be achieved). As Lech Gardocki, the former First President of the Polish Supreme Court, wrote years ago, "I would

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[30] *Yack, B.* The Longing for Total Revolution: Philosophic Sources of Social Discontent from Rousseau to Marx and Nietzshe, Princeton University Press, 1986, p. 385, cited after *Rorty, R.* Contingency, Irony, and Solidarity. Cambridge University Press, 1989, p. 65.

[31] *Rorty, R.* Objectivity, Relativism, and Truth. Vol. 1, Cambridge University Press, 1990, p. 206.

[32] See: CCJE, Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges (2001), para. 12. Available: https://rm.coe.int/1680747830 [last viewed 28.04.2024]; CCJE, Opinion No. 3, para. 28; Bangalore Principles, paras 1.3., 2.5. and 3.1.; Commentary on the Bangalore Principles, para. 106. Cf. generally *Wojtanowski, M.* Judges' Freedom of Expression and the Reasonable Observer Test in International Soft Law. Relevant Documents, the Operationalization of the Test and the Scale of Expectations Placed on It. Krytyka Prawa. Niezależne studia nad prawem, Vol. 14, No. 4, 2022. Available: https://journals.kozminski.edu.pl/system/files/Wojtanowski.pdf [last viewed 28.04.2024].

[33] The ontological status of these demands is up for debate. Is it something empirical – linked to the real views of the society members – or rather purely idealistic? I believe that the Commentary on the Bangalore Principles, para. 32, appreciates the former aspect by linking the "reasonable person test" to the need for contact with the public (described in section 1.2 of this paper). Cf. *Hill, J. B.* Anatomy of the Reasonable Observer. Brooklyn Law Review, Vol. 79, issue 4, 2014, p. 1453, who notes, however, that "[T]he reasonable observer heuristic is fundamentally misunderstood by courts and scholars who urge that the reasonable observer should take on the characteristics of real human being".

[34] Cf. Commentary on the Bangalore Principles, para. 111: "What matters is more not what a judge does or does not do, but what others think the judge has done or might do".

compare it to the situation of a carpenter who, if not asked, should not comment on whether a wardrobe should be large or small, glossy or matt. But on the subject of the tools he uses in his work, he can certainly have a lot of interesting things to say".[35] It seems, however, that separating procedural from substantive law issues can sometimes prove difficult, if not deceptive. It should be added that the relevant proposal is more about public discussion of the law than about social life participation.

3. Another aspect of the issue: diversity of judges

As far as judges' expressions outside a courtroom are concerned, a different kind of problem should also be raised. In the case of public discussion of the law, the scale of participation depends on the type of judge under consideration. For instance, it is relevant whether a judge holds a specific position within the court (such as the president or spokesperson), acts in an institutional entity (like national council of judiciary or association of judges), or is a judge of a higher court. Crucially, when certain types of judges are involved in public discussion of the law, the relevant legal modality can change: this involvement is not (orthodoxly understood) freedom of expression, but rather the performance of a judicial duty. For example, spokesperson judges are required to state the position of their institution, and some particularly high-profile judges are under duty to comment on law-related matters. This raises the weighty question of whether interference in such professional expression can be assessed under the freedom of expression regulations, such as art. 10 ECHR.[36] The answer of the ECtHR's majority in the cases of Baka v. Hungary[37] and Żurek v. Poland[38] was a yes, which was the subject of opposition by Judge Wojtyczek, as evidenced by his dissenting opinions annexed to those judgments.[39]

4. Conclusion

In the international soft law analysis presented above, I contended that the culture of judicial silence – epitomized by the phrase "judges speak through their judgments" – should be abolished. With respect to the postulated activities of judges, participation in the public debate on the law is the most prominent, as judges have legal expertise that can be of benefit to society. In this regard, four specific areas can be distinguished:

1) discourse over regulations or policies affecting the judiciary;
2) widely understood legal education;
3) problem of weaknesses in the law;
4) challenge of responding to a constitutional crisis.

One can reasonably argue that, by virtue of judicial training and professional experience, the enhancement of a judge's expression in law-related areas can be derived from the very core of the judge's identity. Therefore, the view of the judge's function as a mere restriction of expression in comparison with the ordinary citizen

[35] *Gardocki, L.* Naprawdę jesteśmy trzecią władzą [We really are the third power]. Warsaw, C.H. Beck, 2008, p. 39.
[36] Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
[37] Baka v. Hungary.
[38] Judgement of 16 June 2022 of the European Court of Human Rights in case Żurek v. Poland, No 39650/18. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-217705%22]} [last viewed 28.04.2024].
[39] Cf. also CCJE, Opinion No. 25, para. 9.

is erroneous and inadequate. One can speak of a general ethical obligation towards the judge to be active in the fields concerned. In the course of my work, however, I have also addressed the generally understood social life involvement of judges. In this context, it is recommended to dismiss the model of the judge being entirely isolated from the activities of ordinary social life.

The repudiation of a culture of judicial silence is beneficial to the liberal democratic state as its structure requires the elements provided by judicial expression outside a courtroom. It must be emphasized that the basis of the project proposed here stems from public needs rather than an appreciation of the private dimension of the judge's identity[40] – maintaining a balance between the liberal and democratic components of liberal democracy. In my view, strengthening the freedom of expression of a judge does justice to both of these elements. As for the liberal component, participation of judges in the public debate on the law should contribute positively to the interaction between the judiciary and political power. The presence of judges in the field concerned will help to preserve the constitutional role of the judiciary as a contributor to a system of checks and balances. A liberal democratic society necessitates the judges who are actively involved in the public sphere to prevent political power from taking over the state. Nevertheless, it is not only a question of acting in times of constitutional breakdown, but also of effectively translating the legal aspects of state functioning in times of stable constitutional democracy. It is not an aberration of the political system, but rather its beneficial component, that judges operate in the public sphere outside the courtroom. In respect to an adequate appreciation of the democratic component of liberal democracy, participation of judges in public discourse on law acts as a medium to enhance the understanding of legal principles and increase legal awareness among citizens. Also relevant in the context of democratic needs is the second issue discussed in relation to judicial expression outside a courtroom, namely participation in social life. The judiciary's connection with the reality and comprehension of the wider community can cultivate the growth of relevant sensitivity, valuable for both the professional practice of law enforcement and participation in public legal discussions. This potentially offers a factor in countering the alienation of the judiciary from the society.

With regard to the (hard) legal support for enhancing judicial expression proposed in this text, it is particularly worth noting such legal mechanisms as the special protection of judges under Article 10(2) ECHR or the guarantees of judicial independence enshrined in the constitutions of Euro-Atlantic states.[41]

Nonetheless, rejecting a culture of judicial silence comes with certain risks. Consequently, three suggestions have been noted for outlining the boundaries of a judge's expression outside the courtroom – understanding that none of these proposals should be overestimated:

1) relying on public vocabulary criteria (in Rortian sense);
2) reasonable observer test;
3) focusing on procedural-legal matters.

[40] See, however, the Commentary on the Bangalore Principles, para. 140.

[41] See e.g. Art. 178–181 of the Constitution of the Republic of Poland (1997) (covering issues such as: prohibition of external pressures, conditions for work and remuneration, appointment for an indefinite period, irremovability, special type of retirement and immunity from criminal cases). In the past, these guarantees appeared to be interpreted as implying that judges have privileges and are expected to remain silent. However, an alternative conclusion can now be drawn.

While propositions one and two are applicable to both public discussions on the law and participation in social life, proposition three is more appropriate to public discussions on the law. It is, however, important to formulate some additional specified comments addressed to the judicial community. Firstly, there is the issue of striking the appropriate balance concerning judges' involvement in public discussions on law. On the one hand, there is the risk of excessively audacious statements by low-level judges (prioritizing media attention and acquiring symbolic capital for themselves over the interest of the judiciary). On the other hand, it is equally important to consider the danger of paternalism whereby solely the judicial elite actually engage in the public debate on the law. Secondly, judges should exercise caution to ensure that their expert opinions on legal matters do not transform into an excessive effort to strengthen the judiciary. It appears that the use of doublespeak, where the term "judicial independence" should actually be interpreted as "judicial supremacy", is not merely a speculative danger.[42] Thirdly, in the context of judges' participation in society, it is important to note that the postulate of "bringing the judge closer to public" can lead to judgments that are overly responsive to social expectations and therefore present a threat to the autonomy of the law. The judge must consider various rationales, not just responsiveness, and avoid being a mere conduit for social expectations. Fourthly and finally, it should be acknowledged that, regardless of preparation and formal qualifications, not every judge is necessarily predisposed to speak out in public debate for the benefit of public perception of the judiciary.

Summary

The work focused on an analysis of international soft law with the aim of seeking a rationale for rejecting a culture of judicial silence epitomized by the phrase "judges speak through their judgments". The discussion commenced by examining two areas pertaining to judicial expression outside a courtroom: public discussion on the law and generally understood social life involvement. Subsequently, the limits of judges' expression during such activities were analysed, and three proposals for their definition were put forward. As a next step, the diversity of judges was highlighted as a phenomenon relevant to the problem at hand. The article concluded by outlining its findings.

With respect to the postulated activities of judges, the participation in the public debate on the law is the most prominent, as judges have legal expertise that can be of benefit to society. One can reasonably argue that, by virtue of judicial training and professional experience, the enhancement of a judge's expression in law-related areas can be derived from the very core of the judge's identity. In this regard, four specific areas can be distinguished:

1) discourse over regulations or policies affecting the judiciary;
2) widely understood legal education;
3) problem of weaknesses in the law;
4) challenge of responding to a constitutional crisis.

Two fundamental functions can be attributed to the participation of judges in public discussions on the law. The first concerns the relationship of the judiciary to the public (which relates to the proper recognition of the democratic element in liberal democracy). In this case, it is about "translating" the law to the so-called ordinary

[42] Cf. *Parau, C. E.* The Drive for, *passim*.

citizens, to render the obscure principles of legal discourse easier to digest and comprehend by explaining their objectives, e.g. by showing the principle of judicial independence as beneficial to citizens. The second function pertains to the interplay between the judiciary and political power (which concerns the need to safeguard the liberal element of the system). The participation of judges in the public discussion of the law – the presence of their voice – has the potential to promote the preservation of the constitutionally defined role of the judiciary as contributing to a system of checks and balances.

As for the generally understood social life involvement, it enhances judicial awareness of the viewpoint of the ordinary citizen, leading to greater responsiveness both in the interpretation of the law and in public discussions. This is a valuable contribution to meeting democratic expectations. It is also worth adding that recognizing the importance of the judge's awareness of different social opinions and expectations does not mean that he or she must always succumb to these influences. However, even if the law should reject social expectations, the judge should be aware of their existence (e.g. in order to be able to refer to them in the justification of the sentence).

The reflection recognized that there are risks in rejecting a culture of judicial silence. Consequently, three suggestions have been noted for outlining the boundaries of a judge's expression outside the courtroom – understanding that none of these proposals should be overestimated:

1) relying on public vocabulary criteria (in Rortian sense);
2) reasonable observer test;
3) focusing on procedural-legal matters.

I have subsequently recognized the diversity of judges as an important aspect in the context of judicial freedom of expression.

To sum up, it is asserted that the rejection of a culture of judicial silence is beneficial to the architecture of liberal democracy, as judicial expression outside a courtroom assists in maintaining a balance between its components. Whilst this can create defense mechanisms against the alienation of the law from society (which appropriately appreciates the democratic component), it aids in the actualization of the constitutionally determined role of the judiciary within the political system (safeguarding the liberal element).

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State Aid to Electricity Producers: National and EU Law Aspects

Dr. iur. **Anita Rodiņa**
Faculty of Law, University of Latvia
Associate Professor at the Department of State Law
E-mail: *anita.rodina@lu.lv*

Mg. iur. **Dārta Ūdre**
Constitutional Court of the Republic of Latvia
Legal Assistant to a Judge
E-mail: *darta.udre@satv.tiesa.gov.lv*

At European Union level, there is a detailed regulatory framework allowing Member States to introduce state aid. State aid is always granted for a specific purpose and helps Member States to achieve their common objectives. The energy sector is being moved towards reaching targets for both energy efficiency and climate neutrality, with a gradual withdrawal from fossil fuels. However, it is not always easy to align these targets at Member State level and to create the appropriate national regulatory framework. Therefore, this article in the light of the two most recent judgements of the Constitutional Court of the Republic of Latvia (hereinafter – Constitutional Court), analyses the importance of a fixed term of state aid for electricity production and some aspects of state aid for biogas cogeneration plants, including the development of EU law perspective. The article also examines the impact of the enforcement of the Constitutional Court's judgments in the area of state aid in Latvia and explains the emerging concept of environmental constitutionalism.

Keywords: state aid, feed-in tariff, waste heat, climate goals, high-efficiency cogeneration, cogeneration, legitimate expectations, environmental constitutionalism.

Contents

Introduction

The European Union (hereinafter – EU) is a pioneer in developing legislation to reorient energy production towards climate neutrality.[1] At the same time, achieving climate neutrality is closely linked to state aid conditions, as well as to technological challenges in the energy sector.[2] The unfolding climate crisis with heat waves and flooding across Europe, and the war in Ukraine[3] have, as never before, broached the question of state aid aimed at the use of renewable energy resources and the diversification of energy production.

In Member States, state aid intended for these purposes is mostly granted in the form of feed-in tariffs, and Latvia is no exception here. Nevertheless, this aid has historically had very little public support in Latvia, as it has been granted to a very wide range of beneficiaries, including cogeneration (hereinafter also – CHP) plants that produce energy with natural gas. Therefore, in recent years, the government and the parliament of Latvia has taken steps that reduce the state aid. Consequentially, the Constitutional Court (*Satversmes tiesa*) has also been involved in this dialogue and has recently examined two very important cases. The Constitutional Court has resolved issues of both the term of the state aid and the possibilities of equalizing the conditions for receiving the aid in relation to different electricity generation technologies. These cases provide valuable insights into the evolution of state aid regulation in line with climate goals and the need to use energy efficiently.

Therefore, this article offers an insight in the historical context of state aid in Latvia, as the country had to gradually adapt to the EU state aid rules by the time it joined the EU in 2004. Furthermore, the article analyses other aspects relating to determination of the duration of state aid for different beneficiaries and their guarantees of legitimate expectations. Another chapter explores the guarantees of legal certainty and legitimate expectations to producers using renewable energy resources that are included in Article 6.1 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources[4] (hereinafter – Directive 2018/2001). As in one of the two cases the Constitutional Court found the challenged legal norms to be unconstitutional, execution of the judgments of the Constitutional Court and their role in the search for a more balanced legal framework is analysed. Finally, the authors discuss the new concept of environmental constitutionalism and its role in shaping other fields of law.

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[1] *Volchenko, N. et al*. Combating Climate Change Through the International Law Perspective: The Role of the EU in Environmental Diplomacy. European Energy and Environmental Law Review, 32(5), 2023, pp. 263–264.

[2] *Vuletic, D.* The Interaction between the EU's Climate Change Objectives and Its State Aid Regulation in the Area of Renewable Energy. Croatian Yearbook of European Law and Policy, Vol. 16, 2020, p. 351.

[3] *Cordova, J. G. L. et al.* Decentralized Energy Generation for Sustainable Energy Development in EU. European Energy and Environmental Law Review, 32(4), 2023, p. 174.

[4] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. Available: https://eur-lex.europa.eu/legal-content/LV/TXT/?uri=CELEX%3A02018L2001-20231120 [last viewed 11.04.2024].

1. Historical context of state aid schemes for electricity production in Latvia

In Latvia, state aid for electricity production with varying requirements has been granted historically since at least 1998.[5] However, a unified mandatory procurement system with a feed-in tariff was introduced in 2005 – a year after joining the EU.[6] The scheme was designed in such a way that different criteria and regulations were created for receiving state aid for the production of electricity in CHP plants and for the production of electricity from renewable energy resources.[7] The regulations for renewables described the technologies and resources to be used in the scheme (wind, solar, biogas, biomass, hydropower), while the regulations for CHP plants were more focused on high-efficiency cogeneration, as this process is aimed at maximising the heating and power output from combustion. Thus, participation in the mandatory procurement scheme was also available for producers using natural gas. Producers who fulfilled the criteria for receiving state aid for both using renewables and having a CHP plant by, for example, combusting wood chips, had to choose between one of the two mechanisms.[8]

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[5] Ministru kabineta 1998. gada 31. oktobra noteikumi Nr. 425 "Koģenerācijas stacijās saražotās elektroenerģijas pārpalikuma iepirkšanas kārtība" [Cabinet of Ministers Regulation No. 425 of 31.10.1998 "Procedure for purchasing excess electricity produced in cogeneration plants"]. Available: https://likumi.lv/ta/id/50507-kogeneracijas-stacijas-sarazotas-elektroenergijas-parpalikuma-iepirksanas-kartiba [last viewed 11.04.2024].

[6] Elektroenerģijas tirgus likums [Electricity Market Law]. (05.05.2005). Available: https://likumi.lv/ta/id/108834-elektroenergijas-tirgus-likums [last viewed: 11.04.2024].

[7] Historically were regulated by: Ministru kabineta 2006. gada 6. novembra noteikumi Nr. 921 "Noteikumi par elektroenerģijas ražošanu koģenerācijā" [Cabinet of Ministers Regulation No. 921 of 06.11.2006 "Regulations Regarding Electricity Production in Cogeneration"]. Available: https://likumi.lv/ta/id/147673-noteikumi-par-elektroenergijas-razosanu-kogeneracija [last viewed 11.04.2024] that transposed Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC; Ministru kabineta 2007. gada 24. jūlija noteikumi Nr. 503 Noteikumi par elektroenerģijas ražošanu, izmantojot atjaunojamos energoresursus [Cabinet of Ministers Regulation No. 503 of 24.07.2007 "Regulations regarding Electricity Production from Renewable Energy Resources"]. Available: https://likumi.lv/ta/id/162007-noteikumi-par-elektroenergijas-razosanu-izmantojot-atjaunojamos-energoresursus [last viewed 11.04.2024] that transposed Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.
Currently are regulated by: Ministru kabineta 2020. gada 2. septembra noteikumi Nr. 561 "Noteikumi par elektroenerģijas ražošanu, uzraudzību un cenu noteikšanu, ražojot elektroenerģiju koģenerācijā" [Cabinet of Ministers Regulation No. 561 of 02.09.2020 "Regulations Regarding the Generation, Supervision, and Pricing of Electricity in Generation of Electricity in Cogeneration"]. Available: https://likumi.lv/ta/id/317216-noteikumi-par-elektroenergijas-razosanu-uzraudzibu-un-cenu-noteiksanu-razojot-elektroenergiju-kogeneracija [last viewed 11.04.2024]; Ministru kabineta 2020. gada 2. septembra noteikumi Nr. 560 "Noteikumi par elektroenerģijas ražošanu, izmantojot atjaunojamos energoresursus, kā arī par cenu noteikšanas kārtību un uzraudzību" [Cabinet of Ministers Regulation No. 560 of 02.09.2020 "Regulations Regarding the Generation of Electricity Using Renewable Energy Resources, and also the Procedures for Price Determination and Monitoring"]. Available: https://likumi.lv/ta/id/317215-noteikumi-par-elektroenergijas-razosanu-izmantojot-atjaunojamos-energoresursus-ka-ari-par-cenu-noteiksanas-kartibu-un-uzraudzibu [last viewed 11.04.2024].

[8] Producers eligible for participation in the mandatory procurement were determined by tendering. For a time, all producers using CHP plants were able to apply if they fulfilled certain technical requirements, however, the available licenses for producers using renewables were limited to the amount of "green" electricity necessary to produce according to our climate goals (the amount of electricity was calculated each year by the public energy trader in Latvia). Since 31 December 2012, no new licenses allowing to participate in the scheme have been issued.

According to Article 108 (3) of the Treaty of the Functioning of the European Union, the Member States must notify the European Commission (hereinafter – Commission), if they wish to introduce a state aid scheme.[9] Unfortunately, Latvia notified the Commission only in 2015, after the Commission had already received multiple complaints from private entities. During the assessment process, the Cabinet of Ministers introduced some notable amendments in the scheme, and, thus, in 2017 the Commission decided not to raise any further objections.[10] This might be at least partly explained by the fact that upon joining the EU Latvia amongst a few other new Member States (Estonia, Lithuania and Slovenia) did not conclude a transitional agreement regarding state aid rules and their compatibility with EU law.[11]

2. State aid – with or without a fixed term

One of the most important changes in the state aid conditions, which was introduced in Latvia in 2012, was the determination of a deadline for receiving state aid. A fixed term of a planned state aid is one of the core elements that allow the Commission to assess the compatibility of the aid with the internal market[12] – its potential impact on the achievement of the objectives of the EU and possible adverse effects on competition. Therefore, state aid must always have a fixed term for it to be considered compatible with the internal market.[13]

The Constitutional Court has had the opportunity to deliver a ruling on the duration of state aid. A legal entity producing electricity in a CHP plant challenged a clause in regulations that set a 10-year term for the state aid granted to them.[14] The applicant believed that they were entitled to the aid for a period of at least 20 years, because at the time when they received the decision granting the said aid, legal norms did not stipulate any such deadline. Moreover, other producers using renewable energy resources were granted state aid for a period of 20 years. In other words, the producer using a CHP plant claimed that they were eligible to receive state aid for the same amount of time as the producers using renewable resources.

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[9] Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT [last viewed 11.04.2024].

[10] European Commission, State Aid SA.43140 (2015/NN) – Latvia. Support to renewable energy and CHP. Available: https://ec.europa.eu/competition/state_aid/cases/260648/260648_1896605_188_2.pdf [last viewed 11.04.2024].

[11] *Holscher, J. et al.* State Aid in the New EU Member States. Journal of Common Market Studies, 55(4), 2017, p. 782.

[12] The exclusive competence of the Commission to decide on state aid issues is stipulated in Article 108 of the Treaty on the Functioning of the European Union.

[13] Annex 1 of the Commission Regulation (EC) No. 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, stipulates that Member States must inform the Commission re the duration of the scheme and provide additional substantiation if the planned duration exceeds 6 years. Available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0794 [last viewed 11.04.2024].

[14] Decision of the 2nd panel of the Constitutional Court of the Republic of Latvia of 24 February 2022 to initiate a case. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_lemums_par_ierosinasanu.pdf#search= [last viewed 11.04.2024].

The Constitutional court first explained that Article 105 of the *Satversme* [Constitution][15] does not guarantee a person the right to property in the form of state aid *per se*. The violation of property rights can be established, if the producer has received a specific promise from the state to receive the said aid. Therefore, to determine whether the contested norm affects such rights, which are considered to be the object of property rights, the principle of protection of legal expectations must be observed.[16] However, according to the jurisprudence of the European Court of Justice (hereinafter – CJEU), a producer cannot claim to have legitimate expectations or argue that there has been a breach of the principle of legal certainty on such state aid conditions that have not been deemed compatible with the internal market by the Commission.[17]

As there was some confusion between the participants of the case regarding this matter, the judge rapporteur requested the Commission to issue an opinion on its 2017 decision on declaring Latvia's state aid scheme compatible with the internal market.[18] The issue was that as early as 2011 the first complaints from private entities about the scheme in Latvia had reached the Commission. During the period between 2011 and 2017, until the Commission finally issued the decision regarding Latvia, the legislator had already made multiple changes in the scheme to avoid further disputes with the Commission. The Commission took these changes into account, when it declared that the scheme is compatible with the internal market, therefore, the wording of the said decision was in some parts diplomatic enough to be misunderstood by at least a few legal experts involved in the case. The question which had to be clarified was simple: was the specific state aid declared compatible with internal market for a maximum duration of 10 or 20 years? The answer from the Commission was clear – it was 10 years.[19] It means that the state aid scheme for electricity production in Latvia is deemed to be compatible with internal market for two different time periods: 10 years for producers who applied for state aid for the use of high-efficiency cogeneration and 20 years for producers who applied for state aid for the use of renewable resources.

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[15] Article 105 of the *Satversme* states: "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation." Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: http://saeima.lv/en/about-saeima/work-of-the-saeima/constitution/ [last viewed 11.04.2024].

[16] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 17. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[17] Judgment of CJEU of 20 March 1997 in case No. C-24/95 Land Rheinland-Pfalz v. Alcan Deutschland GmbH, para. 25. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0024 [last viewed 11.04.2024].

[18] Article 29(1) of Council Regulation (EU) 2015/1589of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) permits national courts of the Member States to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules. Available: https://eur-lex.europa.eu/eli/reg/2015/1589/oj/?locale=en [last viewed 11.04.2024].

[19] Reply from the Commission to the Request for Opinion from the Constitutional Court of the Republic of Latvia in case No. 2022-06-03. European Commission. 19.12.2022. Available: https://competition-policy.ec.europa.eu/system/files/2023-04/20220603_support_to_renewable_energy_and%20_CHP_opinion_en.pdf [last viewed 11.04.2024].

In this case the Constitutional Court considered several aspects to make a decision. First of all, the wide margin of discretion of the legislator in the field of state aid.[20] The Constitutional Court has previously held that the legislator has a wide margin of discretion in the field of state aid, but that this margin is limited: it cannot be exercised arbitrarily or contrary to, *inter alia,* EU law.[21] Therefore, the Cabinet of Ministers, using its discretionary powers, was entitled to decide on the necessary considerations in order to set a specific term of the state aid. The Court also considered the Commission's exclusive competence in recognizing state aid as compatible with the internal market. As it was explained before, the Commission had recognized the state aid as compatible with the internal market, including the 10 year term of state aid.[22] For these reasons, the Court concluded that producers who chose to participate in the mandatory procurement in accordance with the regulations relating to the production of electricity in cogeneration could not have had a legitimate expectation of such a term for the implementation of the mandatory procurement rights as was established for the production of electricity from renewable resources.[23] Therefore, in this case, the application was dismissed and the contested legal norms were found to be compatible with Article 105 of the *Satversme* (right to own property).

This judgement signifies the continuously increasing importance of renewable resources in the energy sector, as the state aid scheme favours producers using renewables and guarantees support for 10 more years compared to producers combusting natural gas. Such an approach is in line with the view that meeting climate targets requires not only state aid for renewable energy production, but also a review of existing state aid conditions and specific controls on those producers using fossil fuels.[24]

3. State aid for biogas cogeneration plants from the perspective of national and EU law

One of the landmark cases in recent years in the area of state aid is case No. 2021-31-0103 in which the Constitutional Court had to assess the imposition of specific technical requirements for electricity producers and the impact of these requirements on the amount of state aid received. The case was initiated based on the application submitted by several producers (legal entities) who considered the specific requirements to be in fact unfulfillable taken the technological process they used for electricity production: biogas CHP plants. If the requirements were not met, according to the disputed norms, the state aid would have been significantly reduced or even

[20] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[21] Judgement of the Constitutional Court of the Republic of Latvia of 18 April 2019 in case No. 2018-16-03, para. 15.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-16-03_Spriedums.pdf#search= [last viewed 11.04.2024].

[22] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[23] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 23.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[24] *Granat, A., Kozak, M.* The Implementation of the European Green Deal Tensions between Market-Based Approach and State Aid for Renewables. Yearbook of Antitrust and Regulatory Studies, Vol. 23, 2021, p. 98.

withdrawn. Therefore, the applicants claimed that the challenged legal norms are contrary to the Article 105 of the *Satversme* which guarantees the right to property, and breaches the principle of legitimate expectations.[25]

In this case, the Constitutional Court addressed several important issues – it both emphasised the importance of climate objectives and assessed the possibility of compliance with the obligations imposed on producers. The case also raises questions regarding EU law, and highlights the relationship between the legislator and the Constitutional Court in the context of the enforcement of judgments.

3.1. Climate goals – goals for the future

Environmental issues are topical in nearly all aspects of everyday life both nationally and worldwide. This is understandable, as mankind has come to the realisation that environment is a prerequisite for human existence. Aware of the various threats posed by pollution, namely, activity of people and governments, countries are even forced to react and find solutions to eliminate them. As a signatory to the Paris Agreement[26], the EU has introduced numerous policy documents[27] and legislation[28] aimed at decarbonization of the energy sector to combat climate change.

The *Saeima* and the Cabinet of Ministers justified the necessity of the disputed norms, in this case, among other things, with the need to reduce the costs of electricity for end consumers. In this aspect, it is important that at the time when the Constitutional Court considered the case, Russia had already started its invasion of Ukraine, which, naturally, caused an increase in energy prices throughout Europe. At that time, the gradual cancellation of the mandatory procurement system was politically announced in Latvia as an opportunity to reduce electricity bills. In order to help Member States fight the skyrocketing electricity prices in a coordinated way, the EU also took measures that allowed to soften the impact of the energy crisis on end consumers.[29] However, the peculiarity of the mandatory procurement system in Latvia is that the feed-in tariff was lower than the market price of electricity for a large part of the producers during the energy crisis and court proceedings.[30]

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[25] Decision of the 4th panel of the Constitutional Court of the Republic of Latvia of 30 June 2021 to initiate a case. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_lemums_par_ierosinasanu.pdf#search= [last viewed 11.04.2024].

[26] Paris Agreement to the United Nations Framework Convention on Climate Change. 12 December 2015. Available: https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf [last viewed 11.04.2024].

[27] See, for example, Communication from the Commission, "A Clean Planet For All: A European Strategic Long-term Vision for a Prosperous, Modern, Competitive and Climate Neutral Economy", COM (2018) 773 final, 28 November 2018. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0773 [last viewed 11.04.2024].

[28] Regulation 2018/2001 is a notable example of such legislative acts.

[29] For example, Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices Available: https://eur-lex.europa.eu/eli/reg/2022/1854/oj [last viewed 11.04.2024].

[30] State Construction Control Bureau periodically publishes the current data here: https://www.bvkb.gov.lv/lv/elektroenergijas-obligata-iepirkuma-mehanisma-uzraudziba-un-kontrole [last viewed 11.04.2024].
The authors can only speculate that the differences in the market price and feed-in tariff at the time served as the main encouragement for some producers to give up their rights to participate in the mandatory procurement scheme and receive state aid.
It is worth noting that CJEU has received a request for a preliminary ruling from the Council of State (*Consiglio di Stato*) in Italy regarding a similar issue where state aid in some cases is lower than the market price of electricity (case No. C514-23).

In solving this case, the Constitutional Court paid special attention to the fact that a state aid scheme is always created, and state aid is granted with a specific purpose. For in the EU, state aid in energy sector is an important tool for moving policy toward climate neutrality.[31] As the state aid granted to the applicants in the case was specifically intended for the promotion of renewable resources, the climate objectives also had to be taken into account when stricter aid requirements were made.

This is the reason why the Constitutional Court for the first time clearly indicated to the legislator that the climate goals of the EU, signatory of The Paris Agreement, are also the climate goals of Latvia as a Member State.[32] Although the adoption of rules limiting state aid may be justified by considerations of reducing state aid costs, they will always be related to the purpose of granting the aid.

The contribution of each technology to the achievement of climate goals and, among other things, to Latvia's energy independence is also worth evaluating. It should be noted that this is not the first case in which the Constitutional Court has drawn the legislator's attention to the importance of ensuring energy independence.[33] However, the war in Ukraine lends to this aspect an even greater importance.

The specifics of the technology of electricity production and the extent to which it helps to achieve climate goals compared to other technologies were also of great importance. Namely, the regulatory framework, if developed in accordance with scientific knowledge, could prevent producers from acting inefficiently and dishonestly, and, thus, reduce the number of cases where granting the state aid is unjustified, but still promote efficient use of energy and help achieve climate goals.[34] The Constitutional court found the disputed technical requirements for biogas CHP plants to be incompatible with Article 105 of the *Satversme* (right to property) due to the fact that there are other scientifically sound and less restrictive means to exercise control over electricity producers. Biogas CHP plants differ from natural gas CHP plants in a way that makes it impossible to directly apply high-efficiency cogeneration standards to these plants.

While acknowledging the two can and should go hand in hand, the judgement draws a distinction between legislation aimed at promoting high-efficiency cogeneration versus legislation aimed at climate goals in the sector. It also considers that the war in Europe has, as never before, highlighted the importance of diversification of energy production using renewable resources.

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[31] *Schöning, F., Ziegler, C.* What is State Aid? In: State Aid and The Energy Sector, *Hancher, L., de Hauteclocque, A., Salerno, F. M.* (eds). Oxford: Hart, 2018, pp. 3–4.

[32] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 36.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

[33] See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 19 April 2019 in case No. 2018-16-03, para. 10. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-16-03_Spriedums.pdf#search= [last viewed 11.04.2024] or Judgement of the Constitutional Court of the Republic of Latvia of 25 March 2015 in case No. 2014-11-0103, para. 26. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/04/2014-11-0103_Spriedums_ENG.pdf#search= [last viewed 11.04.2024].

[34] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 40.4. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

3.2. High-efficiency cogeneration and the use of renewable resources

As noted above, state support for electricity production in Latvia was granted under different conditions, implementing EU directives related to the promotion of renewable energy (currently in force – Directive 2018/2001), and high-efficiency cogeneration (currently in force – Directive 2012/27/EU of The European Parliament and of The Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU, and repealing Directives 2004/8/EC and 2006/32/EC[35] (hereinafter – Directive 2012/27/EU)). The main objections of the applicants in the case No. 2021-36-0103 were essentially related to the high standards set for biogas CHP plants for the use of useful heat energy, which are characteristic in high-efficiency cogeneration. Useful heat is defined as the heat that satisfies an economically justified demand,[36] for example, by supplying it to a central heating system in a city, or by using thermal energy in production processes. The applicants stated that the new useful heat requirements cannot be met in biogas CHP plants and they have been introduced by incorrectly adopting the requirements of Directive 2012/27/EU, which should not be applied to renewable energy aid schemes at all. Firstly, in keeping with their goal of reducing emissions caused by agriculture, biogas CHP plants are built closer to raw materials (residual products) than to heat energy consumers. Secondly, biogas CHP plants cannot be subject to the same technical requirements as natural gas CHP plants due to different chemical and physical properties of the gas.

It should be pointed out, that the applicants were granted the right to state aid based on the provisions that applied only to the production of electricity using renewable energy resources and related to the provisions of the Directive 2018/2001, and not based on the provisions on the production of electricity in cogeneration, which, on the other hand, refer to the requirements of Directive 2012/27/EU. In addition, at the time when the applicants were granted the right to receive state aid, the feed-in tariff for producers using renewable energy resources did not depend on their useful heat energy indicators. However, for producers who had adapted their businesses to the regulations on electricity production in CHP plants, useful heat energy was already included in the tariff calculation. This situation, in which new requirements from Directive 2012/27/EU are applied to an existing state aid scheme related to the subject matter of Directive 2018/2001, raises the question of respect for legal certainty and legitimate expectations also from the perspective of EU law. [37]

Recital 77 of Directive 2018/2001[38] refers to a possible "synergy" of the mechanisms introduced by Directive 2018/2001 and Directive 2012/27/EU. This suggests that, in general, a Member State can introduce a state support mechanism that combines

[35] Directive 2012/27/EU of The European Parliament and of The Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC. Available: https://eur-lex.europa.eu/eli/dir/2012/27/oj [last viewed 11.04.2024].

[36] Article (32)2 of Directive 2012/27/EU.

[37] To read more about the differences of the understanding of the principles of legal certainty and legitimate expectations in State aid law and Investment law, see: *Pinto, C. S.* The 'narrow' meaning of the legitimate expectation principle in state aid law versus the foreign investor's legitimate expectations: hopeless clash or an opportunity for convergence? European State Aid Law Quarterly (ESTAL), 15(2), 2016, pp. 277–278. and *Fahner, J. H.* Compensation or Competitive Advantage? Reconciling Investment Arbitration with EU State Aid Law. ICSID Review, Vol. 37, No. 3, 2022, pp. 678–679.

[38] It stipulates: "The potential synergies between an effort to increase the uptake of renewable heating and cooling and the existing schemes under Directive 2010/31/EU of the European Parliament and of the Council (14) and Directive 2012/27/EU should be emphasised. Member States should, to the extent possible, have the possibility to use existing administrative structures to implement such effort, in order to mitigate the administrative burden."

the requirements contained in Directive 2018/2001 and Directive 2012/27/EU, while at the same time applying them to CHP plants that use renewable energy resources and also produce heat energy as part of cogeneration. Furthermore, if the requirements of Directive 2012/27/EU could be applied to state aid schemes introduced in connection with Directive 2018/2001 or its predecessors, it could also be concluded that Member States could, therefore, in accordance with the second part of Article 1 of Directive 2012/27/EU introduce even stricter requirements for such CHP plants.[39] Nevertheless, it is unclear whether such changes in the national legal framework are compatible with the principle of legal certainty and the requirement for the stability of financial support set out in Article 6 of Directive 2018/2001. Namely, paragraphs 1 and 2 of Article 6 of the Directive stipulate:

1. *Without prejudice to adaptations necessary to comply with Articles 107 and 108 TFEU, Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support.*

2. *Member States may adjust the level of support in accordance with objective criteria, provided that such criteria are established in the original design of the support scheme.*[40]

Thus, in the context of the specific case, at least two questions could be raised. Firstly, can new criteria that belong to the scope of issues regulated by Directive 2012/27/EU ("energy efficiency" directive) be introduced in previously implemented state aid schemes that exist in accordance with the regulations related to Directive 2018/2001 ("renewable energy resources" directive)? Secondly, does the provision in Article (2)6 of Directive 2018/2001 prevent the introduction of the requirement for useful heat energy, if there was no such requirement for biogas CHP plants in the original version of the state aid scheme that the Commission has deemed compatible with internal market?

The CJEU has held that when Member States adopt measures to implement EU law, they are required to respect the general principles of that law, including the principle of legal certainty.[41] The principle of legitimate expectations derives from the principle of legal certainty.[42] The right to rely on that principle is granted to any person to whom a national administrative body has given rise to a legitimate expectation

[39] Article (2)1 of the Directive 2012/27/ES stipulates that the requirements laid down in this Directive are minimum requirements and shall not prevent any Member State from maintaining or introducing more stringent measures.

[40] Article 6 of Directive 2018/2001.

[41] See, for example, Judgment of CJEU of 11 July 2019 in joined cases No. C-180/18, C-286/18 and C-287/18, Agrenergy Srl, para. 28. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216066&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1364756 [last viewed 11.04.2024]. Judgment of CJEU of 7 August 2018 in case No. C-120/17, Administratīvā rajona tiesa, para. 48. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=204742&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1365303 [last viewed 11.04.2024].

[42] See, for example, Judgment of CJEU of 11 July 2019 in joined cases No. C-180/18, C-286/18 and C-287/18, Agrenergy Srl, para. 29–30. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216066&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1364756 [last viewed 11.04.2024].

based on specific promises, which it has made.[43] At the same time, the principles of legal certainty and the protection of legitimate expectations do not preclude national legislation which allows a Member State to reduce or abolish incentive tariffs previously established for energy produced from renewable energy sources.[44]

Thus, it could be concluded from the jurisprudence of the CJEU that the extension of the heat energy efficiency standards to cogeneration plants participating in the state aid scheme for renewable energy do not infringe upon the principles of legitimate expectations and legal certainty. However, this is questioned by Article 6(1) and (2) of Directive 2018/2001, on the content of which the CJEU has not yet expressed an opinion.

During the public hearings of the case in the Constitutional Court, considerations were also raised about the possibility of the court turning to the CJEU with a request for a preliminary ruling. However, the Constitutional Court did not do so in accordance with Article 267 of the Treaty on the Functioning of the European Union, because the court found the disputed norms to be unconstitutional, and, therefore, the solution of the case could not be changed by interpretation of EU law. Hence, it is in the hands of another court of a Member State, including Latvia, who could raise the aforementioned questions to the CJEU.

However, even though the Constitutional Court resolved this case without an input from the CJEU, this judgement touches the issue of legitimate expectations of producers who have invested in helping Latvia reach its climate goals. According to the Constitutional Court, the right to property in the area of State aid is in itself linked to legitimate expectations, since the granting of State aid by a regulatory act, decision or contract constitutes a promise by the State to the producer or an acquired right.[45] This judgment is, thus, a good example of investment protection in Latvia.

3.3. Execution of the Constitutional Court judgment and necessity to find a balance between interests

The legal relations between the Constitutional Court and the legislator are directly influenced by the way the judgments of the Constitutional Court are executed. Considering the *erga omnes* effect of a judgment, which follows also from Article 85 of the *Satversme*, it is presumed that the judgments of the Constitutional Court will always be executed. This typically means that a legal norm that has been declared unconstitutional loses its force, and the legislator adopts another legal regulation, that is compliant with the Constitution.

The execution of the judgment directly demonstrates the implementation of the principle of separation of powers and the principle of loyalty of constitutional bodies[46]. In a state governed by the rule of law, each institution should fulfil its functions with mutual respect and cooperation. If the Constitutional Court's judgments are ignored and not executed, the Court's role is diminishing. Consequently,

[43] See, for example, Judgment of CJEU of 9 July 2015 in case No. C-183/14, Salomie and Oltean, para. 44. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=165649&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1365820 [last viewed 11.04.2024].

[44] Ibid., para. 47.

[45] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 20 and 21. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

[46] Decision of the Constitutional Court of the Republic of Latvia to terminate proceedings of 8 June 2012 in case No. 2011-18-01, para. 17. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2011-18-01_Lemums_izbeigsana.pdf#search=2011-18-01 [last viewed 06.04.2024].

such a court would become weak or less authoritative. There is a presumption that a constitutional court is strong if its judgment is final and binding (*erga omnes*); it cannot be overruled by anyone except the court itself or by the constitutional legislator, if it amends the constitution.[47] Conversely, if a ruling of the Constitutional Court is overruled by the parliament, the position of the Constitutional Court is weakened and, therefore, constitutional review in such a country in general is weak.

Considering the respectful dialogue between the Constitutional Court and the legislator, the judgments of the Constitutional Court have been usually, with minor exceptions, executed.

Moreover, in Latvia, since 2017, the jurisprudence of the Constitutional Court has formulated the principle of good lawmaking. According to this principle, the legislator must, among other things, assess the draft law, considering the findings expressed in the judgments of the Constitutional Court. In particular, the judgments of the Constitutional Court in which the relevant issue has already been examined and the legal norm has been declared unconstitutional, should be taken into account. If this principle is violated, the court may declare that the law has been adopted contrary to the principle of good lawmaking, and, therefore, it is unconstitutional.[48]

It is unquestionable that the legislator, when executing its legislative powers arising from the *Satversme*, has the discretion to decide on its own, whether and what kind of laws should be adopted instead of the legal norms the Constitutional Court has declared unconstitutional. Moreover, the legislator may also decide not to regulate a particular matter at all. However, the legislator must consider whether such silence might contradict the Constitutional Court's judgment itself. Good cooperation of the Constitutional Court and the legislator can also be witnessed in the way parliament has executed judgement in case No. 2021-31-0103 analysed before.

To execute the aforementioned judgement[49], the Cabinet of Ministers was required to consider introducing a different framework for state aid, which would consider whether or not, and to what extent, biogas CHP plants are subject to the high-efficiency cogeneration requirements rooted in Directive 2012/27/EU. By amending the relevant regulations, the Cabinet of Ministers decided to control the efficient use of heat in biogas CHP plants, taking into account the technological particularities of these plants, and not to apply the high-efficiency cogeneration requirements to them.[50] At the same time, these requirements remain in place for electricity producers participating in the mandatory procurement for the use of renewable energy sources and combusting biomass (e.g. wood chips) in CHP plants.

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[47] *Chen, A. H. Y., Maduro, M. P.* The judiciary and constitutional review. In: Routledge Handbook of Constitutional Law, *Tushnet, M., Fleiner, T., Saunders, C.* (eds). London & New York, 2013, p. 102.

[48] Judgement of the Constitutional Court of the Republic of Latvia of 28 June 2023 in case No. 2021-45-01, para. 17.2.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/12/2021-45-01_Judgement.pdf#search= [last viewed 06.04.2024].

[49] In the annotation of the legal act it is precisely mentioned that the amendments are drafted to execute judgement of the Constitutional Court in case No. 2021-31-0103. See. Annotation (*ex ante*) of the draft act No. 23-TA-628. Available: https://tapportals.mk.gov.lv/annotation/dbefa790-a55c-4df2-9a8b-6f2ce4c893bb# [last viewed 06.04.2024].

[50] Ministru kabineta 2023. gada 6. jūnija noteikumi Nr. 278. Grozījumi Ministru kabineta 2020. gada 2. septembra noteikumos Nr. 560 "Noteikumi par elektroenerģijas ražošanu, izmantojot atjaunojamos energoresursus, kā arī par cenu noteikšanas kārtību un uzraudzību" [Regulations No. 278 of the Cabinet of Ministers of 6 June 2023. Amendments to the Regulations of the Cabinet of Ministers of 2 September 2020 No. 560 "Regulations on the Production of Electricity from Renewable Energy Sources and on the Procedure for Setting and Monitoring Prices"]. Available: https://likumi.lv/ta/id/342445-grozijumi-ministru-kabineta-2020-gada-2-septembra-noteikumos-nr-560-noteikumi-par-elektroenergijas-razosanu-izmantojot-atjaunoj [last viewed 06.04.2024].

Thus, the execution of this judgment has contributed to the development of the state aid rules that merge the requirements of Directive 2012/27/EU and Directive 2018/2001 in a way that, on the one hand, respects the investments made by investors for the use of renewable energy sources for electricity production and promotes their further use, and, on the other hand, requires these producers to comply with appropriate efficiency requirements. So far, no producer has appealed to the Constitutional Court against the newly introduced requirements. It is possible to conclude with some caution that, at least on this issue, Latvia has found a balance between achieving climate goals, the efficiency of electricity production and the protection of the right to property.

4. Environmental constitutionalism: theoretical or applicable concept

Nowadays environmental protection is very much connected with ideas of democracy, fundamental rights, and rule of law. To explain and stress the importance of environment in legal science, new legal mechanisms and concepts have emerged. Today, scholars and courts have developed a new concept – environmental constitutionalism, which means, *inter alia,* that legal provisions on a constitutional level deal with environmental issues, which may include references to environmental protection, ecology, nature.[51] Undoubtedly, it is a very broad concept and it touches both substantive and procedural law aspects.[52] It is also suggested that environmental constitutionalism can be treated as a constitutional value.[53] On a national level, environmental constitutionalism can be fulfilled through the application of constitutional law, international law, fundamental rights, and environmental law.[54] It is the complexity of environmental law and the related environmental constitutionalism as a new phenomenon, that demands a broad legal approach when dealing with these issues.

In the Latvian legal system, environmental constitutionalism is directly manifested in two ways. The first is *Satversme* with the "classical" catalogue of fundamental rights, which provides a specific fundamental right – the right of everyone to live in a benevolent environment, which is granted in the Article 115.[55] By applying this fundamental right, the Constitutional Court uses international law instruments, for example, Aarhus convention,[56] which has played an important role by developing *locus*

[51] *Hudson, B.* Structural environmental constitutionalism. Widener Law Review, 21(2), 2015, p. 201; *O'Gorman, R.* Environmental Constitutionalism: A Comparative Study. Transnational Environmental Law, 6(3), 2017, p. 438.

[52] See, for example, *Kotzé, L. J.* Global Environmental Constitutionalism in the Anthropocene.Bloomsbury Publishing Plc, 2016, pp. 152–153.

[53] *May, J. R., Daly, E.* Global Environmental Constitutionalism, Cambridge University Press, 2014, p. 18.

[54] *Campbell, T. A.* Environmental Constitutionalism: Marrying the Due Process Clause and the Equal Protection Clause With Climate Change. Vermont Journal of environmental law, 22(2), 2021, p. 106.

[55] To compare the regulation of environmental aspects in other constitutions, see: *Hayward, T.* Constitutional Environmental Rights, Oxford University Press, 2005, p. 28; *Daly, E.* Constitutional Protection for Environmental Rights: The Benefits of Environmental Process. International Journal of Peace Studies, Vol. 17, No. 2, Winter 2012, pp. 72–73.

[56] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, namely, Aarhus Convention, has been applied by the Constitutional Court in cases several times. For example, in a recent case which was decided at the end of 2023, the court applied this convention, explaining the necessity to involve society by deciding the issues related to the environmental issues. See. Judgement of the Constitutional Court of the Republic of Latvia of

standi rules of NGOs to apply to the court[57]. The jurisprudence of the Constitutional Court explains that this subjective fundamental right covers not only the interests of the present generations, but also the interests of future generations to live in a benevolent environment. Namely, this ideal must be taken into account when deciding the issues which can influence next generations and protection of nature in a broader sense. In other words, the Constitutional Court has broadly defined the term "everyone" who can be affected in the future, allowing to bring a case to the court to protect future generations. The second manifestation of constitutional environmentalism can be seen in the Preamble of the *Satversme* that *expressis verbis* defines the principle of sustainability.[58] The Constitutional Court has declared that sustainability is the basis of the country's existence. This principle has been applied in different areas, but it is most often referred to when deciding environmental issues. Undoubtedly, the opportunities of current and future generations to live in a benevolent environment depend on the readiness of countries to implement sustainable development policies, protecting the Earth's climate system, anticipating and preventing or neutralizing the causes of climate change and mitigating their harmful effects. In other words – the Constitutional Court in the case No. 2021-31-0103 analysed above has confirmed that in Latvian legal reasoning there is a place to talk about environmental constitutionalism, which combines the principle of sustainability and the fundamental right to live in the benevolent environment.[59]

So far, environmental constitutionalism as a concept has been directly referred to in two judgements of the Constitutional court. One of them has been explained in this article, the other is very recent and related to forest management policy.[60] However, in general lines, Latvian scholars have not been in dialogue with the Court about this new concept, as it has not been much described, analysed, or criticised in legal science papers. It seems that, by keeping their silence, legal scholars have accepted it. It is worth mentioning that this new concept already has been reflected in the applications, which are submitted to the Constitutional Court and are related to the protection of environment. For example, in the constitutional complaint, which was submitted by three NGOs – Latvian Fund for Nature, World Wide Fund for Nature and Latvian Ornithological Society – environmental constitutionalism was used as an argument to substantiate the claim.[61]

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27 November 2023 in case No. 2022-16-05, para. 20.4. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/05/2022-16-05_Spriedums.pdf#search=2022-16-05 [last viewed 06.04.2024].

[57] See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para. 13. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search= [last viewed 06.04.2024].

[58] The Preamble of the Constitution states: "While acknowledging its equal status in the international community, Latvia protects its national interests and promotes sustainable and democratic development of a united Europe and the world." The Constitution of the Republic of Latvia. Available: https://www.saeima.lv/en/legislative-process/constitution [last viewed 12.04.2024].

[59] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 36.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

[60] Judgement of the Constitutional Court of the Republic of Latvia of 8 April 2024 in case No. 2023-01-03, para. 17.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/01/2023-01-03-spriedums_.pdf#search=2023-01-03 [last viewed 11.04.2024].

[61] Decision of the 3rd Panel of 27 January 2023 to initiate a case. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/01/2023-01-03_lemums_par_ierosinasanu-1.pdf#search=[last viewed 06.04.2024].

Summary

Historically, the state aid scheme for producing electricity in Latvia has been dual: with a set of rules for those participating in the mandatory procurement for using renewable resources, and another set of rules for those using combusting in highly efficient CHP plants.

The state aid scheme in Latvia favours those producers who use renewable energy resources and participate in the mandatory procurement for doing so. On the one hand, the producers combusting fossil fuels in CHP plants cannot claim to have legitimate expectations to be subject to the same set of rules (fixed term of state aid) as the producers using renewable resources. On the other hand, the producers using renewable resources can challenge the newly enforced standards that previously were attributed only to producers participating in mandatory procurement for producing electricity in high-efficiency cogeneration, and have successfully done so.

In its jurisprudence, the Constitutional Court takes into account the principles of legal certainty and legitimate expectations when deciding on issues of state aid, as they are related to the right to property. However, there is an unanswered question of how far these principles reach in the context of Article 6.1 of Directive (EU) 2018/2001.

As the Constitutional Court has drawn the attention of the legislature, EU climate goals are being taken very seriously not only in relation to the environment, but also regarding energy independence. These issues are intertwined and demonstrate the necessity to move away from the use of fossil fuels.

Execution of judgment of the Constitutional Court is a prerequisite of the state ruled by law. It demonstrates dialogue between Constitutional Court and the parliament. Execution of the judgement in case No. 2021-31-0103 exemplifies the necessity to find a fair balance between the duty to improve and promote the use of renewable energy resources for electricity production and efficiency requirements.

The Constitutional Court has formulated a new aspect of constitutionalism – environmental constitutionalism, which has been neither analysed, nor commented upon by legal scientists in Latvia. Nevertheless, it appears that this concept has been accepted by lawyers, since it has been reflected as an argument in the applications submitted to the Constitutional Court.

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Solving Wage Information Asymmetry: The Perspective of the European Union and Lithuania

Dr. **Kristina Ambrazevičiūtė**
Law Institute, Lithuanian Centre for Social Sciences
Research Fellow
E-mail: *kristina.ambrazeviciute@teise.org*

The search for criteria and mechanisms for resolving the pay gap between men and women is one of the main directions of the equality policy of the European Union. More than half a century after the establishment of the principle of the right to equal pay for the same work or work of equal value, it became apparent that the pay gap between men's and women's wages remains unsealed. One reason is the wage information asymmetry between the employee and employer. This asymmetry was corrected in the Pay Transparency Directive of the European Union.
The author examines the measures for adjusting information asymmetry on wages provided for in the directive. They are divided into three groups – the measures ensuring pay process transparency, the measures ensuring pay communication transparency, and the measures ensuring pay outcome transparency. Subsequently, obstacles and opportunities for the transfer of these measures to the Lithuanian legal system are discussed.

Keywords: wage, information asymmetry, employee, employer, transparency, pay, gap.

Contents

Introduction

The gender pay gap remains a significant European social issue despite the legal efforts to address it. In 2022, the average pay gap of the European Union countries was 12.7 %, and Lithuania was firmly in the middle among EU countries with a 12 % gap to the disadvantage of women[1]. This difference between Lithuanian men's and women's wages looks highly controversial when evaluated in the context of employment – the employment gap between men and women in Lithuania is small and, in 2022, was the smallest among EU countries.[2] It is obvious that women's wages in Lithuania are inadequate for their employment. This trend is detrimental to the position of women actively participating in the labour market and is no less relevant when they withdraw from active participation in work relations. Women's lower earnings result in a lower old-age pension or even an additional risk of poverty. According to the Lithuanian Statistics Department data, the poverty risk level for women aged 65 and over in 2022 was 46.9 %, whereas for men of the same age group – 23.6 %.[3]

In recent decades, the criteria and mechanisms to reduce the wage gap between men and women are actively sought in the Western world, including the European Union. When trying to implement the principle of equal pay, it has been found that one of the obstacles is the asymmetry of wage information between the employee and the employer, which lies in the nature of labour law. The employer not only has an incomparably more significant amount of information at his disposal (first of all, unlike an individual employee, he manages the information about the wages of all employees of the company) but also has a significantly greater power to dispose of this information, which is given to him by the pay secrecy culture. The term "pay secrecy culture" refers to heterogeneous factors, such as the widespread tendency in labour relations to attribute wages to confidential information and personal data, as well as the customary moral attitudes implying that one cannot disclose wages to third parties. Due to this culture, only the employer can decide to what extent and to whom to provide the information or a permission to disclose it. Clearly, such a situation is beneficial for the employer, as it gives an advantage when negotiating with the employee about wages, reduces the likelihood of competition, and helps to avoid dissatisfaction and conflicts in the workplace. However, when assessing the situation from the employee's point of view, the pay secrecy culture leads to a curious situation when the employee cannot freely dispose of salary information even directly pertaining to him or her (e.g. due to possible sanctions by the employer for breach of confidentiality obligations). More detailed information about the salary intended for a specific category of employees or the salary system applied in the company gives the employees a greater freedom and empowerment, furthermore, helping the employees feel more confident during negotiations with the employer and make informed decisions. Moreover, the employees can defend themselves against discrimination only with the information about co-employees' wages.

[1] Eurostat. Gender Pay Gap Statistics. Available: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics. [last viewed 14.03.2024].

[2] Eurostat. Gender Statistics. Available: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_statistics [last viewed 14.03.2024].

[3] Oficialiosios statistikos portalas, Skurdo rizikos lygis [Official Statistics Portal, At-risk-of-poverty Rate]. Available: https://osp.stat.gov.lt/statistiniu-rodikliu-analize?hash=cd5030e8-bd84-4826-bf16-b40788a8a458#/ [last viewed 14.03.2024].

These problems of information asymmetry about wages are solved in the European Parliament and Council Directive (EU) 2023/970[4] (hereinafter – the Pay Transparency Directive). This directive tightened the previous European Union regulations on the principle of equal pay for men and women for the same work or work of equal value, the prohibition of discrimination through wage transparency, and strengthened enforcement mechanisms. One of the main tools used to ensure wage transparency is the adjustment of wage information asymmetry between the employee and the employer. However, the question arises whether the transparency measures established in the Pay Transparency Directive are sufficient and effective.

Lithuania already applied some national transparency measures before the adoption of the Pay Transparency Directive. However, the Directive's entry into force requires assessing the extent to which the existing Lithuanian measures are sufficient to implement it and, if not, what additional measures should be taken.

Therefore, the goal of this article is to determine what measures are used to correct the asymmetry of information about wages to reduce the gender pay gap in the EU Pay Transparency Directive, which of these measures are already provided for in Lithuanian labour law, and what obstacles and opportunities may arise when transferring them to the Lithuanian legal system.

The analysis presented in the article and the conclusions made regarding the implementation of EU transparency measures in Lithuanian law are expected to be useful for lawyers and decision-makers of other countries, especially the Baltic states.

1. Development of the principle of equal pay in EU legal regulation

The EU's policy on equal pay for men and women is dynamic. Although it started more than half a century ago, it has changed and developed throughout that time in search of new and appropriate measures to tackle the pay gap between men and women.

Anti-discriminatory wage policy in the European Union began to be developed as a demand for equal pay for the work of men and women. The first step was the declaration of gender equality. In 1957, Article 119 of the Treaty of Rome[5] (currently – Article 157 of the Treaty on the Functioning of the European Union) stipulated the duty of each Member State to ensure that men and women receive equal pay for equal work. At the time, these provisions were only recognised as having a declaratory role – not surprisingly, later in doctrine, it was described as "Sleeping Beauty"[6]. The meaning of the requirement of equal pay for the work of men and women has been changed by the Court of Justice of the European Union in the Defrenne v. Sabena cases[7].

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[4] Directive (EU) 2023/970 of 10 May 2023 of the European Parliament and of the Council to Strengthen the Application of the Principle of Equal Pay for Equal Work or Work of Equal Value between Men and Women through Pay Transparency and Enforcement Mechanisms. OJ, L 132, 17.05.2023, pp. 21–44. Available: http://data.europa.eu/eli/dir/2023/970/oj/eng [last viewed 14.03.2024].

[5] Treaty of Rome. 11957E/TXT, 01.01.1958.) Available: https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-rome [last viewed 14.03.2024].

[6] *Ghailani, D.* Gender Equality, from the Treaty of Rome to the Quota Debate: Between Myth and Reality. In: Social Developments in the European Union 2013, *Natali, D.* (ed.). The European Trade Union, 2020, p. 163.

[7] Not only did these cases become the first precedent for gender discrimination, but they formed three rules of principle that led to the further development of the legal policy of inequality, which recognised that the principle of equal pay was a fundamental Community provision; that it pursues not only the economic but also the social objective of ensuring social progress and achieving the continuous improvement of life and work; that Article 119 has horizontal direct effects and applies not only to

The second step in the anti-discrimination pay policy can be seen as Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,[8] prohibiting differences in gender-based treatment in remuneration for work. Article 4 of the Directive requires the elimination of all direct and indirect discrimination on grounds of sex in respect to all aspects and conditions of remuneration for the same work or work of equal value. It is also provided that, where a job classification system is used in determining remuneration, it must be based on criteria that are the same for women and men and designed to not discriminate on grounds of sex.

However, more than half a century after the establishment of the right to equal pay for the same work or work of equal value, it has been acknowledged that gender pay discrimination persists,[9] and the existing regulation of equal pay for equal work, gender equality and exceptional conditions is not sufficient to ensure an actual level playing field. It has become apparent that it is not only the payroll systems that are important but also the access of employees to information about their functioning and the ability to dispose of that information. The main factors contributing to the gender pay gap were the lack of transparency in the wage system and the lack of information on pay for the same work or work of equal value.[10] In 2014, an attempt was made to address this problem with recommendations for strengthening the principle of equal pay for men and women through increased transparency. However, the effectiveness of the recommendation as a non-binding EU legislation was lower than expected, with limited implementation by Member States.[11]

As a result, a new step towards pay transparency was taken in the European Union in 2023, with the adoption of a directive of the European Parliament and the Council identifying the factors for the transparency and enforcement of wage systems[12] and which Member States have three years to transpose into national law.

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the actions of public authorities, but also to all agreements aimed at regulating collective gainful employment, as well as to contracts between individuals. See Judgement of 25 May 1971 of the European Court of Justice in case Gabrielle Defrenne v. Belgian State, No. 80-70; Judgement of 8 April 1976 of the European Court of Justice in case Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, No. 43-75; Judgement of 15 June 1978 of the European Court of Justice in case Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, No. 149/77.

[8] Directive 2006/54/EC of 5 July 2006 of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast). OJ, L 204, 26.7.2006, pp. 23–36. Available: http://data.europa.eu/eli/dir/2006/54/oj/eng [last viewed 14.03.2024].

[9] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Implementation of Commission Recommendation on Strenghtening the Principle of Equal Pay between Men and Women through Transparency. COM/2017/0671 final, 20.11.2017. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0671&qid=1710444496858 [last viewed 14.03.2024].

[10] Commission Recommendation 2014/124/EU of 7 March 2014 on Strengthening the Principle of Equal Pay between Men and Women through Transparency. OJ, L 69, 8.3.2014, pp. 112–116. Available: http://data.europa.eu/eli/reco/2014/124/oj/eng [last viewed 14.03.2024].

[11] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Implementation of Commission Recommendation on Strenghtening the Principle of Equal Pay between Men and Women through Transparency. COM/2017/0671 final, 20.11.2017. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0671&qid=1710444496858 [last viewed 14.03.2024].

[12] Directive (EU) 2023/970 of 10 May 2023 of the European Parliament and of the Council to Strengthen the Application of the Principle of Equal Pay for Equal Work or Work of Equal Value between Men and Women through Pay Transparency and Enforcement Mechanisms. OJ, L 132, 17.05.2023, pp. 21–44. Available: http://data.europa.eu/eli/dir/2023/970/oj/eng [last viewed 14.03.2024].

This article will then proceed with discussion of the measures provided in the Pay Transparency Directive to ensure wage transparency by adjusting the asymmetry of pay information between the employee and the employer. The measures will be examined by dividing them into three groups according to the trinitarian system of elements of payroll communication described by Peter Bamberger, which allows for the best disclosure of pay transparency: (a) pay process transparency, (b) pay communication transparency, and (c) pay outcome transparency.[13]

1.1. Pay process transparency in the EU Pay Transparency Directive

Pay process transparency shows the degree to which the employer shares information with employees about the company's mechanisms and practices of wage setting.[14] In other words, when solving the wage gap, not only does the establishment of objective and unbiased wage structures become essential here, but the information is also provided to employees about the functioning of these structures.

The Pay Transparency Directive provides several situations in which the employer must share the available information with applicants for employment and employees.

First, Article 5 of the directive provides measures to correct the information asymmetry at the time of employment. A person seeking employment has the right to receive information from the employer in advance about the initial salary or its range and the provisions of the collective agreement that the employer applies to the place of work. It is clear that with the increased focus on the employment process, the directive aims to reduce the information asymmetry between the employee and the employer in favour of the former and provide additional opportunities and protection when the employee negotiates wages. Accordingly, the employee, having learned the possible limits of wages before negotiations with the employer, will have a stronger bargaining position; in addition, V. E. Hooton and H. Pearce point out that this norm can be helpful to the employee, even in the event of failure to enter into a new employment relationship: if a candidate receives discriminatory wages in a current employment relationship, information about the amounts of gender-neutral wages can help him to start negotiations with a current employer.[15] On the other hand, the requirement for the employer to provide information on the starting salary or its range, based on objective, gender-neutral criteria and attributable to the respective workplace, is very broad in the directive and leaves several possible loopholes for wage discrimination. First of all, the recitals of the Pay Transparency Directive point out that ensuring transparency in no way limits the ability of an employer or employee to negotiate remuneration even outside the specified range. This means that people of different sexes can agree on significantly different levels of wages that are not bound by the range referred to in Article 5 of the Directive. Considering that women are characterised by lower self-confidence,[16] which means less successful negotiations, it has to be acknowledged that this instrument will not necessarily solve the pay gap successfully.

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[13] *Bamberger, P.* Exposing Pay: Pay Transparency and What It Means for Employees, Employers, and Public Policy. Oxford University Press: 2023, p. 33. Available: https://doi.org/10.1093/oso/9780197628164.001.0001 [last viewed 14.03.2024].

[14] Ibid., p. 191.

[15] *Hooton, V. E., Pearce, H.* As Clear as Mud: Assessing the Relationship between Proposed Pay Transparency Mechanisms and Data Protection Obligations in EU Law. European Labour Law Journal, Vol. 14, No. 4, 2023, p. 633.

[16] *Baker, D. T., Bourke, J.* How Confidence Is Weaponized Against Women. Harvard Business Review, 20 October 2022. Available: https://hbr.org/2022/10/how-confidence-is-weaponized-against-women [last viewed 14.03.2024]

Another measure provided for in the same article to correct the asymmetry of information and thus ensure transparency in employment relationships is the pay history ban, which is the prohibition on the employer from asking persons wishing to take up employment about the wages they have received in the current or previous employment relationship. As a rule, women receive lower salaries, and the pay secrecy ban limits the employer's access to information, which could weaken the employee's position during negotiations and simultaneously help a woman break out of the lower wage circle. Although in the doctrine, one can agree that the prohibitions on the history of wages are perhaps the least effective provisions of the current state's equal pay laws,[17] the U.S. experience shows that the pay secrecy ban helped increase pay for women.[18]

Several measures correct the information asymmetry between the employer and the current employee. Firstly, this group should include the requirement to inform about the company's pay policy: Article 6 of the Directive provides the employer's obligation to give the employees objective and gender-neutral criteria for determining employees' wages, wage levels and wage increases. The second measure is the right of employees, as provided for in Article 7(1) to (4) of the Pay Transparency Directive, to request information on the level of their wages and the average wage levels according to the sex of the employee and the categories of employees performing work of the same type or equal value, of which the employer is obliged to inform employees on an annual basis. This norm is one of the main instruments of the directive against the culture of pay secrecy and the monopolisation of information on wages in the hands of the employer. Employees are given access to information usually managed by the employer, thereby transcending the barrier that has hitherto prevented them from comparing wages of the same category of employees and gathering evidence of possible pay discrimination in the workplace. However, the right of employees to information on wages is rather severely limited: information on the amount of salary can be obtained by the employee not directly but through employees' representatives or equality bodies[19] (the employee can apply directly to the employer only with a request to clarify the previously provided data). An indirect referral or the involvement of an intermediary always implies less access to information by the employee. However, this norm can be evaluated in multiple ways: firstly, it protects the interests of the employer, secondly, it can protect the employee from harassment by the employer,[20] thirdly, limiting information reduces the risk of violating personal data protection requirements.[21]

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[17] *Fiorentino, S., Tomkowicz, S.* Can Millennials Deliver on Equal Pay? Why the Time Is Finally Right for Pay Transparency. Hofstra Labor & Employment Law Journal, Vol. 38, No. 2, 2021, pp. 255–257. Available: https://scholarlycommons.law.hofstra.edu/hlelj/vol38/iss2/3 [last viewed 14.03.2024].

[18] *Bessen, J., Denk, E., Kossuth, J.* Stop Asking Job Candidates for Their Salary History. Harvard Business Review, 14 July 2020. Available: https://hbr.org/2020/07/stop-asking-job-candidates-for-their-salary-history [last viewed 14.03.2024].

[19] Member States have designated an institution or institutions which, by established procedures, promote, investigate, supervise and support equal treatment of all persons without discrimination based on sex. See Article 20 of Directive 2006/54/EC of 5 July 2006 of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast). OJ, L 204, 26.7.2006, pp. 23–36. Available: http://data.europa.eu/eli/dir/2006/54/oj/eng [last viewed 14.03.2024].

[20] *Hooton, V. E., Pearce, H.* As Clear as Mud, p. 634.

[21] Article 12 of Directive (EU) 2023/970 of 10 May 2023 of the European Parliament and of the Council to Strengthen the Application of the Principle of Equal Pay for Equal Work or Work of Equal Value between Men and Women through Pay Transparency and Enforcement Mechanisms. OJ, L 132, 17.05.2023, pp. 21–44. Available: http://data.europa.eu/eli/dir/2023/970/oj/eng [last viewed 14.03.2024].

The difficulty of transmitting information on wages is also indicated by the unreasonably long period of 2 months provided for the employer's response. Bearing that the employer must have implemented transparent wage structures in the company, technological advances that allow for a quick search for information, and shorter deadlines for providing information in other areas,[22] two months is to be regarded as a burden on the right to information.

The literature indicates that one of the advantages of the right of employees to request information is the relatively small financial burden on employers since this measure is implemented only after the employees have taken the initiative. It is estimated that implementing a binding measure at the EU level on the right of employees to request information on remuneration in all EU Member States will cost employers 9 million euro.[23] In addition, the doctrine states that the ban on pay secrecy positively affects the increase in women's salaries and the decrease in the pay gap.[24]

On the other hand, the lack of this tool should also be mentioned. Since it is typical for people to overestimate their abilities and results and reduce the results and achievements of others, the pay information of co-employees may not meet their expectations and lead to consequences such as less effort and poorer performance, termination of employment, etc. The workplace must, therefore, provide for objective and transparent wage systems.[25] Another disadvantage of this tool is the provision of an initiative to employees. Studies show that when wage transparency systems have been introduced and established in some EU countries, the public is unaware of them and cannot benefit from them.[26]

1.2. Pay communication transparency in the EU Pay Transparency Directive

"Pay communication transparency" describes employees' ability to disclose information about their wages or organisational wage practices.[27] Article 7(5) of the Pay Transparency Directive prohibits contractual clauses restricting employees' right to disclose information on their wages and salaries.

Studies show that in those U.S. states where legislation provides for a ban on insurance to discuss their wages with colleagues, it has influenced the decrease in the gender pay gap.[28] There is also a noted and negative aspect of sharing information about the size of one's salary. As in the case of the right of employees to request information, a subjective and, therefore, not necessarily correct assessment of the work efforts of oneself and co-employees can lead to the fact that finding out the wage amounts can

[22] For example, The GDPR provides a deadline of one month for the data controller to provide information to the data subject. See Regulation (EU) 2016/679 of 27 April 2016 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). OJ, L 119, 4.5.2016, pp. 1–88. Available: http://data.europa.eu/eli/reg/2016/679/oj/eng. Also see *Hooton, V. E., Pearce, H.* As Clear as Mud, p. 640.

[23] *Hofman, J. et al.* Equal Pay for Equal Work: Binding Pay-Transparency Measures. Luxembourg: Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2020, pp. 16–17. Available: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)642379 [last viewed 14.03.2024].

[24] *Treleaven, Ch., Fuller, S.* BB See: Transparency Legislation and Public Discussions of Wage Inequality. Canadian Review of Sociology/Revue Canadienne de Sociologie, Vol. 58, No. 1, 2021. Available: https://doi.org/10.1111/cars.12326.10 [last viewed 14.03.2024].

[25] *Heisler, W.* Increasing Pay Transparency: A Guide for Change. Business Horizons, Vol. 64, No. 1, 2021, p. 79. Available: https://doi.org/10.1016/j.bushor.2020.09.005 [last viewed 14.03.2024].

[26] *Hofman, J. et al.* Equal Pay, p. 21.

[27] *Bamberger, P.* Exposing Pay, p. 191.

[28] *Hofman, J. et al.* Equal Pay, pp. 18–19.

lead to dissatisfaction in the workplace.[29] Hence, accessible communication about wage levels alone cannot solve equality problems and requires transparent wage systems.

The prohibition, provided for in Article 7 of the Directive, concerning restriction of employees' right to disclose information on their wages and salaries, is directly linked to the right to demand information from the employer on wages, as discussed above. In conversations with co-employees about wages, an employee can identify a possible pay discrimination in the company and then contact the employer for information about wages in the company or vice versa; after receiving information about wages in the company, he can verify it during conversations with co-employees.

1.3. Pay outcome transparency in the EU Pay Transparency Directive

Pay outcome transparency is the disclosure of information about the wages paid by the employer to the public.[30] usually carried out through authorised state bodies. Article 9 of the Directive obligates the employer to report the pay gap between the various men and women to the responsible public authority. Companies are obliged not only to present the pay gap between men and women but also to point out the gap between bonuses and all other additional benefits. The Pay Transparency Directive provides for the possibility for the State to gather some of this information based on administrative data itself. In any case, including the state in the relationship between the employee and the employer fulfils the traditional tripartite nature of labour law. In this case, the state, receiving part of the information from the employer, performs a control function and protects the interests of the weaker party to the labour relationship. At the same time, publicising information can influence and reduce the gender pay gap in enterprises.[31] The examples of Denmark and Sweden show that when employers were obliged to submit payroll reports, an adjustment in wage levels and a decrease in the pay gap were subsequently observed.[32]

The directive provides that reporting does not bind all employers and depends on the number of employees in the company. Employers with 250 or more employees are required to report annually, those with up to 249 employees – every three years, while employers with fewer than 100 employees can report voluntarily or at the discretion of the Member States. Such a determination of the lower limit of the number of employees gives rise to some doubts. On the one hand, such a restriction eases the administrative burden on employers but simultaneously reduces the practical impact of wage transparency measures.[33] The facts that the European business environment is mainly composed of small and medium-sized enterprises,[34] female employees dominate companies with fewer than 100 employees,[35] and the low level of wages in sectors dominated by women[36] lead to the suggestion that this requirement of the directive will apply to a sufficiently narrow range of actors and that a large

[29] *Hofman, J. et al.* Equal Pay, p. 16.
[30] *Bamberger, P.* Exposing Pay, p. 191.
[31] *Hooton, V. E., Pearce, H.* As Clear as Mud, p. 635.
[32] *Hofman, J. et al.* Equal Pay, pp. 17–18.
[33] *Hooton, V. E., Pearce, H.* As Clear as Mud, p. 638.
[34] *McEvoy, O.* SMEs in Europe. Available: https://www.statista.com/topics/8231/smes-in-europe/ [last viewed 14.03.2024]. Eurochambres Women Network Survey 2023: A Picture of Female Entrepreneurship. Available: https://www.eurochambres.eu/publication/eurochambres-women-network-survey-2023-a-picture-of-female-entrepreneurship/ [last viewed 14.03.2024].
[35] ILOSTAT. Where Women Work: Female-Dominated Occupations and Sectors. Available: https://ilostat.ilo.org/where-women-work-female-dominated-occupations-and-sectors/ [last viewed 14.03.2024].
[36] EU monitor. Understanding the Gender Pay Gap: Definition and Causes. Available: https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vl59mpupm0vq?ctx=vk4jic6t1dxz [last viewed 14.03.2024].

proportion of women facing pay discrimination will not fall within the scope of Article 9. The limitations of the reporting obligation are particularly evident in the context of Article 10 of the Directive, since the latter's requirements do not apply to undertakings employing fewer than 100 employees. According to Article 10, employers required to report the wage gap to the state authorities must conduct a general wage assessment if the gap exceeds 5%, is not justified by objective gender-neutral factors, and is not corrected within six months. The wage assessment must be carried out in cooperation with the employees' representatives. Then, the employer must implement the measures set out in the Directive and correct unjustified wage differences within a reasonable period. Article 10 of the Directive thus gives meaning to the functioning of Article 9 of the Directive. It makes the employer's reporting obligation not a formal requirement for transmitting information, but instead – an effective instrument. At the same time, it must be acknowledged that both reporting and auditing place a significant financial burden on employers, with studies showing that expenditure per organisation would be up to 2 028 euro per year, with costs of 38 million euro in all EU Member States.[37] Mandatory payroll audits require additional analysis, requiring even higher costs than reporting. Its administrative expenses related to the compulsory payroll audit requirement are estimated to cost 10 000 euro per organisation per year or 188 million euro in all EU Member States.[38]

2. The wage transparency measures in Lithuania's labour law

The Lithuanian labour law system enshrines not only the principle of equal pay provided in the legal acts of the European Union but also a significant part of the pay transparency measures.[39] Most of these transparency measures were adopted in response to the 2014 Commission recommendations. According to the model of transparency measures, Lithuania is identified as the typical European implementation of pay transparency. Typical European pay transparency countries, which in addition to Lithuania includes Romance-speaking Europe, parts of Scandinavia, and the rest of the Baltic countries, are described as the states whose employment laws to ensure transparency are applied when the company has a smaller number of employees and enforcement of legislation is provided for.[40]

Further below, based on the transparency measures mentioned above, the wage transparency measures provided in the Lithuanian legal system will be discussed, and the existing regulations in the context of the Pay Transparency Directive will be assessed.

2.1. Pay process transparency in Lithuanian labour law

In the Labour Code,[41] the main legal act regulating the issues of pay transparency, three situations can be distinguished when the employer is obliged to share information about the functioning of the wage system: indicate in the job

[37] *Hofman, J. et al.* Equal Pay, p. 17.

[38] Ibid., pp. 17–18.

[39] *Ambrazevičiūtė, K.* Moterų lygių galimybių užtikrinimas darbo santykiuose Baltijos valstybėse [Ensuring Equal Opportunities for Women in Labour Relations in the Baltic States]. Vilnius: Lietuvos socialinių mokslų centro Teisės institutas, 2022, pp. 22–28. Available: https://teise.org/moteru-lygiu-galimybiu-uztikrinimas-darbo-santykiuose-baltijos-valstybese/ [last viewed 14.03.2024].

[40] *Ceballos, M., Masselot, A., Watt, R.* Pay Transparency across Countries and Legal Systems. CESifo Forum, Vol. 23, No. 02, 2022, p. 8. Available: https://www.cesifo.org/en/publications/2022/article-journal/pay-transparency-across-countries-and-legal-systems [last viewed 14.03.2024].

[41] Labour Code of the Republic of Lithuania, No. XII–2603, 2016. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/6eea48d294ea11eea70ce7cabd08f150?jfwid=wd68si44j [last viewed 14.03.2024].

advertisement information about the size and range of the proposed basic (tariff) salary; to acquaint employees with the system of remuneration of labour; at the request of the works council or trade union to provide information on the average salary of employees by occupational groups and gender.

The first measure aims to correct the information asymmetry between the applicants for employment and the employer. Article 25(6) of the Labour Code requires the employer to indicate in the advertisement for the proposed job information about the size and range of the proposed basic (tariff) salary. This rule is intended to give the employee more opportunities during negotiations. Still, implementing the norm in practice shows employers have many opportunities to circumvent this requirement by providing extensive intervals in the job advertisement or offering a completely different salary during the job interview.[42]

The second measure is the obligation of the employer to provide opportunities for existing employees to familiarise themselves with the labour payment system. Article 140(3) of the Lithuanian Labour Code provides two possible ways of approving the pay system – establishing a payroll system in a collective agreement and the employer's approval. The legislature prioritises introducing a system of wages in collective agreements, which could be an effective tool for achieving transparency and reducing the gender pay gap. However, in Lithuania, collective labour relations do not play a more prominent role,[43] and the coverage of collective agreements is too low to introduce pay systems through them.[44] The analysis of collective contracts presented in the Lithuanian Register of Collective Agreements[45] shows that even when providing for a system of remuneration in a collective agreement, in most cases, the system of remuneration is described declaratively, often limited to repeating the norms of the Labour Code, the provisions of the system of remuneration of collective agreements are characterised by formality and non-reflection of the interests of employees. This makes it possible to identify the lack of transparency.[46] Thus, despite prioritising the collective establishment of the remuneration system, in practice, the employer often approves the remuneration of labour. The Labour Code provides that the employer adopts the system of payment of labour in workplaces from twenty employees and gives it to employees for information at the workplace in the usual way.[47] The Labour Code does not provide for in what way and with what frequency this familiarisation takes place, so it seems that such a way of informing employees about the system of wages is very formal and does not lead

[42] *Davulis, T.* Gender Equality: How Are EU Rules Transposed into National Law? Lithuania: Country Report. Brussels: European Commission, 2023, p. 21. Available: https://www.equalitylaw.eu/downloads/5970-lithuania-country-report-gender-equality-2023 [last viewed 14.03.2024].

[43] Ibid., p. 19.

[44] *Veldman, A.* Pay transparency in the EU: a legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway. Luxembourg: Publications Office of the European Union, 2017, p. 39. Available: https://data.europa.eu/doi/10.2838/148250 [last viewed 14.03.2024].

[45] Kolektyvinių sutarčių registras ir kolektyvinių sutarčių registravimo tvarka [Register of Collective Agreements and Procedure for Registration of Collective Agreements]. Available: https://socmin.lrv.lt/lt/paslaugos/administracines-paslaugos/kolektyviniu-sutarciu-registras-ir-kolektyviniu-sutarciu-registravimo-tvarka/?lang=lt [last viewed 14.03.2024].

[46] *Ambrazevičiūtė, K.* Vienodo darbo užmokesčio principas užtikrinant lygias moterų galimybes darbo santykiuose [The Principle of Equal Pay in Ensuring Equal Opportunities for Women in Labour Relations]. Jurisprudencija, Vol. 29, No. 2, 2022. Available: https://doi.org/10.13165/JUR-22-29-2-03 [last viewed 14.03.2024].

[47] *Davulis, T.* Lietuvos Respublikos darbo kodekso komentaras [Commentary on the Labor Code of the Republic of Lithuania]. Vilnius: Registrų centras, 2018, p. 433.

to consequences. Article 140 of the Labour Code lists the elements of the system of remuneration of a recommendatory nature[48] – the categories of employees, the forms of their payment and the amounts of wages, the grounds and procedure for awarding additional payment (bonuses and bonuses), the procedure for indexing wages, and is subject to the requirement of non-discrimination based on sex. It could be said that the provisions of Article 140(3) of the Labour Code are similar to those of Article 6(1) of the Pay Transparency Directive. Still, the Pay Transparency Directive emphasises the specification of criteria rather than the salary amounts themselves.

The third measure provided for in the Labour Code, which could be classified as a pay process transparency**,** is adopted in response to the 2014 Commission recommendations. Under Article 23(2), an employer with an average number of employees of more than twenty must, at the request of the works council or a trade union at the level of the employer, provide up-to-date anonymised information on the average wages of employees by occupational group and gender (except employees in managerial positions) at least once a year. A similar obligation is provided for employers who employ employees to work part-time, remotely, under fixed-term or temporary employment contracts - if, in this way, more than two employees work in the occupational group.[49] This provision was expected to identify problematic aspects of implementing the principle of equal pay for men and women[50] and to encourage dialogue between employers and employees about company pay policies and equal opportunities.[51] However, practice shows that works councils are not inclined to require information and even more so to use it properly.[52] Besides, the limitation of providing information to 20 employees leaves the employees of small companies behind the threshold. The employer's obligation to provide information is also provided for in Article 7 of the Pay Transparency Directive. Still, it emphasises the individual ability of an employee to seek and obtain information on the remuneration situation of their category of employees, thereby enabling him to defend himself against possible discrimination. Meanwhile, the employer's obligation to provide information in the Labour Code aims to ensure a common anti-discrimination wage policy in the enterprise.

Other pay process transparency measures of the Pay Transparency Directive are not provided for in the Lithuanian labour law system. Admittedly, when talking about the pay history ban, a mention should be made in Article 41(1) of the Labour Code when regulating the pre-contractual relations of the parties to an employment contract, providing for a prohibition on the employer from requesting information from the employee that is not related to his state of health, qualifications or other circumstances not related to the direct performance of the labour function. Such information is commented on as "irrelevant to the conclusion of the contract, and therefore, the employer is prohibited from demanding it and making decisions based on it."[53] Although the courts have not clarified the content of "circumstances not related to the direct performance of work" in Lithuanian case law, it can be assumed

[48] *Davulis, T.* Lietuvos Respublikos darbo kodekso, p. 432.

[49] Articles 40(8), 52(8), 71(3), 79(4) of the Labour Code of the Republic of Lithuania. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/6eea48d294ea11eea70ce7cabd08f150?jfwid=wd68si44j [last viewed 14.03.2024].

[50] *Burri, S. D.* National Cases and Good Practices on Equal Pay. Luxembourg: Publications Office of the European Union, 2019. Available: https://doi.org/10.2838/93401 [last viewed 14.03.2024].

[51] *Davulis, T.* Lietuvos Respublikos darbo kodekso, p. 92.

[52] *Davulis, T.* Gender Equality, p. 22.

[53] *Davulis, T.* Lietuvos Respublikos darbo kodekso, p. 16.

that pay history would fall within the scope of the prohibitions of Article 41(1) of the Labour Code. However, the direct entrenchment of the pay history ban in the Labour Code would undoubtedly be a more successful tool in the fight against the pay gap.

Concerning the pay process transparency tool provided for in Article 7 of the Pay Transparency Directive – the right of employees to request information – one cannot fail to mention the challenges its implementation in Lithuania will pose. The possibility for employees to access information managed by the employer not only about their wages but also about the wages of other employees (performing the same work or work of equal value) will face the established pay secrecy culture between Lithuanian companies. In Lithuania, pay secrecy culture manifests as a cultural sensitivity of pay data among all stakeholders.[54] In a 2017 study, only 51 % of those surveyed agreed with the statement "publishing the average wages per job type earned in the organisation or company where you work by each sex", which is the second lowest result in the European Union.[55] The culture of pay secrecy stems from the customary moral beliefs of society that publicly talking about one's own money or being interested in another person's finances is unethical and rude behaviour. In other words, information about monetary funds, including wages, is traditionally attributed to private personal data. In labour law, this provision is enshrined in Article 148(2) of the Labour Code, which stipulates that the employer may provide or publish information about the wages of an individual employee only in the cases established by law or with the employee's consent. In other words, the ability of an employee to receive information about the wages of his co-employee is influenced not only by the ethical rules of behaviour but also by legal norms, which allow information to be obtained only with the co-employee's consent. This is fully justified in terms of privacy but makes it extremely difficult to prove discrimination.

Moreover, the EU General Data Protection Regulation (GDPR)[56] and the Law on Legal Protection of Personal Data of the Republic of Lithuania[57] store the employee's data. The GDPR defines personal data in a very broad way (as any information about a natural person that can help to identify them directly or indirectly), and this allows information about the wages received by the employee to be included in the personal data.[58] In other words, the remuneration of employees performing work of the same type or of equal value provided for in Article 7 of the Pay Transparency Directive may be personal data protected by law, if they allow the recipient of the pay to be identified. This raises the question of the compatibility between the employer's obligation to protect employees' personal data under the GDPR and the employer's

[54] *Veldman, A.* Pay transparency in the EU, p. 27. Available: https://data.europa.eu/doi/10.2838/148250 [last viewed 14.03.2024].

[55] *Hofman, J. et al.* Equal Pay, p. 27.

[56] Regulation (EU) 2016/679 of 27 April 2016 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). OJ, L 119, 4.5.2016, pp. 1–88. Available: http://data.europa.eu/eli/reg/2016/679/oj/eng

[57] Republic of Lithuania Law on Legal Protection of Personal Data, No. I–1374, 1996. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/3e1ba58238c711edbf47f0036855e731?jfwid=wd68si3yx [last viewed 14.03.2024].

[58] State Data Protection Inspectorate, Mykolas Romeris University. Gairės darbuotojams ir darbdaviams apie asmens duomenų apsaugą darbo santykių kontekste [Guidelines for Employees and Employers on the Protection of Personal Data in the Context of Employment Relations]. 2023. Available: https://vdai.lrv.lt/lt/naujienos/gaires-darbuotojams-ir-darbdaviams-apie-asmens-duomenu-apsauga-darbo-santykiu-kontekste/ [last viewed 14.03.2024].

obligation to provide information under Article 7. Although the Pay Transparency Directive provides for a sufficiently large number of safeguards to protect employees' personal data – Article 7 obliges the employer to provide general and non-identifying information, Article 12 provides that information about personal data is processed under the GDPR, in practice, some many additional factors and circumstances will allow in some cases to be identified by a particular employee. This means a conflict between the Pay Transparency Directive's provisions and data protection law is inevitable.[59]

2.2. Pay communication transparency in Lithuanian labour law

Pay communication transparency, the ability of employees to share information about their wages or the organisation's pay practices is not regulated directly by Lithuanian legal acts. Neither the Labour Code nor other laws prohibit the disclosure of the size of one's wages or the company's wage practices, nor is it prohibited to ban disclosure of one's salary or the company's salary practices. . Nevertheless, in Lithuanian practice, discussing one's wages is limited by confidentiality agreements. As in the case of the protection of personal data mentioned above, the functioning of the terms of the confidentiality agreement about the non-disclosure of one's wages is reinforced by the ethical provisions of society. In addition, the prevalence of pay confidentiality is also significantly influenced by the established situation of wage systems in Lithuania, where wages are determined by individual negotiations between the employee and the employer, and the influence of collective bargaining is small or non-existent[60].

Determining how widespread are the terms of confidentiality agreements regarding wages is not easy, since no official statistics exist about it. However, the Lithuanian public sphere abounds in articles of an informative nature, identifying wages or the system of wages as confidential information,[61] as well as confidential agreements themselves, in which one of the conditions is wages.[62] This allows us to conclude that agreements on the confidentiality of wages are a common practice in Lithuania's labour relations.

Confidentiality agreements are regulated by the Labour Code, Article 25(5), which stipulates that the obligation to protect confidential information may arise on two grounds: firstly, based on the law, and secondly, as in the case we are discussing – based

[59] *Hooton, V. E., Pearce, H.* As Clear as Mud, p. 642.

[60] *Veldman, A*. Pay transparency in the EU, pp. 35–36.

[61] For example, *Venckienė, A*. Įmonių konkurencinė kova: kada atlyginimas – konfidenciali arba vieša informacija? [Corporate Competition: When is Salary Confidential or Public Information?]. 31.07.2019. Available: https://www.delfi.lt/darbas/darbo-rinka/imoniu-konkurencine-kova-kada-atlyginimas-konfidenciali-arba-viesa-informacija-81867089 [last viewed 14.03.2024]; *BizTools*. Susitarimas dėl konfidencialios informacijos apsaugos [Agreement on the Protection of Confidential Information], 26.11.2020. Available: https://www.biztools.lt/personalas/susitarimas-del-konfidencialios-informacijos-apsaugos/ [last viewed 14.03.2024]; *Lituanian Trade Union Solidarumas*. Darbo apmokėjimo sistema nelaikytina konfidencialia informacija [The Payroll System is not Considered Confidential Information]. 27.01.2021. Available: https://www.lps.lt/darbo-apmokejimo-sistema-nelaikytina-konfidencialia-informacija/ [last viewed 14.03.2024].

[62] For example, UAB "Vilniaus vandenys". UAB " Vilniaus Vandenys" konfidencialios informacijos sąrašas [CJSC "Vilniaus Vandenys" Confidential Information List]. 25.10.2021; *Všį "Go Vilnius"* Všį "Go Vilnius" vidaus tvarkos taisyklės [Public Institution "GO Vilnius" Rules of Internal Procedure]. 5.04.2018; *UAB* "VAATC" "Dėl UAB "VAATC" darbuotojų supažindinimo su konfidencialios informacijos sąrašu bei konfidencialios informacijos naudojimo tvarkos aprašu" [Regarding the Familiarization of CJSC "VAATC" employees with the List of Confidential Information and the Description of the Procedure for Using Confidential Information]. 05.02.2016.

on a contract. Article 39 of the Labour Code contains a definition of an agreement on the protection of confidential information, which provides that the parties to an employment contract may agree that the employee during the performance of the employment contract and after the end of the employment contract for personal or commercial purposes will not use and disclose to other persons certain information received from the employer or as a result of the performed labour function, which the parties to the employment contract will identify as confidential in their agreement. Neither the existing regulation, nor the case law has provided an unequivocal answer as to whether information on wages can be included in the scope of confidential information.[63] The situation is complicated further, because the definition and separation of confidential information from a trade secret is problematic in case law and doctrine.[64] On the other hand, given that it is possible to agree, in principle, on the confidentiality of any non-public information, it is not surprising that wages are included in the list of confidential information by default. Given the widespread culture of pay secrecy, the employee's situation is also aggravated by Article 154 of the Labour Code, which provides that if an employee violates the obligation to protect confidential information, he will have to compensate the employer for all the damage caused.

Article 39 of the Labour Code also provides conditions limiting confidentiality agreement objects. One of them is that confidential information cannot be agreed to be treated as data that cannot be kept confidential by law or by its purpose. The transposition into the Lithuanian legal system of the requirement of the Pay Transparency Directive to prohibit contractual clauses aimed at restricting the right of employees to disclose information about their wages will form a more than sufficient legal framework that prevents employers from prohibiting employees from making public the amount of their salaries. However, the low awareness of employees, the prevalence of the terms of the confidentiality agreement on wages and, in the end, the very nature of confidentiality agreements lead to the conclusion that the change will not be swift in practice.

2.3. Pay outcome transparency in Lithuanian labour law

Article 23(1) of the Labour Code of the Republic of Lithuania provides the employer's obligation to provide information about employees and their working conditions or other aspects of employment relations to the responsible state authorities by the procedure established by legal acts. However, the law does not regulate the employer's obligation to state authorities to provide information on the gender pay gap, nor does it provide for a mandatory wage assessment. However, references should be made to specific initiatives and measures intended to promote pay transparency. The most striking is the pay gap between men and women, announced at the Sodra[65]

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[63] *Ambrazevičiūtė, K., Birštonas, R.* Darbuotojo pareiga saugoti komercines paslaptis ir kitą konfidencialią informaciją: grėsmė laisvei pasirinkti darbą? [Employee's Duty not to Disclose Trade Secrets and other Confidential Information: Threat to Freedom to Choose a Job?] Teisės problemos, Vol. 98, No. 2, 2019. Available: https://teise.org/wp-content/uploads/2020/01/Ambrazeviciute_Birstonas_2019_2.pdf [last viewed 14.03.2024]; *Petrylaitė, V.* Konfidencialios informacijos apsauga darbo santykiuose [Protection of Confidential Information in Labour Relations]. In: Darbo teisės iššūkiai besikeičiančiame pasaulyje [Labour Law Challenges in a Changing World], *Mačernytė-Panomariovienė, I.* (ed.). Vilnius: Mykolas Romeris universitetas, 2020. Available: https://cris.mruni.eu/server/api/core/bitstreams/af14df96-cdde-4acc-9382-64bc54601cb1/content [last viewed 14.03.2024].

[64] *Ambrazevičiūtė, K., Birštonas, R.* Darbuotojo pareiga.

[65] The State Social Insurance Fund Board under the Ministry of Social Security and Labour.

initiative. 1 April 2021, the amendments to the Article 15(3)(6) Law on State Social Insurance of the Republic of Lithuania[66] came into force, expanding the list of public data of the employer; Sodra could publish on its website[67] the average salaries of companies with at least eight employees, of which there are at least four men and women, the average salaries of men and women, men and women. These averages are calculated by dividing the income from which social insurance contributions are calculated by the number of employees of the employer. Employers are not obliged to provide pay gap information; Sodra receives all the necessary data by analysing the data provided by employers about insured employees. However, Sodra provides only general and difficult-to-compare information.[68] Moreover, Sodra publishes facts about wages paid in companies without detailing the duties of employees, and no mandatory reaction from employers to the published results is provided. From all this, it can be concluded that the publicity policy initiated by Sodra is not enough.

In the context of pay transparency, the recommendations of the Equal Opportunities Ombudsperson can also be mentioned. Article 26(6) of the Labour Code provides for an obligation for the employer, whose average number of employees is more than fifty, to adopt and publish at the workplace measures for the implementation of the principles of implementation and supervision of the implementation of the policy of equal opportunities. The Labour Code does not specify the content of such measures. Still, the Office of the Equal Opportunities Ombudsperson has developed recommendations on how the application of this policy in private and public sector organisations could be ensured. One such proposed measure is the audit of the pay gap. The wage gap audit aims to ensure that positions and jobs are assessed according to neutral criteria, completely distancing themselves from the employee doing the job. During the audit, procedures for working with staff are checked, including recruitment, selection, promotion, training, discipline, and complaint handling.[69]

Thus, in Lithuania, the application of pay outcome transparency measures is minimal; the measures provided are recommendatory and do not entail any consequences for employers. Employers are not obliged to publish information on average wages or carry out a salary assessment.

Summary

Recently, in EU law an increasing attention has been drawn to the need to address the mitigation of wage information asymmetry, as this is a fundamental prerequisite for resolving the wage gap task. To that end, three general directions can be identified in the newly enacted EU Pay Transparency Directive, which aims to change the specified information asymmetry. The first direction envisages that the employee is given more power to decide whether to share information about his salary with other persons,

[66] Lietuvos Respublikos valstybinio socialinio draudimo įstatymas [Republic of Lithuania Law on State Social Insurance, No. I–1336, 1991]. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.1327/asr [last viewed 14.03.2024].

[67] SODRA. Vieši draudėjų duomenys [Public Data of Insurers]. Available: https://draudejai.sodra.lt/draudeju_viesi_duomenys/ [last viewed 14.03.2024].

[68] *Davulis, T.* Gender Equality, p. 22. Available: https://www.equalitylaw.eu/downloads/5970-lithuania-country-report-gender-equality-2023 [last viewed 14.03.2024].

[69] Lygių galimybių kontrolieriaus tarnyba. Lygių galimybių politikos priemonių rekomendacijos [Office of the Equal Opportunities Ombudsperson. Recommendations for Equal Opportunity Policy Measures]. 11.08.2017. Available: https://lygybe.lt/naujienos/lygiu-galimybiu-politikos-priemoniu-rekomendacijos/ [last viewed 14.03.2024].

including other company employees. Likewise, the pay history ban provision gives employees the right not to share information about their salary in different workplaces. Secondly, the Pay Transparency Directive obliges the employer to provide the employee with information about the company's wage policy, information about the amount of the employee's wages and average wages according to the gender of the employee and the categories of employees performing work of the same type or of equal value, both during employment and in existing employment relationships. Thirdly, the state is included in the wage transparency process alongside the employee and employer, which, receiving part of the information from the employer, performs a control function and protects the employee's interests as the weaker party in labour relations.

However, the measures established in the Pay Transparency Directive will not be fully effective due to the additional legal provisions established in the directive, which significantly reduce the practical effectiveness of the employer's obligation to share information. Such legal provisions are the indirect receipt of employer wage rate information and the extended deadline for providing information provided in Article 7 of the Directive. In addition, the establishment of a minimum number of employees for the employer's obligation to submit reports on various gender wage gaps to the responsible state institution means that this requirement will be applied to a sufficiently narrow circle of entities and a large number of women facing wage discrimination will not fall under the obligation to provide information to state institutions without the scope of application of the responsibility to perform a general wage assessment.

Evaluating the problem of wage transparency and wage information asymmetry from the perspective of the Republic of Lithuania, the Labour Code of the Republic of Lithuania already provides several measures to correct the specified asymmetry: firstly, the requirement for the employer to indicate information about the amount and/or range of the offered salary in the job advertisement; secondly, the employer's duty to provide opportunities for employees to get acquainted with the labour payment system; third, the employer's obligation to provide updated personalised information on the average salary of employees by occupational group and gender. However, these measures are limited in practice, and most of the measures provided in the Pay Transparency Directive are not offered in Lithuanian labour law.

The significant challenges of transposing the Pay Transparency Directive into the Lithuanian legal system are the collision of the directive's norms with the pay secrecy culture, which is strengthened by the law on personal data protection and the provisions of confidentiality agreements. Although there are legal safeguards in both cases, which at first sight allow for the harmonisation of conflicting legal regulations, the implementation and harmonisation of the contradictory provisions will not be simple.

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Experience of Reforms to the State Social Insurance in the Republic of Latvia after Restoring the Independence of the State *de facto*[*]

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 is dedicated to an overview of the reforms to the state social insurance law and criticism of some aspects in the reforms carried out in the Republic of Latvia after the restoration of independence *de facto* in 1990–1991, analysing the rights and obligations of the State, the employer and the employee in the area of social insurance. On the basis of research outcomes, the author concludes that the Soviet understanding of the social insurance law was soon dispensed with. However, it is debatable whether the reforms of social insurance have been successful enough. Although the social insurance contributions are paid in the amount of at least "the minimum amount of the object of mandatory contributions", it is not clear whether, if an insured case sets in, the disbursed benefit ensures a life that is worthy of human dignity because the subsistence minimum has not been calculated in Latvia. Moreover, not all socially insured persons have all forms of social insurance. Hence, reforms in the area of social insurance cannot be regarded as being completed.

Keywords: social insurance, solidarity, tax, human dignity, subsistence minimum.

Contents

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Introduction

Social security is one of the foundations for national security. The State social insurance law (hereafter – social insurance), in turn, is part of the social security system. Social insurance as part of national security is no less important than the national defence, the right to education or clean environment. Unfortunately, until now, significant studies of social insurance law have not been published in the literature of legal science. Of course, the relevance of this article is not determined solely by the lack of studies on social insurance. The discussions, often heard in Latvia, about negligible State pensions, unemployment benefits, inaccessible health care services, etc., also point to the need for starting a scientific debate about the issues related to social insurance. However, these discussions predominantly focus on the consequences rather than one of the most important causes of the insufficiency of the social service (benefit) – problems in social insurance law.

All the issues linked to social insurance cannot be examined within the limits of a single article. Analysis of the rights of farm workers, employees of micro companies, as well as socially insured employees of a foreign employer remains outside its scope. The current article will provide only a comparative description of a self-employed person's status.[1]

The aim of the article is to analyse the experience related to social insurance reforms in the Republic of Latvia after the restoration of the State's independence *de facto* in 1990–1991 from the perspective of the social insurance rights and obligations of the State, the employer and the employee. The fact that the absolute majority of employed persons in Latvia has the status of an employee[2] speaks in favour of the author's choice.

1. Social insurance reforms of the transitional period

1.1. Legacy of the Soviet social insurance law

The Constitution (Basic Law) of the USSR of 7 October 1977 provided that "citizens shall have the right to material security in old age, in case of sickness, total or partial loss of the capacity for work, as well in case of survivorship".[3] All workers, public

[1] The concept of a self-employed person was introduced into the social insurance law by the law of 2 November 1995 "On Social Tax". Similarly to the social insurance law that is currently in effect, the definition of a self-employed person was provided. A definition was substituted by enumeration of persons who should be considered as being self-employed. The law regarded persons registered as engaged in commercial activities, in the meaning of personal income tax, e.g., individually practicing physicians, sworn attorneys, etc. as self-employed persons. See the law "Par sociālo nodokli" ["On social tax"] (02.11.1995), Art. 1. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[2] The concept of an employee in the meaning of the social insurance law is broader than the concept of an employee in the meaning of "Labour Law". In social insurance law, the status of an employee is applied also to a deputy of the *Saeima* (the parliament) and local governments, a Member of the Cabinet, a civil servant, etc. Compare "Par valsts sociālo apdrošināšanu" ["On State Social Insurance"] (01.10.1997), Art. 1 and Darba likums [Labour Law] (20.06.2001), Art. 3. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024]. See also Likuma "Par valsts sociālo apdrošināšanu" komentāri [Comments to the Law "On State Social Insurance"], Art. 1. Available: https://www.dbhub.lv/rokasgramatas [last viewed 15.05.2024].

[3] Padomju Sociālistisko Republiku Savienības Konstitūcija (Pamatlikums) [Constitution of the Union of Soviet Socialist Republics (Basic Law)] (07.10.1977) (hereinafter – Constitution of the USSR). Rīga: Liesma, 1977, Art. 43; The same is also established: Latvijas Padomju Sociālistiskās Republikas Konstitūcija (Pamatlikums) [Constitution of the Latvian Soviet Socialist Republic (Basic Law)] (18.04.1978) (further – Constitution of the Latvian SSR). Rīga: Liesma, 1978, Art. 41.

servants and collective farm (*kolkhoz*) workers were socially insured.[4] The social insurance of collective farm workers, however, had certain particularities.[5]

The social insurance rights (hereafter – social insurance) of workers and public servants were exercised at the expense of the State.[6] "Social insurance contributions [from the salary fund[7]] [were] made by enterprises, institutions and organisations without any deductions from the salaries of workers or public servants. If the enterprise, institution of organisation [had not] made the social insurance contribution, this [did] not deprive workers and public servants of the right to the material security guaranteed by the State."[8] Commenting on the provision of "Labour Law Code of the Latvian Soviet Socialist Republic", Soviet scientists wrote: "the right is guaranteed not by the contributions made but by the fact that they [workers and public servants] had been in a legal labour relationship".[9] Thus, the State's paternalism towards employees, loyal to the regime, was fully manifested in the area of social insurance.

The following benefits were guaranteed to the Soviet citizens 1) allowance for temporary work incapacity; for women, also pregnancy, childbirth and child care allowance until the child reached the age of one year; 2) childbirth allowance; 3) funeral allowance; 4) old-age, disability, survivor's and special pensions.[10] The Soviet law did not provide for social insurance in the case of unemployment because the right to work was constitutionally guaranteed to all Soviet citizens.[11] Likewise, health insurance was not envisaged because medical assistance was provided free of charge.[12] Social insurance resources were used also to cover the costs of sanatoriums, resorts, prevention centres for workers and public servants, pioneer camps, etc.[13]

Contrary to the declared social security of working people in the Soviet state, social insurance law was one of the most underdeveloped branch of law. This can be explained by the nihilistic treatment by the Soviet power of those persons who were engaged in a legal labour relationship with the State. For example, at the end of the 1970s and beginning of 1980s, the Soviet pensions did not exceed 45 to 120 roubles per month.[14] To mitigate pensioners' poverty, retired persons could continue

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[4] *Voronova, L. K., Khimicheva, N. I.* (eds). Sovetskoye finansovoye pravo [Soviet financial law]. Moskva: Yuridicheskaya literatura, 1987, pp. 364–368.

[5] Until the first half of the 1960s, the level of social insurance for collective farm workers was lower compared to that of workers and public servants, in particular, as regards their right to old-age pension. The cause for this was the negligible support from the state budget for the social security of collective farm workers. Moreover, it was considered that a collective farm worker lived on a collective farm and received social support from other members of the farm. On 15 July 1964, "Law on Pensions and Benefits to Members of Collective Farms" was adopted. With this law entering into effect, collective farm workers were gradually made equal to workers and public servants in their social rights. See *David, R., Grasmann, G.* Einführung in die groβen Rechtssysteme der Gegenwart. 2. deutsche Auflage [Introduction to the major legal systems of the present day. 2nd German edition]. München: C. H. Beck'sche Verlagsbuchhandlung, 1988, p. 355; Padomju tiesības. V. Millera un E. Meļķiša redakcijā [Soviet law. *Millers, V. and Meļķisis, E.* (eds).]. Rīga: Zvaigzne, 1978, p. 309.

[6] See Latvijas Padomju Sociālistiskās Republikas Darba likuma kodekss [Code of Labour Law of the Soviet Socialist Republic of Latvia] (14.04.1972) [in the wording: 01.05.1988] (hereinafter – Code of Labour Law), Art. 241 (1). Rīga: Avots, 1989.

[7] Padomju tiesības [Soviet law], pp. 267–269.

[8] Code of Labour Law, Art. 241(1).

[9] *Rozenbergs, J., Zonne, O.* In: Padomju tiesības [Soviet law], pp. 2, 268.

[10] Code of Labour Law, Art. 242.

[11] Constitution of the USSR, Art. 40; Constitution of the Latvian SSR, Art. 38.

[12] Ibid., Art. 40, 42; Constitution of the Latvian SSR, Art. 38, 40.

[13] Code of Labour Law, Art. 242.

[14] Padomju tiesības [Soviet law], p. 275.

legal labour relationships, without having the amount of their pensions decreased.[15] A limit, however, had been set – the total monthly income of a pensioner could not exceed 300 roubles.[16]

The State's paternalism, implemented in the insurance law of the USSR, did not comply with the requirements of free society. Likewise, the provision that only State enterprises, institutions, organisations of State-controlled cooperative organisations could be an employer did not meet the needs of a State oriented towards market economy. Therefore, after the independence of the Republic of Latvia was restored *de facto,* new legal regulation on social insurance had to be drafted.

1.2. Dispensing with the Soviet social insurance law

In 1990–1991, the Republic of Latvia restored its independence *de facto*.[17] The historical declaration "On the Restoration of Independence of the Republic of Latvia"[18] was adopted on 4 May 1990. The economic situation in the country changed rapidly after this declaration was made. Economic reforms demanded elaboration of a new social insurance model. On 14 December 1990, the Supreme Council of the Republic of Latvia adopted the law "On Social Tax"[19] (hereafter – the First Social Tax Law). This law changed the understanding of social insurance in several aspects.

From then on, not only State enterprises, institutions, organisations and State-controlled cooperatives, but also private legal and natural persons could offer their work for remuneration. Therefore, such new concepts as an employer and an employee were introduced. An employee was defined as "a person who is in a labour relationship with an employer".[20]

In difference to the Soviet law, an employee also had to pay the social tax. Although the part of the social tax to be paid by the employee constituted only 1 % of the remuneration for work that had been calculated for an employee, this changed the legal relationships, defining an employee's duty to participate in financing the social security system. Substantially, the employer had to pay the social tax. The amount of social tax to be paid by the employer was 37 % of remuneration for work, calculated for an employee.[21] Responsibility for paying the social tax contributions into the State budget was determined for the employer, whereas controlling the payment of the social tax became the basic duty of the State.[22] This

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[15] *David, R., Grasmann, G*. Einführung [Introduction], pp. 355–356.

[16] Pensioners involved in the production of agricultural products were an exception. See Latvijas tiesību vēsture (1914–2000). Prof. Dr. iur. Andreja Dītriha Lēbera redakcijā [History of Latvian Law (1914–2000). Edited by Prof. Dr. iur. Andrejs Dītrihs Lēbers]. Rīga: Fonds Latvijas Vēsture, 2000, pp. 394–395.

[17] On the restoration of the independent state, see more: *Cercel, C., Pleps, J.* Eternity clause as Agalma. Articulating constitutional Identity in Romania and Latvia. In : Law, culture and identity in central and eastern Europe. A comparative engagement, *Cercil, C., Mercescu, A., Sadowski, M. M*. (eds). Abingdon, Oxol, New York: Routledge, Taylor & Francis Group, 2024, pp. 174–187.

[18] Par Latvijas Republikas neatkarības atjaunošanu [On the Restoration of Independence of the Republic of Latvia] (04.05.1990). Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[19] Likums "Par sociālo nodokli" [law "On social tax"] (14.12.1990). Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs. 1991. gada 31. janvārī [Bulletin of the Supreme Council and Government of the Republic of Latvia. 31 January 1991], No. 3/4.

[20] The First Social Tax Law, Art. 2.

[21] Ibid., Art. 2–3, 6. Not all employers were obliged to pay the social tax according to the standard rate. For example, employers, who had among their employees at least 50% disabled persons, had the right to pay the employer's part of the social tax in the amount of 8 % of the remuneration calculated for the employee (See Art. 3).

[22] Par nodokļiem un nodevām [On Taxes and Fees] (28.12.1990), Art. 10. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

marked the diminishing of the State's responsibility in the area of social insurance compared to the Soviet period.

On 7 September 1995, the law "On Social Security"[23] was adopted. The principle of social insurance was determined as one of the basic principles for the functioning of the social security system.[24] On 2 November 1995, a new law "On Social Tax" (hereafter – the Second Social Tax Law)[25] was passed to implement this principle. *Prima facie* contradiction between the two concepts – "insurance" and "tax" was eliminated by explanations, provided in Transitional Provisions of the Second Social Tax Law, that "the social tax shall be considered as being a social insurance contribution".[26]

The social tax was defined as mandatory payment into the State special social insurance budget, which created an insured person's right to the social service defined in law.[27] At the sitting of the *Saeima*, State Minister for Social Affairs Vladimirs Makarovs explained that the purpose of the Second Social Insurance Tax Law was to implement the provisions of the law on social security. This law would become "the economic foundation for those social guarantees that are envisaged by the law "On Pensions", the law " On Insurance against Unemployment" [and] the law "On Insurance against Accidents"[28]. In the author's opinion, the Second Social Tax Law completed the rapid process of abandoning the paternalistic policy of the Soviet law in social insurance law. Two facts testify to this:

1) social insurance contributions became personified (hereafter also – "the principle of personified contributions"). As explained by V. Makarovs: "the personified contributions will be the basis for further guarantees that these persons will receive in the case of insurance risk".[29] This meant that the amount of social service disbursements in the case of a pension, a sickness benefit, an unemployment benefit and in other cases[30] would depend, *inter alia*, on the amount of social contributions made;
2) the so-called "principle of actual contributions" was introduced. This meant that only a person who had made social insurance contributions, or for whom these contributions had been made by a third party, was socially insured.[31]

All employed persons, within the limits of their abilities, must take care of themselves and their relatives. However, this does not release the State from responsibility in the area of social security. The social insurance, organised by the State, cannot be based only upon "the principle of actual contributions" or, as the well-known Latvian proverb states – each man forger of his own fortune. In such a case, the State would, in principle, distance itself from responsibility in the area of

[23] Par sociālo drošību [On Social Security] (07.09.1995). Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[24] On Social Security, Art. 2

[25] Par sociālo nodokli [On social tax] (02.11.1995) (hereafter – the Second Social Tax Law). Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[26] The Second Social Tax Law. Transitional provisions, Art. 2 (1).

[27] Ibid., Art. 2.

[28] 5. Saeimas sēžu stenogrammas. Latvijas Republikas 5. Saeimas sēde 1995. gada 2. novembrī [5. Transcripts of the sittings of the *Saeima*. Session of the 5th *Saeima* of the Republic of Latvia, 2 November 1995]. Available: https://www.saeima.lv/steno/st_955/st0211.html [last viewed 15.05.2024].

[29] Ibid.

[30] Article 2 of the Second Social Tax Law determined seven types of services for a socially insured person: "1) old-age pension; 2) disability benefit; 3) survivor's pension; 4) sickness benefit; 5) maternity benefit; 6) allowance in the case of unemployment; 7) funeral allowance."

[31] The Second Social Tax Law, Art. 1(1).

social security. A State like that could not be considered as being a socially responsible State. At the moment when the Second Social Tac Law was adopted, the concept of a socially responsible State had not yet taken root in the Latvian legal system. Only on 2 November 2006, in the judgement by the Constitutional Court of the Republic of Latvia (hereafter – the Constitutional Court) in Case No. 2006-07-01, Latvia for the first time was examined as a socially responsible State: "Latvia is a socially responsible State. i.e., a State, which attempts, to the extent possible, to implement social justice in its legislation, governance and administration of justice. The aim of a socially responsible State is […] to ensure an appropriate living standard."[32] Then, eight years later, on 19 June 2014, it was determined in the Preamble to the Constitution (*Satversme*) of the Republic of Latvia (hereafter – the Constitution) that Latvia was a socially responsible State.[33] After the end of the transitional period, the Constitutional Court has interpreted the rights and obligations of a socially responsible State in the area of social insurance in its judgements. Interpretation of this analysis will be provided in the second part of this article.

The paternalistic policy of the Soviet law in social insurance law was not compatible with the interests of free society and the State, founded on market economy, the principle of "actual contributions", in turn, in the implementation of social insurance rights could not meet in full the requirements of a socially responsible State. This meant that the reform of the social insurance law had to be continued also after the transitional period had ended.

2. Social insurance reforms after the end of the transitional period

2.1. Basic principles and forms of social insurance

On 1 October 1997, the law "On State Social Insurance"[34] was adopted and is still in effect. Pursuant to the law, "[t]he social insurance is a set of measures organised by the State to insure the risk of a person or dependants thereof to loss of income for work in connection with sickness, disability, maternity, paternity, unemployment, old-age, an accident at work or the contraction of an occupational disease, nursing of a child of the socially insured person, as well as additional expenditures in connection with the death of the socially insured person or dependants thereof."[35]. The object of mandatory social insurance contributions (hereafter – mandatory contributions) is all income, calculated for an employee in salaried employment, up to the maximum amount of mandatory contributions, determined by the State.[36] Mandatory

[32] Judgement of the Constitutional Court of the Republic of Latvia (further – JCCRL) of 2 November 2006 in Case No. 2006-07-01, Art. 18. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[33] Grozījums Latvijas Republikas Satversmē [Amendment to the Constitution of the Republic of Latvia] (10.06.2014). Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[34] Par valsts sociālo apdrošināšanu [On State Social Insurance) (01.10.1997). Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024]. It has been recognised also in the Constitutional Court's judicature (case law) that the purpose of social insurance is to ensure to an insured person replacement of income in the case of losing income from work. See JCCRL of 25 February 2002 in Case No. 2001-11-0106, para. 1; JCCRL of 15 February 2018 in Case No. 2017-09-01, para. 14.1., JCCRL of 7 October 2020 No. 2019-36-01, para. 15.1. etc. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[35] On State Social Insurance, Art. 3. See also Likuma "Par valsts sociālo apdrošināšanu" komentāri [Comments to the Law "On State Social Insurance"], Art. 14.

[36] The maximum amount of the compulsory contributions is 78 100 EUR. See the law "On State Social Insurance", Art. 14(1, 5).

contributions from the employee's whole income, calculated in salaried work, must be paid both by the employer and the employee, exactly as it was provided for by the First Social Tax Law. The currently valid law has only decreased the employer's part of mandatory contributions and increased the employee's part.[37]

With the law entering into effect, the fundamental principles, on which social insurance is based, were defined:

1) the principle of solidarity or "solidarity between those making social insurance contributions and the recipients of social insurance services"[38];
2) the principle of using social insurance contributions or "the use of social insurance funds only for social insurance services in accordance with Law".[39]

The law "On Taxes and Fees" provides that mandatory contributions are a tax.[40] Pursuant to the same law, it is explained that "[p]ayment of taxes does not provide for a direct compensation to the taxpayer"[41]. Contrary to this, the scope of social insurance services directly depends on the amount of mandatory contributions made[42], as pointed out by the Constitutional Court: "[t]he scope of social insurance services to be received depends on the scope of a person's co-participation in making social contributions".[43] Of course, just like a tax, the mandatory contribution is a solidarity payment. However, the mandatory contribution is also an insurance payment. Therefore, in the author's opinion, an amendment should be introduced into the text of the law "On State Social Insurance", providing that the principle of insurance is also one of the fundamental principles of social insurance. The introduction of the principle of insurance would promote the awareness of the need to differentiate between the concept of mandatory contributions and a tax.

Pursuant to the Constitutional Court's judicature (case law), social insurance fulfils its task in a meaningful way if it comprises "all traditional social risks"[44] or "would comprise all most significant social risks".[45] The law "On State Social Insurance" in its basic wording defined five forms of social insurance:

1) the State pension insurance;
2) the social insurance in case of unemployment;
3) the social insurance against accidents at work and occupational diseases;

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[37] "If an employee has been insured for all types of social insurance, the mandatory contribution rate shall be 34.09 per cent from which an employer shall pay 23.59 per cent and an employee shall pay 10.50 per cent. See the law "On State Social Insurance", Art. 18(1). See also *Ketners, K.* Nodokļi un nodokļu plānošanas principi [Tax and tax planning principles], Rīga: SIA "Tehnoinform", SIA "Info Tilts", 2018, pp. 32–33; *Jurušs, M.* Nodokļi [Taxes]. Rīga: RTU Izdevniecība, 2019, pp. 112–113.

[38] Social "[s]olidarity is the very basis of the principle of a socially responsible State" see *Kovaļevska, A.* Sociāli atbildīga valsts [A socially responsible country]. Jurista Vārds, 2022, No. 7 (1221). Available: https://m.juristavards.lv/doc/280633-sociali-atbildiga-valsts/ [last viewed 23.01.2024].

[39] On State Social Insurance, Art. 3.

[40] Likums "Par nodokļiem un nodevām" [Law "On Taxes and Fees"] (02.02.1995), Art. 8. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[41] On Taxes and Fees (02.02.1995), Art. 1 (1).

[42] *Ketners, K.* Publisko finanšu tiesību pamati. In: Publiskās tiesības. Ievads. Autoru kolektīvs Inetas Ziemeles un Sanitas Osipovas zinātniskā redakcijā [Fundamentals of public finance law. Public law. Introduction. Scientific editors Ineta Ziemele and Sanita Osipova]. Rīga: Tiesu namu aģentūra, 2024, p. 426.

[43] JCCRL of 10 December 2020 in Case No. 2020-07-03, para. 16.1. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[44] JCCRL of 29 October 2010 in Case No. 2010-17-01 para. 7. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[45] JCCRL in Case No. 2017-09-01 para. 14.1.

4) the disability insurance;

5) the maternity (from 2019, also paternity[46]) and sickness insurance.[47]

The history of the law has proven that all the most significant cases of social insurance risk were not covered by the forms of social insurance enumerated above. Therefore, the legislator until now already has added two more cases to the risks to be socially insured:

6) the parents' insurance (2007)48;

7) the health insurance (2017)[49].

Amendments to the law of 3 April 2019 eliminated gender inequality in social insurance law. From then on, not only the risk of maternity occurring but also that of paternity must be socially insured.[50] In concluding the overview of the forms of social insurance, one more finding by the Constitutional Court needs to be pointed out: "if an employee has been insured for a certain type of insurance then, upon setting of an insurance case, he is entitled to the respective security".[51] Thus, the exercise of the social insurance right is based, *inter alia*, on the principle of legitimate expectations.

Does the current social insurance system cover all social risks that a person might face in the case of losing one's income? The author holds that the development of the social insurance system will continue in accordance with the political system and the level of social welfare in the state.

Analysing the social insurance system, it needs to be explained that not all socially insured persons must have all forms of social insurance.[52] This is based on the assumption in the national legal policy that a person is ensured against those social risks that they might incur in the future.[53] For example, a person who is entitled to the State old-age pension (also in early retirement) or any of the special pensions should not be insured against employment because, if the job is lost, the source of income – pension – is retained. However, such an approach might prove to be wrong in many other cases of social insurance. To compare, a self-employed person is not insured against unemployment either. However, as the recent crisis, caused by COVID-19, proved, many self-employed persons lost all income due to the restrictions imposed and could rely only on the State's support in the form of allowance for idle time.[54] The fact that the majority of people do not understand insurance law

[46] Grozījumi likumā "Par valsts sociālo apdrošināšanu" [Amendments to the Law "On State Social Insurance"] (03.04.2019), Art. 3. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[47] On State Social Insurance, Art. 4.

[48] Grozījumi likumā "Par valsts sociālo apdrošināšanu" [Amendments to the Law "On State Social Insurance"] (08.11.2007), Art. 2. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[49] Grozījumi likumā "Par valsts sociālo apdrošināšanu" [Amendments to the Law "On State Social Insurance"] (27.07.2017), Art. 3. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[50] Amendments to the Law "On State Social Insurance" (03.04.2019), Art. 3.

[51] JCCRL 26 March 2004 in Case No. 2003-19-0103, para. 11. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[52] An employee who has reached the age of 15 is insured for all types of socially insurable risks. However, there are several exceptions. See the law "On State Social Insurance", Art. 5–6.

[53] JCCRL in Case No. 2019-36-01, para. 5.

[54] Ministru kabineta noteikumi Nr. 179 "Noteikumi par dīkstāves pabalstu pašnodarbinātām personām, kuras skārusi Covid-19 izplatība" [Cabinet of Ministers Regulations No. 179 "Regulations Regarding the Allowance for Idle Time for the Self-Employed Persons Affected by the Spread of COVID-19"]

exacerbates this problem even more. For example, it follows from the judgement by the Supreme Court (Senate) of the Republic of Latvia (hereafter – the Senate) of 28 April 2023 in case No. SKA-234/2023 that a board member of a company had not understood that, pursuant to his status as a socially insured person, he had not been insured against the risk of sickness and, therefore, was not entitled to sickness benefit.[55] The examples described above lead to the conclusion that the national policy in the area of social insurance should be reviewed, reducing to minimum the number of those persons who, in accordance with their status of a person to be socially insured, are not insured in all forms of social insurance.

2.2. Problems and solutions in social insurance

On 15 October 1998, Chapter VIII "Fundamental Human Rights"[56] was added to the Constitution. In the very same year, Latvia was affected by a severe economic crisis. The economic crisis "shed light" on the incompatibility of the "actual contributions", repeatedly referred to, with the Constitution. In this regard, the judgement by the Constitutional Court of 13 March 2001 in case No. 2000-08-0109[57] became historic.

Article 109 of the Constitution provides: "[e]veryone has the right to social security in old age, for work disability, for unemployment and in other cases provided by law." The Constitutional Court concluded from this: "[i]f anyone's social rights are included in the basic law, the State cannot derogate from them. These rights are no longer of only declarative nature"[58].

In the course of reviewing the case, it was found that an employee who was employed by a domestic employer was the only person belonging to the social insurance system who could make the mandatory contributions only with the mediation of the employer and the State's obligation was to control whether the employer fulfilled this statutory obligation. The employee's co-responsibility in exercising the social insurance rights was not examined. Since this aspect was not taken into consideration in the examination of the case, the Constitutional Court's judgement included the following statement: "[…] an employee as the subject of social insurance relationship has fulfilled his obligation in full at the moment of entering the legal labour relationship and commencing to discharge one's duties of work. […] to guarantee the rights of persons subject to mandatory social insurance, disbursements cannot be linked to the fact of whether other persons [employer or the State] have not properly fulfilled the duties defined in law".[59] Thus, "the principle actual contributions" lost its relevance. Ensuring the social service (benefit), regardless of whether mandatory contributions for the insured person had or had not been made, became the State's obligation. The author is of the opinion that, in accordance

(31.03.2020). Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024]. See also *Dārziņa, L.* Krīzes dīkstāves pabalsts pašnodarbinātajiem – kam un kā [Crisis downtime allowance for the self-employed – to whom and how]. Available: https://lvportals.lv/skaidrojumi/314861-krizes-dikstaves-pabalsts-pasnodarbinatajiem-kam-un-ka-2020 [last viewed 15.05.2024].

55 Judgment of the Supreme Court of the Republic of Latvia (*Senāts*) of 28 April 2023 in Case No. A420231320, SKA-234/2023, ECLI:LV:AT:2023:0428.A420231320.10.S, para. 10. Available: https://www.at.gov.lv/en/tiesu-prakse/judikaturas-nolemumu-arhivs [last viewed 15.05.2024].

56 Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (15.10.1998). Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

57 JCCRL of 3 March 2001 in Case No. 2000-08-0109, conclusion part. Available: https://www.satv.tiesa.gov.lv/cases/ [last viewed 15.05.2024].

58 Ibid.

59 JCCRL No. 2000-08-0109, conclusion part.

with the social situation in 2001, the Constitutional Court's judgement was just. However, in the long term, such legal regulation promoted neither social solidarity nor a person's responsibility for one's financial security in the future.

A certain balance between the responsibility of the State and a socially insured person was reached in 2009–2010, during the major economic crisis. On 20 December 2010, amendments were introduced to the law "On State Social Insurance". Amendments to the law provided, *inter alia*, that "[a] person shall be socially insured for pension insurance if mandatory contributions have been actually made".[60] This meant that the amendments to the law inevitably were contrary to the Constitutional Court's judicature (case law) and marked a return to "the principle of actual contributions", although only in the case of insurance for pensions.

This time, the Constitutional Court concluded in its judgement (case law) of 19 December 2011 that "[t]he pensions system, in particular – its first tier[61], was based on the principles of solidarity, justice and individual contribution"[62], and, namely:

1) the solidarity principle determines that the disbursement of pensions is ensured at the expense of the current mandatory contributions;
2) the principle of justice is implemented by making the amount of the pension dependent on the amount of mandatory contributions and the length of service;
3) the principle of individual contribution envisages the accumulation of the mandatory contributions by the payer in an individual account of contributions for pensions.[63]

On the basis of the principles described above, the Constitutional Court noted: "[…] the amount of a pension depends directly on the income, from which the social insurance contributions have been calculated, [and] the pensions system, *inter alia*, comprises a person's responsibility for one's future and the amount of one's pension.[64] […] Thus, the responsibility for a sustainable system of pensions is divided between the State, the employer and the employee.[65]" This meant that, in the case of insurance for pensions, "the principle of actual contributions" was not contrary to the Constitution.[66] The State's responsibility in cases of other socially insured risks was retained. The author holds that, in the current social insurance law, a proportionate balance has been reached in the responsibilities of the State, the employer and the employee.[67]

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[60] Grozījumi likumā "Par valsts sociālo apdrošināšanu" [Amendments to the law "On State Social Insurance"] (20.12.2010), Art. 2. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[61] The funded pension scheme or pensions of the second tier and investment of financial resources in private pension funds or pensions of the third tier require a person's own participation in the accumulation of capital and, in this case, this is not a matter of social solidarity.

[62] JCCRL of 19 December 2011 in Case No. 2011-03-01 para. 16.1. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[63] JCCRL No. 2011-03-01 para. 16.1–16.2.

[64] Ibid., para. 16.2.

[65] Ibid., para. 25.

[66] Ibid., para. 31.

[67] In other social insurance cases, it is not envisaged to calculate the disbursements of social insurance from the accumulated social insurance contributions, as it is in the case of pension insurance. For example, the unemployment benefit is calculated from "the salary of the insured person's insurance contributions for the period of 12 calendar months, concluding this period two months before the month, in which the person acquired the status of an unemployed person." See "Par apdrošināšanu bezdarba gadījumam" ["On Unemployment Insurance"] (25.11.1999), Art. 5–6.

Ensuring inhabitants subsistence minimum that is worthy of human dignity is the duty of a socially responsible State.[68] In Latvia, human dignity is a person's fundamental right[69] and, pursuant to the Constitutional Court's interpretation: "[h]uman dignity as a constitutional value characterises a human being as the supreme value of a democratic State governed by the rule of law."[70] In social insurance law this means that the State has the duty to determine such object of social insurance contributions that would ensure that, in the case of an insurance risk setting in, the benefit disbursed would be at least in the amount of subsistence minimum.[71]

In this regard, the crisis caused by COVID-19 brought a positive impetus. On 27 November 2020, amendments were made to the law "On State Social Insurance". They introduced the concept of "the minimum object of mandatory contributions".[72] "The minimum object of mandatory contributions within a quarter is three minimum monthly wages determined by the Cabinet".[73] Unfortunately, it is not known whether the social insurance contributions in the amount of minimum object of contributions ensure a social security benefit that is worthy of human dignity if a case of socially insured risk sets in because the subsistence minimum has not been calculated in Latvia.

The case law regarding the State's obligation to ensure to inhabitants a standard of living that is worthy of human dignity has been developing rapidly over the recent years. In this matter, the Constitutional Court has the leading role. The Constitutional Court has noted that the State's obligation is "to ensure social justice and serve to ensure everyone the possibility to lead such a life that is worthy of human dignity"[74], "the legislator's obligation to create such social security that is directed at protecting human dignity as the supreme value of a democratic State governed by the rule of law, levelling out of social injustice and sustainable national development follows from the principle of a socially responsible State"[75], etc.[76] However, it is also noted

[68] See, for example, 1) German legal doctrine: *Friedhelm, H.* Staatsrecht II. Grundrechte. 10. Auflage [Constitutional Law II. Fundamental rights. 10th edition]. München: C. H. Beck, 2023, pp. 137–138, 149 or Latvian scientific doctrine: 2) *Kovaļevska, A.* Sociāli atbildīgas valsts princips kā Latvijas Republikas valsts iekārtu raksturojošs princips [The principle of a socially responsible state as a characterizing principle of the state system of the Republic of Latvia]. In: Ilgtspējīga attīstība un sociālās inovācijas. Zinātniskā redaktore Dr. sc. soc. Baiba Bela [Sustainable development and social innovation. Scientific editor Dr. sc. soc. Baiba Bela.]. Rīga: LU Akadēmiskais apgāds, 2018, pp. 42–43.

[69] See Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922), Introduction and Art. 95. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024].

[70] JCCRL of 5 March 2019 in Case No. 2018-08-03 para. 11. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[71] See also *Rodiņa, A., Kārkliņa, A.* 25 Years of Fundamental Rights in the Constitution of the Republic of Latvia: Development, Significance and Content. Journal of the University of Latvia. Law, No. 16, 2023, pp. 32–35.

[72] Grozījumi likumā "Par valsts sociālo apdrošināšanu" [Amendments to the law "On State Social Insurance"] (27.11.2020), Art. 10. Available: https://likumi.lv or https://likumi.lv/about.php [last viewed 15.05.2024]. See also *Dārziņa, L.* Sociālā apdrošināšana darba ņēmējiem, pašnodarbinātajiem un obligātās iemaksas [Social insurance for employees, the self-employed and compulsory contributions]. Available: https://lvportals.lv/skaidrojumi/337197-sociala-apdrosinasana-darba-nemejiem-pasnodarbinatajiem-un-obligatas-iemaksas-2022 [last viewed 15.05.2024].

[73] Law "On State Social Insurance", Art. 20^4.

[74] JCCRL 9 July 2020 in Case No. 2019-27-03, para. 20.2. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[75] JCCRL 25 June 2020 in Case No. 2019-24-03, para. 17.1. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[76] On Latvia as a country governed by the rule of law, see more: *Osipova, S.* "The Borders" of the Legislator's Freedom in the Legislation. In: New Perspectives on Legislation. A Comparative Approach. *Chmielnicki, P., Sulikowski, A.* (eds). Berlin: Peter Lang GmbH, 2020, pp. 189–196.

in the Constitutional Court's judicature (case law) that: "the principle of a socially responsible State does not exclude the obligation of every person, insofar it can be reasonably expected within the limits of their abilities, to care for oneself and one's relatives and to ensure life worthy of human dignity."[77] Thus, the Constitutional Court's judicature (case law) allows to conclude that, in a socially responsible State that respects human dignity, responsibility for social security is a duty shared between the State and citizens.

Predominantly, the Constitutional Court's judicature (case law) is embodied in the relationships between the State and citizens in the area of social law through the mediation of administrative courts. In this respect, the author would like to point to the Senate's judgement of 16 March 2021 in case No. SKA-259/2021 regarding the amount of the old-age pension, calculated by the State, which obviously did not ensure a person life worthy of human dignity (EUR 96.07 per month). The calculated pension was based mainly on the person's length of service and not on the social insurance contributions. However, also in this case, the Senate validly noted that lower instance courts, in the future, would have to assess whether the pension, in conjunction with other social measures, satisfied the basic needs in compliance with human dignity, in case of necessity requiring from the Ministry of Welfare the methodology for calculating the minimum old-age pension.[78] This means that the minimum amount of pensions that follows from social insurance should likewise ensure a standard of living that is worthy of human dignity to an insured person.

Summary

Dispensing with the Soviet understanding of social insurance law began immediately after the restoration of the independence of the Republic of Latvia *de facto* and was completed with the entering into effect of the Second Social Insurance Law when social insurance contributions became personified and the so-called principle of "actual contributions" was introduced.

In several of its judgements, the Constitutional Court has reviewed the compliance of "actual contributions" with the Constitution. The Constitutional Court has recognised the compatibility of "actual contributions" with the Constitution only in the case of pension insurance, pointing out that the employee also has to assume responsibility for the sustainability of the pension system in the case of pension insurance. The State's responsibility for ensuring the social service was retained in other cases of socially insured risks.

The solidarity principle has been recognised as one of the fundamental principles in legislation on social insurance. However, the solidarity principle reveals the substance of social insurance only partially. Therefore, the principle of insurance should be added to the law. That would help to differentiate between the concepts of mandatory contributions and taxes.

In recent years, the fact that not all socially insured persons are insured in all social insurance forms has started to emerge as a problem in social insurance law. One can assume that this problem will be highlighted in the coming years through case law. However, it is clear already now that such statuses of socially insured persons

[77] JCCRL 5 October 2023 in Case No. 2022-34-01, para. 11. Available: https://www.satv.tiesa.gov.lv/en/cases/ [last viewed 15.05.2024].

[78] Judgment of Supreme Court (*Senāts*) of Latvia of 16 March 2021 in Case No. A420271718, SKA-259/2021, ECLI:LV:AT:2021:0316.A420271718.17.S, para. 14–15. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi [last viewed 15.05.2024].

that do not envisage insurance in all forms of social insurance should be brought down to minimum.

Latvia is a socially responsible State. It is the obligation of a socially responsible State to ensure to inhabitants' standard of living that is worthy of human dignity. In Latvia, the concept of "object of minimum mandatory contributions" has been introduced into the social insurance law. However, it is not known whether the mandatory contributions in the amount of the object of minimum mandatory contributions in the case where a socially insured risk sets in guarantees social services (benefit) that would ensure a life that is worthy of human dignity because the subsistence minimum, according to which the minimum about of mandatory contributions should be determined, has not been calculated in Latvia.

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Constitutional Identity Between Riga and Strasbourg: The Courts' Dialogue Developing Latvian Constitutional Law*

Dr. iur. **Artūrs Kučs**
Faculty of Law, University of Latvia
Associate Professor at the Department of International and European Union Law
E-mail: *Arturs.Kucs@lu.lv*

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*

The article provides insight into the recent development of the concept of constitutional identity in the Latvian legal system. The authors mainly focus on the dialogue between the national highest courts, especially the Constitutional Court, and the European Court of Human Rights and the Court of Justice of the European Union, concerning the concept of constitutional identity. In recent years, both supranational courts have dealt with cases involving various aspects of Latvia's constitutional identity and the respected constitutional values, norms, and principles that define it, as well as the relevant jurisprudence of the national highest courts. The case study of Latvia demonstrates that it is possible to guarantee a harmonious approach to implementing constitutional identity in light of the state's international obligations as a member of the European Union and the Convention on Human Rights.

Keywords: constitutional identity, inviolable core of the *Satversme*, Constitutional Court, Supreme Court, European Court of Human Rights, Court of Justice of the European Union, Court's dialogue.

Contents

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Introduction

The concept of constitutional identity, its meaning, scope, and impact on interaction between the national highest courts and European Court of Human Rights and Court of Justice of the European Union is widely discussed in recent years both in academic discourse and in growing jurisprudence of courts. Developments in Latvian legal doctrine and jurisprudence have not been an exception in this context.

The emergence of this debate is linked to several factors, including the raise of globalization and federalization trends at the European level and fears at local level to lose identity of each Member State. These fears are especially understandable in Latvia due to its history, long occupation period, when Soviet authorities tried to eliminate characteristics essential to Latvian state and nation. At the same time, emergence of the debate around national constitutional identity has raised a question – how to reconcile this concept with multilayer legal system that characterizes European states today,[1] namely, priority of international law, including European Convention on Human Rights[2] and supremacy of the European Union law.

The aim of this article is to explore answers to this question by, firstly, analysing theoretical developments of the concept of constitutional identity in Latvian legal discourse, secondly, its application in the jurisprudence of Latvian Supreme Court and Constitutional Court and thirdly – by examining discourse between the Latvian courts and the European Court of Human Rights on the use of national constitutional identity as a ground of limitation of human rights.

The analysis of debate about the place of constitutional identity in relationship between the national courts and Court of Justice of the European Union is left outside the scope of this article, and would be the subject of another research due to the *sui generis* nature of the European law compared to international law as well as specific recognition of the constitutional identity of Member States in founding treaty of the European Union.

1. Constitutional identity in Latvian legal system

The concept of constitutional identity is relatively new in the Latvian legal system.[3] It was first proposed by the Constitutional Law Commission – a high-profile legal expert group (think tank) created by the State President – as the concept of the inviolable core of the *Satversme*[4] on 17 September 2012.[5] This concept was

[1] *Lenaerts, K.* Introductory speech by Mr. Koen Lenaerts, President of the Court of Justice of the European Union. In: EUnited in diversity: between common constitutional traditions and national identities. International Conference Riga, Latvia – 2–3 September 2021. Conference proceedings. Luxembourg: Court of Justice of the European Union, 2022, p. 15.

[2] European Convention on Human Rights. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [last viewed 06.06.2024]

[3] *Kusiņš, G.* Konstitucionālo tiesību pamati [Foundations of Constitutional law]. In: Publiskās tiesības. Ievads. Rīga: Tiesu Namu Aģentūra, 2024, p. 263.

[4] The Constitution of the Republic of Latvia. Available: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [last viewed 06.06.2024].

[5] See more: Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas 2012. gada 17. septembra viedoklis [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the *Satversme*. Opinion of the Constitutional Law Commission on 17 September 2012]. In: Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas viedoklis un materiāli [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the *Satversme*. Opinion and Materials of the Constitutional Law Commission]. Rīga: Latvijas Vēstnesis, 2012, pp. 27–155.

soon accepted in legal doctrine and practice. The concept of the inviolable core of the *Satversme* is based on the idea that there exists a set of constitutional values, norms, and principles that define the identity of the Latvian state and are inviolable. It is not possible to legally change these constitutional values, norms, and principles included in the core of the *Satversme*, even via constitutional amendments.[6] The main function of the concept of the constitutional identity is to guarantee the existence of Latvia as an independent state based on the principles of the democratic republic governed by the rule of law. The concept of constitutional identity reflects importance of the national state and democratic principles for the Latvian society.[7]

The idea of a bloc of fundamental constitutional norms and principles that form the constitutional basis for the Latvian state has always existed in Latvian legal science and practice. Article 77 of the *Satversme*, adopted on 15 February 1922, prescribes that any amendments to Articles 1, 2, 3, and 6 of the *Satversme* must be ratified in a national referendum in order to come into force as a law. Professor Kārlis Dišlers, one of the most authoritative Latvian constitutionalists, recognized that Article 1, 2, 3 and 6 of the *Satversme* prescribe the most important constitutional norms and principles which define essence of Latvia as an independent and democratic republic.[8]

In Article 4 of the Declaration of 4 May 1990, "On the restoration of the independence of the Republic of Latvia", these articles of the *Satversme* were descripted as the constitutional basis of the State of Latvia:

"[...] Articles which determine the constitutional basis of the State of Latvia and which, in accordance with Article 77 of the *Satversme*, are to be amended only upon national referendum, namely:

Article 1 – Latvia is an independent democratic republic;

Article 2 – The sovereign power of the State of Latvia is vested in the people of Latvia;

Article 3 – The territory of the State of Latvia, within the borders established by international agreements, consists of Vidzeme, Latgale, Kurzeme and Zemgale;

Article 6 – The *Saeima* shall be elected in general, equal and direct elections, and by secret ballot based on proportional representation."[9]

As it is recognized, Article 77 of the *Satversme* and Article 4 of the Declaration of 4 May 1990, already defined the core elements of the constitutional identity.[10] With constitutional amendments on 15 October 1998 Article 77 was amended to include Article 4 and Article 77 itself in the constitutional basis. Article 4 prescribes that

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[6] See more: Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas 2012. gada 17. septembra viedoklis [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the Satversme. Opinion of the Constitutional Law Commission on 17 September 2012]. In: Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas viedoklis un materiāli [On the Constitutional Foundations of the Latvian State and the Inviolable Core of the Satversme. Opinion and Materials of the Constitutional Law Commission]. Rīga: Latvijas Vēstnesis, 2012, pp. 146–152.

[7] See also: *Lazdiņš, J*. Consolidation of the Principle of Democratic Elections in the Law of the Latvian People. Journal of the University of Latvia. Law, Vol.16, 2023, pp. 169–172.

[8] *Dišlers, K*. Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian Public Law]. Rīga: A. Gulbis, 1930, p. 110.

[9] Par Latvijas Republikas neatkarības atjaunošanu [On the Restoration of Independence of the Republic of Latvia]. Available: https://likumi.lv/ta/en/en/id/75539-on-the-restoration-of-independence-of-the-republic-of-latvia [last viewed 31.05.2024.]

[10] *Kusiņš, G*. 1990. gada 4. maija deklarācija [Declaration of 4 May 1990]. Available: https://enciklopedija.lv/skirklis/146164-1990-gada-4-maija-deklar%C4%81cija [last viewed 31.05.2024].

"the Latvian language is the official language in the Republic of Latvia. The national flag of Latvia shall be red with a band of white."[11]

As Article 77 of the *Satversme* provided for a national referendum for changes to Articles 1, 2, 3, 4, 6, and 77 of the *Satversme*, the constitutional doctrine, recognizing these constitutional norms as a fundamental basis of the State of Latvia, also acknowledges that it is legally possible to hold such a referendum and change the constitutional basis of the state. As noted by Professor Kārlis Dišlers, the defence of Latvia as an independent and democratic republic is entrusted to the people of Latvia. The existence of Latvia as an independent and democratic republic depends on the will of the people of Latvia expressed in a national referendum.[12] The Constitutional Court also held that the *Satversme* guarantees exclusive rights to deal with the fundamental norms of the *Satversme* to the people of Latvia, namely, to repeal the constitution or to establish a new constitutional order.[13]

The proposal of the inviolable core of the *Satversme* was a reaction to the referendum on 18 February 2012, regarding the Russian language as a second state language.[14] Despite the initiative for the Russian language as a second state language being rejected with a constitutional majority in a national referendum, the fundamental constitutional foundations of the State of Latvia were put at risk of regular ballots and destabilization. Attempts were made to use constitutional procedures to introduce painful issues dealing with the traumas of the Soviet occupation into the political agenda.[15] In 2012, another initiative group proposed a legislative initiative for a referendum to recognize all former citizens of the USSR who do not hold Latvian citizenship or citizenship of any other state (commonly known as non-citizens of Latvia) as citizens of Latvia. At that moment, the Constitutional Law Commission introduced the concept of the inviolable core of the *Satversme*, and the potential referendum on citizenship was halted as unconstitutional.[16]

The concept of the inviolable core of the *Satversme* was borrowed from German constitutional thought[17], where it was well elaborated by German Federal Constitutional Court in the so-called Lisbon judgement.[18] It should be noted that in Germany, the concept of constitutional identity was necessary to address external

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[11] Grozījumi Latvijas Republikas Satversmē [Amendments to the *Satversme* of the Republic of Latvia] (15.10.1998). Available: https://likumi.lv/ta/id/50292-grozijumi-latvijas-republikas-satversme [last viewed 31.05.2024].

[12] *Dišlers, K.* Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian Public Law]. Rīga: A. Gulbis, 1930, p. 110.

[13] Judgement of the Constitutional Court of the Republic of Latvia of 7 April 2009 in case No. 2008-35-01, para.14. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/09/2008-35_01_ENG.pdf [last viewed 31.05.2024].

[14] *Levits, E.* Desmit gadi kopš konstitucionālā satricinājuma [Ten years since the constitutional upheaval]. Jurista Vārds, No. 8(1222), 22.02.2022, pp. 8–10.

[15] See more: *Druviete, I., Veisbergs, A.* The Latvian language in the 21st century. In: Latvia and Latvians. Collection of scholarly articles in 2 volumes. Volume 1. Rīga: Latvian Academy of Sciences, 2018, pp. 257–259.

[16] Judgement of the Supreme Court of the Republic of Latvia of 12 February 2014 in case No. SA-1/2014. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/355724.pdf [last viewed 31.05.2024].

[17] *Osipova, S.* Tautas gars, pamatnorma un konstitucionālā identitāte [Spirit of nation, *Grundnorm* and constitutional identity]. In: Tiesību interpretācija un tiesību jaunrade – kā atrast pareizo līdzsvaru. Latvijas Universitātes 71. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2013, pp. 305–306.

[18] Judgement of the Federal Constitutional Court of 30 June 2009 in case No. 2BvE 2/08. Available: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html [last viewed 31.05.2024].

threats of losing national statehood and sovereignty during the process of European integration. In contrast, for Latvia, the concept of the inviolable core of the *Satversme* was necessary for internal reasons, strengthening the principle of self-defending democracy against potential threats to the principle of a national state (mostly expressed in the Latvian language as the only state language) and the principle of a democratic state based on the rule of law.[19] It also enables overcoming Russian hybrid threats to the Latvian constitutional order.

Supreme Court, as a first of the national highest courts, accepted the concept of the inviolable core of the *Satversme* and applied it in its jurisprudence.[20] It was also accepted by constitutional doctrine.[21] The politicians introduced the concept of the inviolable core of the *Satversme* through constitutional amendments, including a new preamble to the *Satversme*.[22]

The Constitutional Court remained sceptical of the concept of the inviolable core of the *Satversme* for quite a long time.[23] It was only in 2015 that the Constitutional Court recognized the concept of constitutional identity.[24] Now, the Constitutional Court widely uses the concept of constitutional identity, but it differs in content from what was developed by the Constitutional Law Commission. There are enough differences in details that, for proper application of the concept of constitutional identity, it is necessary to study the relevant jurisprudence of the Constitutional Court. As recently stated by the Constitutional Court,

> *Each state is characterized by its constitutional identity, which allows differentiating it from other states. The formation of identity,* inter alia, *constitutional identity, is a long process that depends upon historical circumstances [...] It follows from the above, in turn, that the constitutional identity is not static.*
>
> *The constitutional identity comprises the state law identity that characterizes a state and the identity of the state order. It provides an answer both to the question what the particular state is like, i.e., reflects the classical constitutive elements of the state recognized in international law – territory, nation and sovereign state power, and to the question what the particular*

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[19] See more: *Osipova, S.* Latvijas Republikas konstitucionālā identitāte Satversmes tiesas spriedumos [The constitutional identity of the Republic of Latvia in the jurisprudence of the Constitutional Court]. Jurista Vārds, No. 27(1033), 03.07.2018, pp. 8–13.

[20] For example: Judgement of the Supreme Court of the Republic of Latvia of 30 April 2013, in case No. SKA-172/2013. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/127853.pdf [last viewed 31.05.2024].

[21] For example: *Balodis, R.* Latvijas Republikas Satversmes ievads [The preamble of the *Satversme* of the Republic of Latvia]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi. Rīga: Latvijas Vēstnesis, 2014, pp. 118–135; *Grigore-Bāra, E., Kovaļevska, A., Liepa, L., Levits, E., Mits, M., Rezevska, D., Rozenvalds, J., Sniedzīte, G.* Satversmes 1. pants [Article 1 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi. Rīga: Latvijas Vēstnesis, 2014, pp. 157–160.

[22] Grozījums Latvijas Republikas Satversmē [Amendment to the *Satversme* of the Republic of Latvia] (19.06.2014). Available: https://likumi.lv/ta/id/267428-grozijums-latvijas-republikas-satversme [last viewed 31.05.2024].

[23] Decision of the Constitutional Court of the Republic of Latvia on terminating judicial proceedings in case No. 2012-03-01 of 19 December 2012. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/01/2012-03-01_Lemums_izbeigsana_ENG.pdf [last viewed 31.05.2024].

[24] Judgement of the Constitutional Court of the Republic of Latvia of 2 July 2015, in case No. 2015-01-01, para. 15.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/01/2015-01-01_Spriedums_ENG.pdf [last viewed 31.05.2024].

> *state order is like. In reflecting the territory of the state, the nation and the state power in the constitution, such extra-legal factors as history, politics, national, cultural and other factors that identity the respective state are taken into account. Whereas the identity of the particular state order is determined by the general overarching legal principles that characterize this order of the state. Hence, constitutional identity is a broad phenomenon, deep as to its content, consisting of elements that are different as to their nature, of which only a part are generally binding legal norms. Such are, for instance, the overarching principles of democracy, rule of law, nation state and socially responsible state that determine the identity of Latvia's order of the state. Whereas the references included in the constitution to,* inter alia*, the history of the state and the nation, traditions, circumstances in which the state was established, purposes of the state and other elements, which, from the perspective of constitutional law, help to recognize the particular state, ascribes a specific meaning to it, characterize it, are elements of the state's identity on which the particular state is founded [...] These elements comprise both references to the legal principles of the particular state and to values which determined the path in which the constitutional identity of this state evolved; however,* per se*, these are not generally binding legal norms.*[25]

2. Constitutional identity in the jurisprudence of the national courts

The concretization of constitutional identity is contained in several judgements of the Constitutional Court and the Supreme Court. Most often, the Constitutional Court and the Supreme Court has applied the concept of constitutional identity in cases affecting the role and functions of the Latvian language as the only state language in society, especially considering the need to overcome the consequences of the occupation, as well as the challenges caused by globalization to the use of the state language.

The Constitutional Court in its judgement of 23 April 2019 assessed the compliance of several legal norms, which deal with the proportion of the use of the national language and the minority language in the learning of the curriculum at the primary education level and the transition to studies in the national language at the secondary education level, with the *Satversme*. In the judgement, the Constitutional Court concluded, among other things, that "the Preamble to the *Satversme* reveals the values that are the basis for building an inclusive democratic society. The Latvian language is one of these values. It is an integral part of the constitutional identity of the Latvian state. The function of the state language to be the common language of society's communication and democratic participation follows from the constitutional status of the state language."[26]

On the other hand, in the judgement of 15 February 2024 the Constitutional Court evaluated the norm of the transitional provisions of the Immigration Law, according to which changes were made regarding permanent residence permits for Russian citizens, including requiring a certain level of knowledge of the national language. In this case, the Constitutional Court emphasized:

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[25] Judgement of the Constitutional Court of the Republic of Latvia of 4 June 2021, in case No. 2020-39-02, para. 14.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/2020-39-02_Judgement.pdf [last viewed 31.05.2024].

[26] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018-12-01 of 23 April 2019, para. 24.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-12-01-12.-Saeimas-dep_latvie%C5%A1u-valoda-valsts-skol%C4%81s_ENG.pdf [last viewed 03.06.2024].

> *…the Latvian language is an integral part of the constitutional identity. The national language is the common language of society's communication and democratic participation. Moreover, Latvia is the only place in the world where the existence and development of the Latvian language and thus the Latvian nation can be guaranteed. The state has an obligation to develop and defend the only state language – Latvian. The narrowing of the use of the Latvian language as the state language in the national territory can also be considered a threat to the democratic state system. Therefore, the restriction of fundamental rights, as contained in the contested norm, is aimed at strengthening the state language and protects a democratic state system. In addition, such regulation is also aimed at protecting the right of Latvian residents, including nationals, to use the national language. […] In other words, the restriction contained in the disputed norm is aimed at ensuring that persons who lead their daily lives in Latvia, form social ties, work, engage in daily communication with other people, should be able to use the Latvian language at least at a basic level, and thus it protects the right of individuals to use the national language in communication. Therefore, the limitation of fundamental rights contained in the contested norm in the aspect of strengthening the national language is aimed at protecting the democratic state system and the rights of other people*.[27]

Similarly, the Supreme Court held that "language is one of the central elements forming constitutional identity [...]. The value of the Latvian language as the state language is emphasized in the preamble to the *Satversme*. […] Thus, the language is established as the foundation of the state and a symbol of the state, i.e., a constitutional value, with the highest level of legal protection."[28]

In a number of rulings, the Constitutional Court has also developed other elements forming Latvia's constitutional identity. The Constitutional Court in its judgement of 2 July 2015 assessed whether the legal norm, which determines the penalty for not placing the Latvian national flag on residential buildings belonging to natural persons, complies with the Constitution. The Constitutional Court concluded that "the days determined by the *Saeima*, on which the Latvian national flag should be placed on residential buildings belonging to individuals, mark particularly important historical events for the creation and existence of the Latvian state. Thus, the national flag of Latvia as a national symbol is an integral element of the constitutional and international identity of the Latvian state."[29] On the other hand, in the decision of 18 February 2022, the Constitutional Court has indicated the entirety of Latvian citizens as one of the constituent elements of the Latvian state, which forms the legal identity of the Latvian state.[30] Likewise, the Supreme Court stipulated the principle

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[27] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2023-04-0106 of 15 February 2024, para. 18.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/03/2023-04-0106_Spriedums.pdf [last viewed 06.06.2024].

[28] Judgement of the Supreme Court of 22 March 2019, in case No. SKA-232/2019, para. 12. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/378561.pdf [last viewed 31.05.2024.]

[29] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2015-01-01 of 2 July 2015, para. 15.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/01/2015-01-01_Spriedums_ENG.pdf [last viewed 06.06.2024].

[30] Decision on terminating legal proceedings of the Constitutional Court of the Republic of Latvia in case No. 2021-10-03 of 18 February 2022, para. 14.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/03/2021-10-03_lemums_par_tiesvedibas_izbeigsanu.pdf [last viewed 06.06.2024].

of state continuity and protection of the entirety of the Latvian citizens as elements of the constitutional identity. The Supreme Court held, that "the circle of citizens must not be manipulated. First, it must retain its identity, as it is an essential part of the state's constitutional identity. In principle, this can only be ensured through individual naturalization, where the degree of integration of the candidate into the existing circle of citizens, their loyalty to the Latvian state, and their personal desire to belong to the Latvian nation as a citizen are evaluated."[31]

Finally, in the judgement of 4 June 2021, in which the Constitutional Court assessed the compliance of the Council of Europe Convention on preventing and combating violence against women and domestic violence with several constitutional norms, the court stated: "Both Christian values and the postulate that the family is the basis of a cohesive society are among the constituent elements forming the constitutional identity of Latvia that help to identify the state of Latvia." [32]

The aforementioned elements of constitutional identity have been developed by the Constitutional Court in its jurisprudence to date. However, this does not mean that they are exhaustive. For example, at the Constitutional Court hearing of case No. 2022-45-01, in which the Constitutional Court evaluated the norms that determine the acquisition of education in private educational institutions only in the state language, the applicant's representative stated that respect for minorities is also part of Latvia's constitutional identity.[33] Therefore, in the future, the Constitutional Court may need to provide arguments as to whether and which other elements form the constitutional identity of the Latvian state.

The Supreme Court also recognized that democracy, as a fundamental state value, is part of the constitutional identity of Latvia.[34] Similarly, the Supreme Court specified the principle of self-defending democracy as an element of constitutional identity. The Supreme Court stated: "According to the basic norm reflected in Article 1 of the *Satversme*, in conjunction with Article 3, Latvia exists in a certain territory as an independent democratic state. [...] The preamble to the *Satversme* reveals the meaning and purpose of the establishment of the Latvian state and provides a clear indication of the integral elements of Latvia's constitutional identity. [...] The state of Latvia was and is needed so that the Latvian nation living there could democratically self-determine and live in their national state (instead of existing as a minority in Russia). This goal is the basis of the identity acquired and embodied by the state of Latvia created by the Latvian nation. [...] No one – either the nation, or state institutions, or an individual person – may use their rights contained in the *Satversme* for the purpose of destroying the Latvian state (its identity) or its democratic system. The constitutional identity of the Latvian state, chosen by the Latvian nation and included in the core of the *Satversme*, must not be amended (and thus destroyed)

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[31] Judgement of the Supreme Court of the Republic of Latvia of 12 February 2014, in case No. SA-1/2014, para. 27. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/355724.pdf [last viewed 31.05.2024].

[32] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2020-39-02 of 4 June 2021, para. 14.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/2020-39-02_Judgement.pdf [last viewed 06.06.2024].

[33] Information about the case No. 2022-45-01. Available: https://www.satv.tiesa.gov.lv/cases/?search[number]=2022-45-01 [last viewed 06.06.2024].

[34] Judgement of the Supreme Court of the Republic of Latvia of 30 April 2013 in case No. SKA-172/2013, para. 21. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/127853.pdf [last viewed 31.05.2024].

even in a legal and legitimate way or procedure."[35] Likewise, the Supreme Court has highlighted and strengthened the principle of human dignity as an essential element of Latvia's constitutional identity. The Supreme Court stated: "The constitutional value of Latvia as an independent and democratic state based on the principle of rule of law is human dignity. The value of every individual is the essence of fundamental rights. Human dignity characterizes the person as the highest value of a democratic state based on the principle of rule of law. [...] It follows from the principle of human dignity that every person is a value. In addition, the principle of human dignity requires recognition of the oneness of all human beings, because human dignity is inherent in every human being, regardless of any conditions."[36]

3. Constitutional identity in dialogue with the European Court of Human Rights

The concept of national constitutional identity has traditionally been used in the discourse on the supremacy of European Union law in the relations between the Court of Justice of the European Union and constitutional courts.[37] It goes without saying, because the Article 4(2) Treaty on European Union reads, as follows: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."[38] For example, in the case of Cilēvičs v. Latvia, the Court of Justice of the European Union entered into a dialogue with the Constitutional Court of Latvia, concluding that the national language is part of the country's constitutional identity. At the same time, the Court of Justice has made it clear that constitutional identity is a concept which is essential not only for Member States, but it is a fundamental pillar of the European Union. Therefore, the constitutional identities of Member States may not be manipulated in such a way that turns into a violation of the constitutional identity of the European Union. In its decision about the rule-of-law conditionality mechanism concerning Hungary and Poland the Court defined the constitutional identity of the EU, as follows: "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties."[39]

The text of the Convention does not *expressis verbis* refer to the national constitutional identity of member-states. The drafters of the Convention rather focused on the shared values of Member States. As stated in the Preamble: "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to

[35] Judgement of the Supreme Court of the Republic of Latvia of 31 May 2019 in case No. SKA-238/2019, para. 10. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/384111.pdf [last viewed 31.05.2024].

[36] Judgement of the Supreme Court of the Republic of Latvia of 10 December 2021 in case No. SKA-[B1]. Available: https://www.at.gov.lv/downloadlawfile/8243 [last viewed 31.05.2024].

[37] *Breuer, M.* (ed.). Principled Resistance to ECtHR Judgments: A New Paradigm? Berlin: Springer, 2019.

[38] Treaty on European Union OV C 202, 7.6.2016, pp. 0016–0045. Available: https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html [last viewed 06.06.2024].

[39] Judgement of 16 February 2022 of the Court of Justice of the European Union in case Hungary v. Parliament and Council, No. C-156/21, para. 127. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=254061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=9604709 [last viewed 06.06.2024].

take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."[40] The European Court of Human Rights has emphasised the role of the Convention as a "constitutional instrument of European public order."[41] Presumption that Convention reflects the common values and European heritage and the European Court of Human Rights is the guardian of European identity and constitutional values is widely acknowledged. There are a number of arguments in the legal doctrine supporting this argument. First, all member states of the Council of Europe have recognized the jurisdiction of the European Court of Human Rights, giving the right to every citizen of a member state to appeal to the European Court of Human Rights. Second, the European Convention on Human Rights is incorporated into the legal system of most member states, sometimes even with a rank comparable to the constitution. Thirdly, the European Convention on Human Rights is used on a daily basis by national courts. Finally, the European Court of Human Rights evaluates the evolution of law in all 46 member states and, based on this, decides on the extension of the scope of the protection of some human rights.[42]

However, the discourse that the Convention and the European Court of Human Rights should be equated with constitutional courts was expressed ten years ago. As the former president of the European Court of Human Rights, Róbert Spanó, has concluded, today we are increasingly living in an era where countries do not want international institutions, including the European Court of Human Rights or the Court of Justice of the European Union, to be able to decide on their internal affairs. Therefore, not only politicians in their rhetoric, but also national supreme courts and constitutional courts increasingly refer to national constitutional identity in their decisions in order to justify deviations from the case-law of the European Court of Human Rights and limitations of human rights.

The idea that the norms of the constitution or the values contained in the constitution can be a basis for non-implementation of the rulings of the European Court of Human Rights is not new. Already in 2019, the German legal scholar Martin Breuer spoke about principled resistance to the judgements of the European Court of Human Rights – that is, situations in which the non-execution of court judgements is based not on political considerations, but on the rulings of the constitutional or supreme courts, which prevent the legislator, even if the legislator would like to do so, to comply with the ruling of the European Court of Human Rights.[43]

The use of national constitutional identity as an argument to challenge the findings of the European Court of Human Rights was first used by the German Federal Constitutional Court after the judgement in case Gorgulu v. Germany.[44] While the German Federal Constitutional Court only expressed the theoretical possibility

[40] European Convention on Human Rights, Rome, 4.XI.1950, preamble. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [last viewed 06.06.2024].

[41] See, for example, judgement of 13 February 2020 of the European Court of Human Rights in case N.D. and N.T. v. Spain [GC], No. 8675/15 and 8697/15, para. 110. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-201353%22]} [last viewed 06.06.2024].

[42] See, for example, the judgement of 13 July 2021 of the European Court of Human Rights in case Fedotova and others v. Russia [GC], No. 40792/10. Available: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2240792/10%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-222750%22]} [last viewed 06.06.2024].

[43] *Breuer, M.* (ed.). Principled Resistance.

[44] Judgement of 26 February 2004 of the European Court of Human Rights in case Gorgulu v. Germany, No. 74969/01, Available: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2274969/01%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61646%22]} [last viewed 06.06.2024].

that national constitutional identity might create an obstacle for the implementation of the European Court of Human Rights judgement, few years later Russian Constitutional Court applied this theory in practice in a number of cases.[45] What is more, Russian Parliament adopted a law which precluded execution of those European Court of Human Rights judgements that are contrary to the Constitution of Russia. Another example is a Polish Constitutional Court which has declared that certain European Court of Human Rights judgements cannot be executed due to being contrary to the Constitution of Poland.[46]

Can national constitutional identity be an obstacle to the execution of European Court of Human Rights judgements? According to international public law, namely, Article 27 of the Vienna Convention on the Law of International Treaties,[47] national law cannot justify a country's failure to fulfil its international obligations. Moreover, national judges, including judges of the Constitutional Courts bear the primary responsibility for the application of the European Convention on Human Rights in light of the principle of the subsidiarity. At the same time, the issue is not as simple as it might look. To rephrase Martin Beuer one cannot change "constitutional identity" like changing clothes.[48] Many constitutional courts see as their primary responsibility to safeguard constitution and constitutional identity of the state. Due to common constitutional traditions of member states and special status of the Convention in legal system of many Member States the possibility of conflict between the Constitution of state and Convention is rare. Moreover, not every conflict with the Constitution will concern the constitutional identity of Member State. However, if there is a conflict between the European Court of Human Rights judgement and constitutional identity, there is a serious likelihood that European Court of Human Rights judgement will not be implemented. This calls into question the very system of Convention supervision. Therefore, as Andreas Paulus, former judge of the German Federal Constitutional Court, has emphasized, the concept of constitutional identity must be applied very carefully. The German Federal Constitutional Court, which created this concept, has so far never applied it to the European Court of Human Rights.

The solutions to avoid a deep disagreement between the national courts and European Court of Human Rights on the protection of human rights are not simple but might lie in the mutual respect and constructive dialogue between the European Court of Human Rights and national courts. It can be debated whether the tools for mutual dialogue between courts are sufficient. Thus, for example, Professor Joseph Weiler has expressed the idea of the involvement of national constitutional judges in the sessions of the European Court of Human Rights Grand Chamber in cases where

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[45] See, for instance, the judgement of 4 July 2013 of the European Court of Human Rights in case Anchugov and Gladkov v. Russia, No. 11157/04 and 15162/05. Available: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2211157/04%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-122260%22]}, and the judgement of 31 July 2014 of the European Court of Human Rights in case Neftyanaya Kompaniya Yukos v Russia [GC], No. 14902/04. Available: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2214902/04%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-145730%22]} [last viewed 06.06.2024].

[46] Judgement of The Polish Constitutional Tribunal in case No. K 6/21 of 24 November 2021. Available: https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny [last viewed 06.06.2024].

[47] Vienna Convention on the Law of International Treaties. Available: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [last viewed 06.06.2024].

[48] *Breuer, M.* (ed.). Principled Resistance.

questions affecting the constitutional identity of one or more countries have to be decided. Protocol 16 of the Convention provides further opportunities for dialogue between the European Court of Human Rights and national higher courts. It provides for the possibility for the national court to ask the European Court of Human Rights to provide advisory opinions on fundamental issues regarding the interpretation or application of the rights and freedoms established in the Convention or its protocols.

At the same time a number of ECtHR recent judgements against Latvia reveal the openness of the European Court of Human Rights to engage in dialogue with reasoning of the national constitutional court. In 2009, in the case Andrejeva pret Latviju[49], the Grand Chamber found a discrimination of the applicant – a person belonging to the category of Latvian non-citizens – in that the calculation of her pensione did not include years of employment in the USSR in the factory registered outside the territory of Latvia, whereas the pension of a Latvian national would include such employment. A few years later, the Latvian Constitutional court faced constitutional complaint submitted by the Mr. Savickis, who was in a relatively similar position. The Constitutional court analysed judgement in Adrejeva case and concluded that in addition to the protection of the economic system of the state – the only legitimate aim established in Andrejeva case – the restriction of the rights of the applicant serves the protection of constitutional identity of state based in the doctrine of the state continuity. In this judgement, the Constitutional Court stated that, according to the doctrine of state continuity, Latvia is not the inheritor of the rights and obligations of the former USSR, and the Latvian state does not have to undertake other state obligations to provide persons with a pension for the time worked outside the territory of Latvia.[50] Taking into account this primary legitimate aim of the restriction and broader legal framework, the Constitutional Court concluded that applicant's rights have not been violated.

After the judgement of the Constitutional Court, the Grand Chamber of the European Court of Human Rights passed the judgement in the case of Savickis and Others v. Latvia. Also in this case, similar to the case of the applicant in the case Andrejeva v. Latvia, the periods when the applicants had worked outside the territory of Latvia were not included in the calculation of pension of the applicants. However, in this case, the European Court of Human Rights changed its jurisprudence and came to the opposite conclusion than in the case Andrejeva v. Latvia, admitting that there was no violation of the applicants' rights contained in Article 1 of Protocol 1 of the Convention in conjunction with Article 14 of the Convention. In this judgement, the court referred to the judgement of the Constitutional Court, agreeing with the assessment of the Constitutional Court that Latvia was not obliged to take over the obligations of public law that were established on the territory of Latvia by the Soviet government. Namely, Latvia did not have to assume the obligations of the USSR after the restoration of independence.

Another vivid example of dialogue between the Constitutional Court and the European Court of Human Rights in cases affecting the country's national constitutional identity are the judgements of the European Court of Human Rights

[49] Judgement of 18 February 2009 of the European Court of Human Rights in case Andrejeva v. Latvia [GC], No. 55707/00. Available: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2255707/00%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-91388%22]} [last viewed 06.06.2024].

[50] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2010-20-0106 of 17 February 2011, paras 11 and 13. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/03/2010-20-0106_Spriedums_ENG.pdf [last viewed 06.06.2024].

in the cases Valliulina and Others v. Latvia[51] and Džibuti and Others v. Latvia.[52] These cases refer to the reform of the language of instruction implemented in Latvia in state and private educational institutions and increase of Latvian as a language of instruction. In these judgements European Court of Human Rights extensively engaged with the reasoning of the Constitutional Court. The findings of the Constitutional Court that there is no European consensus as regards minority rights in the field of education were used by the European Court of Human Rights as argument among others to interpret the scope of the right to education under Convention and conclude that Article 2 of Protocol No. 1 of the Convention does not guarantee the right of the person to obtain an education in a language which is not official language of the state. The European Court of Human Rights also accepted as essential legitimate aims established by the Constitutional Court of the need to ensure the unity of the education system and to protect state language especially in light of the consequences of the Soviet occupation. The European Court of Human Rights considered that questions relating to the need to protect state language went the heart of the constitutional identity of the state, and it was not for the European Court of Human Rights to question the assessment made by the Constitutional Court in that regard, unless it was arbitrary.

The willingness of the European Court of Human Rights to change its previous jurisprudence in Savickis and Others v. Latvia and engagement with reasoning of Constitutional Court in cases Valliulina and Others v. Latvia and Džibuti and others v. Latvia confirm the European Court of Human Rights' openness to dialogue with constitutional courts and the fact that the national court's reasoning can also change European Court of Human Rights jurisprudence in future cases, if evaluation by national courts is not arbitrary.

Summary

The concept of constitutional identity, namely, that there exists a set of constitutional values, norms and principles which define the essence of the Latvian state and are inviolable is recently developed in Latvian legal discourse. The emergence of this concept of inviolable core of *Satversme* was influenced by the legal developments in other European states, most notably jurisprudence of the German Federal Constitutional Court. While in Germany the concept of constitutional identity was aimed to address external threats of losing national sovereignty considering federalization trends of the European Union, in Latvia it served also to protect state against internal threats: to overcome the consequences of the occupation and Russian hybrid threats to the Latvian constitutional order.

The concept of the constitutional identity has now been well established in the jurisprudence of both national highest courts: the Supreme Court and the Constitutional Court of the Republic of Latvia. The courts have recognized that

[51] Judgement of 14 September 2023 of the European Court of Human Rights in case Valiullina and others v. Latvia, No. 56928/19, 7306/20 and 11937/20. Available: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2256928/19%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-226485%22]} [last viewed 06.06.2024].

[52] Judgement of 16 November 2023 of the European Court of Human Rights in case Džibuti and Others v. Latvia, No. 225/20, 11642/20 and 21815/20. Available: https://hudoc.echr.coe.int/eng#{%22docname%22:[%22D%C5%BDIBUTI%20AND%20OTHERS%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-228839%22]} [last viewed 06.06.2024].

constitutional identity is a broad phenomenon and not a static concept. Until now both highest national courts have identified, *inter alia*, the following elements Latvia constitutional identity: Latvian as state language, principle of Latvian state continuity and the protection of the entirety of the Latvian citizens, the national flag of Latvia as a national symbol, the family as a basis of a cohesive society, human dignity, and self-defending democracy. However, these elements are not exhaustive and may be expanded in future jurisprudence of both courts.

The emergence of the concept of constitutional identity has raised issues how to reconcile this concept and role of the national highest courts with multi-level governance system in Europe where legal system is affected not only by the national constitutions but also state's international and supra-national obligations. In a legal discourse the arguments have been advanced to oppose national constitutional identity to states international obligations and use this concept as a ground to challenge the findings of the international courts, including the European Court of Human Rights. However, the interaction between national highest courts and the European Court of Human Rights in several recent cases illustrate that such concerns have been overestimated. Common values and principles between the Latvian legal system and European Convention of Human Rights, careful and *bona fide* use of the concept of constitutional identity by national courts as well as readiness of the European Court of Human Rights to engage with reasoning of the national highest courts and openness to dialogue is a key to mutual reinforcement of both legal systems.

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Constitutional Guarantees of Intellectual Property Protection in the Context of Digital Transformation: Ukrainian Experience

Tetiana A. Frantsuz-Yakovets
Kyiv University of Intellectual Property and Law of
the National University "Odesa Law Academy"
Professor, Head of the Department of Constitutional,
International Law and Public Legal Disciplines
E-mail: *tetiana.frantsuz-yakovets@pltch-sci.com*

Kyrylo Anisimov
Yaroslav Mudriy National Law University
Assistant Professor at the Department of Civil Procedure,
Arbitration and International Private Law
E-mail: *k.g.anisimov@nlu.edu.ua*

Alevtyna G. Biryukova
Yaroslav Mudriy National Law University
Associate Professor at the Department of Civil Legal Politicians,
Intellectual Property Law and Innovation
E-mail: *alevtinabirukova@gmail.com*

Hanna V. Kolisnykova
Yaroslav Mudriy National Law University
Associate Professor at the Department of Civil Legal Politicians,
Intellectual Property Law and Innovation
E-mail: *annakolisnikova@gmail.com*

Tamara V. Yaroshevska
Educational and Scientific Institute of Law and Innovative Education,
Dnipro State University of Internal Affairs
Associate Professor at the Department of Civil and Legal Disciplines
E-mail: *yaroshevskaya-t@ukr.net*

The purposes of this research are to determine the legal status of intellectual property in the context of digital transformation; to analyse the role of innovative digital technologies in the legal regulation of intellectual property issues; to provide a detailed description of the measures of constitutional protection of intellectual property in the context of digital transformation in Ukraine; to systematize knowledge about constitutional guarantees of intellectual property

protection; to determine the role of specialised courts in ensuring intellectual property protection; to provide specific proposals for the development of the legal framework for intellectual property protection. An important aspect of the current study is an in-depth analysis of the challenges and threats of digital transformation to intellectual property. In order to achieve this purpose, the following methods were used: the general philosophical method, the method of system analysis, synthesis, the dialectical method and the formal logical method, the method of deduction and induction. These methods have been used to formulate scientifically significant and practical conclusions on proposals for improving intellectual property legislation in line with the challenges and threats of digital transformation, as well as to provide interim conclusions in accordance with the research purpose.

Keywords: intellectual property, digital transformation, constitutional guarantees, copyright, artificial intelligence.

Contents

Introduction

High social and economic development of the state is achieved by means of various factors and conditions, one of which is the direct existence of an internationally recognised intellectual property system adapted to the realities of today. The existence of constitutional guarantees and mechanisms for the protection of intellectual property is a catalyst of various changes and transformations in the country, development of creative talents, achievement of new inventive results, support and preservation of the national potential itself, which further guarantees the attraction of investments in certain areas, as investors will be confident in the protection and respect for their rights. Taken together, such coordinated actions are aimed at stabilising the economic situation of the state and its place among other states at the international level as a country with high scientific, technical and intellectual potential.

In accordance with the provisions of Article 54 of the Constitution of Ukraine[1], every citizen is guaranteed freedom of literary, artistic, scientific and technical creativity, protection of intellectual property, their copyrights, moral and material interests arising from various types of intellectual activity. Moreover, every citizen is guaranteed the right to use the results of his or her intellectual and creative activity.

[1] Constitution of Ukraine (28.06.1996). Available: https://www.president.gov.ua/documents/constitution [last viewed 20.01.2024].

No one else has the right to use or distribute these results without the consent of such a citizen, because in the exceptions provided for by law. The very concept of "intellectual property" arose as a result of many years of practice of scientific, technical, creative and literary developments and achievements that required legal recognition of the right of individuals to the results of their activities in a particular area[2].

In a broad sense, intellectual property is understood as the rights provided for by law and enshrined in it, which are considered to be the result of intellectual activity in the scientific, literary, industrial and artistic fields. As a rule, the term "intellectual property" is understood as specific rights to the results of one's intellectual activity in the field of science, technology, industry, art and other fields, which are the objects of civil law relations in terms of the right of everyone to own, use and dispose of the results of their intellectual and creative activity. This is not a material benefit, but the creators necessarily retain the above rights. Use by other persons is permitted subject to the permission of the relevant person, except as expressly provided by law[3,4]. Intellectual property can be divided into four groups:

1. Copyright and related rights, which include artistic and literary works, computer programs, various databases, phonograms, videograms, and broadcasting programmes.
2. Industrial property objects, including utility models, inventions, industrial designs, rationalisation proposals, and layouts (topographies) of integrated circuits.
3. Breeds of animals and plant varieties are considered to be a creative result and, subject to compliance with the law, are objects of intellectual property. In general, their legal regime is equivalent to industrial property objects.
4. Trade names, trademarks, trade secrets, geographical indications. To be more precise, these objects are not results of activity, but in terms of their legal regime, they are equivalent to industrial property objects[5,6].

In Ukraine, the above is regulated by the Civil Code of Ukraine[7], the Laws of Ukraine "On Copyright and Related Rights"[8], "On Protection of Rights to Trademarks and Service Marks"[9], "On Protection of Rights to Industrial Designs"[10], "On Legal

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2 *Bryntsev, O., Kokhan, V., Mamaiev, I., Novikov, Y., Pasmor, Y., Shevchenko, L., Shmatkov, D., Vodoriezova, S., Yefremova, K.* Basic aspects of digitalization and their legal provision. Kharkiv: Research Institute of Law, National Academy of Sciences of Ukraine, 2021.

3 *Kostiuchenko, O.* Legal Regulation of Intellectual Property in Ukraine. Available: https://minjust.gov.ua/m/str_4487 [last viewed 20.01.2024].

4 *Kravchenko, O.* International Experience of Regulatory and Legal Protection of Commercial Business Secrets. Philosophy, Economics and Law Review, Vol. 3, issue 1, 2023, p. 289.

5 *Kostiuchenko, O.* Legal Regulation.

6 *Kravchenko, O.* International Experience, p. 289.

7 The Civil Code of Ukraine (16.01.2003). Available: https://zakon.rada.gov.ua/laws/show/en/435-15?lang=uk [last viewed 20.01.2024].

8 Law of Ukraine "On Copyright and Related Rights", No. 2811-IX (01.12.2022). Available: https://zakon.rada.gov.ua/laws/show/2811-20 [last viewed 20.01.2024].

9 Law of Ukraine "On Protection of Rights to Trademarks and Service Marks", No. 3689-XII (15.12.1993). Available: https://zakon.rada.gov.ua/laws/show/3689-12#Text [last viewed 20.01.2024].

10 Law of Ukraine "On Protection of Rights to Industrial Designs", No. 3688-XII (15.12.1993). Available: https://zakon.rada.gov.ua/laws/show/3688-12?lang=en#Text [last viewed 20.01.2024].

Protection of Geographical Indications"[11], "On Protection of Rights to Integrated Circuit Designs"[12], "On Protection of Rights to Inventions and Utility Models"[13], etc.

Today, scientists, government agencies and inventors dedicate much attention to the protection of intellectual property. Stimulating the development of various vectors of science and technology is one of the most progressive directions, and therefore easily becomes one of the most advanced and important factors of political and economic relations and economic security both within each developed country and in international relations. Given the rapid pace of modern technology development and large-scale digital transformation (note that digital transformation involves the adoption and implementation of advanced digital tools, technologies and processes to increase the efficiency, effectiveness and reach of copyright management and law enforcement agencies), the issues pertaining to protection and enforcement of intellectual property rights are gaining even greater momentum and wider horizons. At the same time, the transformation of digital technologies and the modification of every sphere of society's life encourage many unscrupulous individuals and organisations to violate intellectual property laws by means of piracy, plagiarism, and counterfeiting of certain information. Piracy has become so widespread that many people do not even realise that they are becoming active consumers of pirated services.[14] Hence, this is explored in more detail in the following sections.

The above is a direct indication that although Ukraine has an established legal framework governing intellectual property issues, at present there still remains a large number of unresolved issues, given the rapid pace of digital transformation. However, despite the existence of certain problems, the state policy is implemented with due regard for the constitutional rights of citizens to protect intellectual property and ensure favourable conditions for the creation thereof. This is confirmed by the great efforts to improve legislative regulations, adapt legislation to new realities and eliminate conflicts in law.[15] Much attention is paid to cooperation between various government agencies, including the judiciary, as a way of constitutional guarantee of intellectual property rights protection.

Given the above, there are several purposes of this research: to determine the legal status of intellectual property in the context of digital transformation; to analyse the role of innovative digital technologies in the legal regulation of intellectual property issues; to provide a detailed description of the measures of constitutional protection of intellectual property in the context of digital transformation in Ukraine; to systematise knowledge about constitutional guarantees of intellectual property protection; to determine the role of specialised courts in ensuring the protection of intellectual property. An important aspect of the study is an in-depth analysis of the challenges and threats of digital transformation to intellectual property.

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[11] Law of Ukraine "On Legal Protection of Geographical Indications", No. 752-XIV (16.06.1999). Available: https://zakon.rada.gov.ua/laws/show/752-14?lang=en#Text [last viewed 20.01.2024].

[12] Law of Ukraine "On Protection of Rights to Integrated Circuit Designs" (05.11.1997). No. 621/97-BP. Available: https://zakon.rada.gov.ua/laws/show/en/621/97-%D0%B2%D1%80?lang=uk [last viewed 20.01.2024].

[13] Law of Ukraine "On Protection of Rights to Inventions and Utility Models", No. 3687-XII (15.12.1993). Available: https://zakon.rada.gov.ua/laws/show/3687-12#Text [last viewed 20.01.2024].

[14] Intellectual Property Crime Threat Assessment Report. Available: https://www.europol.europa.eu/cms/sites/default/files/documents/Report.%20Intellectual%20property%20crime%20threat%20assessment%202022_2.pdf [last viewed 20.01.2024].

[15] *Androshchuk, G.* Digital Piracy and Counterfeiting in the Conditions of Digital Transformation: Analysis of the Situation, Trends, Defense Mechanisms. Theory and Practice of Intellectual Property, Vol. 3, 2023, p. 103.

Methodological framework

In accordance with its purposes, this research has been carried out with due regard for the following methods of scientific knowledge: the general philosophical method, the method of system analysis, synthesis, the dialectical method and the formal logical method, the method of deduction and induction. The general philosophical method is a cross-cutting method of scientific research, which is used at all stages to formulate comprehensive conclusions and recommendations for improving legislation. The system analysis method has enabled the authors to determine the role of innovative digital technologies in the legal regulation of intellectual property issues, as well as to examine, which measures of constitutional protection of intellectual property in Ukraine should be applied in the context of rapid digital transformation.

By applying the synthesis method, the authors have arrived at a common vision of possible actions that the State can take on the way to improving intellectual property legislation. The authors also drew conclusions about the immediate challenges and threats of digital transformation to intellectual property. It is through the use of the method of systematic analysis and synthesis that scientifically significant and practical conclusions have been drawn regarding the constitutional guarantees of intellectual property protection and the role of courts in ensuring the protection of intellectual property. To achieve this goal, the authors also used the dialectical method of scientific research. This method was applied to identify and study in detail the problematic issues of providing constitutional guarantees of intellectual property protection in Ukraine. The dialectical method is employed to reveal the content of the challenges and threats that pose an immediate danger to intellectual property. Particular attention has been dedicated to piracy.

The formal and logical method of scientific knowledge was exercised as the leading method in identifying problematic aspects of responding to rapid technological changes in legislation. Using the method of deduction, the authors have concluded that despite the activities of public authorities aimed at improving the legislation on intellectual property rights, there still remain unresolved problems that require a quick response. The method of induction was used to draw conclusions about the challenges and threats faced by the state and citizens as a result of taking advantage of innovative technologies and their impact on intellectual property. Taken together, these methods helped to formulate not only scientifically significant conclusions, but also practical recommendations for improving intellectual property legislation.

Results and discussion

1. Guarantees of constitutional protection of intellectual property in the context of digital transformation

Modern times dictate new rules for the legal regulation of issues related to intellectual property, including its protection. Undoubtedly, rapid technological developments and the digitalisation of society have a number of advantages and disadvantages in terms of intellectual property. Ukraine is taking a number of measures at the state level to protect intellectual property from unlawful infringement, use and distribution. However, today there is still a need to amend the existing peculiarities of legal regulation of these issues, which will be discussed in more detail below. In the context of our study, it is necessary to carry out a detailed description of the constitutional guarantees of intellectual property protection in the context of digital transformation. The authors can easily include the following:

- Direct recognition of intellectual property rights – at the level of the Constitution, namely, Article 41 stipulates the right to own, use and dispose of one's property, the results of one's intellectual and creative activity.[16] The constitutional recognition of these rights is the basis for legal protection thereof.
- Adaptation to the digital environment – provisions of many bylaws, regulations, and international commitments (for example, in the context of Ukraine's incipient accession to the European community) may emphasise the need to adapt existing laws to the challenges and opportunities posed by digital technologies. This may include updating laws related to copyright infringement, digital piracy, software and database protection.[17]
- Striking a balance between public and private interests – at the level of laws and regulations, there is a desire to strike a balance between private and public interests, with provisions for fair use, access to knowledge and the promotion of innovation, ensuring that intellectual property rights do not unduly restrict the flow of information and creativity.[18]
- The special laws noted in the introduction contain provisions to protect intellectual property from unauthorised access, hacking, and other forms of cyber threats.
- Development of technology and innovation – at the level of state policy, technological development and innovation are strongly encouraged through various developments and research. Intellectual property protection is an effective way to stimulate innovation.[19]
- Active international cooperation, which in itself represents an increased regulation of the issue of intellectual property protection. There are some obstacles to the rapid adaptation of national legislation to international norms, but a number of steps have already been implemented and embodied in the existing regulations[20].
- Access to fair justice – everyone has the right to go to court for protection, if their rights are infringed. Intellectual property rights are no exception.
- The authors consider it appropriate to describe in greater detail the role of courts in ensuring the protection of intellectual property as one of the key aspects of the modern legal environment. The judicial method of protection involves a person who believes that his or her right has been challenged, unrecognised or violated, applying to a court. A court decision is binding and ensures effective protection of intellectual property rights. The advantages of judicial protection of intellectual property include, first and foremost, the fact that it promotes creativity and further technological developments, as it is a kind of confidence and protection against unauthorised use. In general,

[16] Constitution of Ukraine (28.06.1996). Available: https://www.president.gov.ua/documents/constitution [last viewed 20.01.2024].

[17] *Dickenson, J., Morgan, A., Clark, B.* Creative Machines: Ownership of Copyright in Content Created by Artificial Intelligence Applications. European Intellectual Property Review, Vol. 39, issue 8, 2017, p. 458.

[18] *An, I.* Judicial Protection of Intellectual Property Rights. Available: https://prikhodko.com.ua/my-i-zmi/my-i-zmi/stattya/sudovyj-zahyst-prav-intelektualnoyi-vlasnosti/ [last viewed 20.01.2024].

[19] *Matiuk, T., Mazurka, Y.* Intellectual Property and Innovation as a Factor of Economic Development. International Scientific Journal "Internauka", Vol. 4, issue 84, 2020, p. 23.

[20] *An, I.* Judicial Protection.

this contributes to the emergence of a potentially favourable environment where technologies and products are successfully developed and improved. Such an environment is quite attractive for investment, as investors have the assurance that their investments will bear results.

In this context, the guarantee of judicial protection of rights increases investor interest and helps to finance research and development initiatives. Another advantage is the fact that judicial protection, by its very nature, ensures that equal competition is maintained, while hindering the attempts to copy other people's creative solutions and research. This, in turn, is a good incentive to search for unique methods and approaches.[21] Along with the positive aspects of judicial protection, there are certain negative facets. These include the long timeframe of litigation, which often lasts for several months or a year. It is quite logical that significant financial resources are required. For large companies, this will not be as great an obstacle as for small businesses and individual creators.

As of today, the High Court of Intellectual Property has been established in Ukraine, yet, unfortunately, it is not functioning. The purpose of this court is to professionally consider disputes in the field of intellectual property. Back in 2019, a competition for the position of a judge was launched, but after the liquidation of the High Qualification Commission of Judges (HQCJ), these processes were suspended and have not been resumed to date, although there are sufficient reasons for this[22].

A rather effective mechanism is augmenting the procedural rules with the procedure for requesting information on the distribution and origin of services or goods that directly infringe intellectual property rights. The introduction of provisions on the destruction of goods seized by the court, manufactured or put into civil circulation in violation of intellectual property rights, is also a positive development.[23] Likewise, in determining the role of judicial protection, it is advisable to focus on injunctive relief. As a general rule, it enables prohibiting actions that directly threaten to infringe a person's right or actually violate it.

2. Challenges and threats of digital transformation to intellectual property

In the context of the protection of intellectual property rights, the authors consider it appropriate to analyse the challenges and threats arising from the active development of digital technologies and changes in the production and distribution of intellectual property. These include, first and foremost, the problem of controlling and protecting copyright, which results in piracy, distribution and consumption of pirated products, i.e. illegal use of content.[24] In general, commercial counterfeiting and digital piracy is a very serious problem – not only for Ukraine but for the entire global community. Infringement of intellectual property rights is a direct cause of immense financial losses, which entail the risk of undermining sustainable business

[21] *Matiuk, T., Mazurka, Y.* Intellectual Property, p. 23.

[22] *Kopolovets, D.* The Top 5 Challenges of IT Intellectual Property Protection. Available: https://medium.com/@dkopolovets/the-top-5-challenges-of-it-intellectual-property-protection-c19192bb03f6 [last viewed 20.01.2024].

[23] *Strelnik, V. V., Kalita, A. V., Tarasenko, A. Y.* Protection of Intellectual Property Rights in Modern Conditions. Scientific Bulletin of Uzhhorod National University, Vol. 79, issue 1, 2023, p. 250.

[24] *Kuzheliev, M., Britchenko, I.* Theoretical and Methodological Aspects of Formation of Corporate Control System in Ukraine. Ikonomicheski Izsledvania, Vol. 25, issue 2, 2016, p. 18.

models based on intellectual property.[25] Considering social harm in general, it is manifested in the counterfeiting of medicines or medical equipment, which can lead to harmful consequences.[26]

As for Ukraine, according to the NBU Centre for Social Communications Research, the level of computer piracy in Ukraine is 86%, while the global average is only 42%. According to the latest estimates of the NBU Centre for Social Communications Research, the level of software piracy in 2023 is 80%[27]. Unfortunately, due to the circumstances that have developed in recent years, there are currently no large-scale efforts to reduce the use and consumption of pirated resources. However, some steps have been taken. For example, in 2022, the Law of Ukraine "On Amendments to the Code of Ukraine on Administrative Offences, the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine regarding Liability for Copyright and (or) Related Rights"[28] was adopted, which provides for changes to sanctions for copyright infringement, including an increase in the penalty for the offence. The new law also stipulates introduction of a new article to the Criminal Code of Ukraine, which directly deals with the financing of copyright infringement.

The next challenge concerns patents. Overall, the patents protect new technological inventions. With regard to digital technological changes, the patents are currently generally aimed at protecting computer technology or software. The problem lies in the difficulties associated with the overlap between patents protecting inventions and software that are directly related to artificial intelligence technology and algorithms.[29] Firstly, these challenges include the fact that, by its very nature, the legal framework for software patents is often inconsistent and differs from jurisdiction to jurisdiction, which leads to uncertainty for inventors and companies. Furthermore, the rapid pace of innovation in the AI field means that patent offices are struggling to keep up with the latest developments, potentially leading to delays and backlogs in patent approvals. The complexity of AI algorithms, which can be highly abstract and specialised, creates additional challenges in determining the novelty and non-obviousness required for patentability.[30]

The authors would like to note the problematic aspects of the work of patent archives.[31] Many archives are far from being easily accessible, which in turn makes it difficult for researchers and developers to find relevant prior art. This situation and lack of transparency can therefore hinder innovation as such, as it is an onerous task to determine whether an idea is truly new or has already been patented[32] The next challenge follows from the previous statement and relates directly to artificial intelligence and machine learning technologies. Taken together, they are very powerful and effective tools of influence designed to solve various problems. Such

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[25] *Zolotar, A. S.* The Current State of Intellectual Property Protection in the Context of Digitalisation "Actual Problems of State and Law", 2022, p. 45.

[26] Ibid.

[27] Business calls on Ukrainians to use legal content on the Internet. Available: https://eba.com.ua/biznes-zaklykaye-ukrayintsiv- korystuvatysya-legalnym-kontentom-v-interneti/ [last viewed 20.01.2024].

[28] Law of Ukraine "On Amendments to the Code of Ukraine on Administrative Offences, the Criminal Code of Ukraine and the Code of Criminal Procedure of Ukraine on Liability for Infringement of Copyright and (or) Related Rights", No. 2803-IX (01.12.2022). Available: https://zakon.rada.gov.ua/laws/show/2803-20#Text [last viewed 20.01.2024].

[29] *Bryntsev, O., Kokhan, V., Mamaiev, I., Novikov, Y., Pasmor, Y., Shevchenko, L., Shmatkov, D., Vodoriezova, S., Yefremova, K.* Basic aspects of digitalization.

[30] *Zolotar, A. S.* The Current State, p. 45.

[31] Ibid.

[32] Ibid.

tasks may include copying and disseminating information that is directly protected by intellectual property. Moreover, artificial intelligence can raise ethical issues related to transparency, fairness, bias, and discrimination.[33]

Artificial intelligence has given rise to a number of problematic issues for intellectual property. These include the problem of determining copyrights for intellectual property when using artificial intelligence, as well as the problem of almost identical fakes of works of art using artificial intelligence technologies. Theft, which manifests itself in the illegal use of industrial designs on the Internet, is a significant threat,[34] *inter alia*, duplication of interfaces, digital product design, or graphic design results. The threat of open-source software is becoming widespread. Open source is a code that is made available to the public and can be easily accessed. While this encourages new collaborations and funding for innovation, it has the side-effect of blurring the boundaries of property rights as such, and raises questions about the protection of intellectual property.

The proliferation of open-source software has disrupted traditional models of IP protection. While open-source software encourages collaboration and innovation, it also obscures the boundaries of ownership and raises questions about the ways to protect IP in a collaborative environment. This means that the source code of the software is freely available, which can make it difficult for businesses to protect their own code from being copied and used by others. Managing open-source contributions and ensuring compliance with licences can be challenging.[35]

The threat to trade secrets is quite substantial, given the rapid technological changes, when the risks of hacking and data theft are extremely high. In general, such trade secrets are intended to protect information on certain formulas and business strategies that, by their very nature, can put their owner in a winning position against their competitors.[36] Another challenge is caused by the growing number of legal acts designed to regulate intellectual property issues. More does not always mean better. In most cases, it means inconsistency and conflicts.

Another problem is the global nature of digital technologies and the IT industry in general. Globalisation, by its very nature, significantly complicates the mechanisms for protecting intellectual property rights. Laws and regulations differ from one jurisdiction to another, making it difficult to navigate the legal field and protect IP on a global scale.[37] In the context of our study, it is necessary to note the problematic aspects of the use of blockchain technologies aimed at determining authorship in the absence of relevant legal provisions. There is a completely unobvious, but real problem in encrypting and providing some kind of access to old and historical works, the right to which cannot be identified.

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[33] *Moroz, V., Begaliyev, Y.* Modern Aspects of the Use of Artificial Intelligence by the Armed Forces of Ukraine under Martial Law. Philosophy, Economics and Law Review, Vol. 3, issue 2, 2023, p.156.

[34] *Androshchuk, H. O.* Artificial Intelligence: Economy, Intellectual Property, Threats. Theory and Practice of Intellectual Property, Vol. 2, 2021, p. 64.

[35] *Kopolovets, D.* The Top 5 Challenges.

[36] *Vakofian, V. G.* Intellectual Property Issues in the Process of Digital Transformation of Entrepreneurial Activity. Creation, Protection, Defence and Commercialisation of Intellectual Property Rights, 2023, p. 139.

[37] *Kopolovets, D.* The Top 5 Challenges.

3. The role of intellectual property in the context of digital transformation and ways to improve intellectual property legislation in line with the challenges of the digital age

The understanding of intellectual property law is undergoing significant changes due to the large-scale digital transformation. Issues and problems related to the protection of both intellectual property and intellectual property rights in general are increasingly arising. However, today there is a certain number of scholars who are convinced that intellectual property is not in danger, and that technological developments have all the necessary mechanisms to protect intellectual property.[38] In the opinion of authors, which corresponds to the views of the majority of academics, the protection of intellectual property is not fully thought out. The authors argue that the current intellectual property system in the world is imperfect and believe that it should be changed on a large scale to one that, from the long-term perspective of open innovation and the movement towards open source, will be based on the principle of shared ownership, and consist of a knowledge-sharing infrastructure, a mechanism for distributing rewards among participants (inventors), and a mechanism for enhancing the benefits of the innovator.

To put it less radically, an appropriate and effective solution would be to make local improvements to legislation with mandatory justification of current changes and public awareness. It is worth analysing these issues in greater detail, as, based on current data and the principles of intellectual property rights, legal relations in the digital space generally concern copyright, utility models, inventions, trademarks, trade secrets and industrial designs.

Copyright in video content, graphic content or textual content is crucial for professionals and consumers who are tangentially or directly involved in the media sphere. The challenges of copyright protection in general stem from the fact that digital transformation has significantly affected the scope of video files and music files, thereby transcending them. For example, it is now possible to convert three-dimensional objects into certain digital files and easily reproduce them using a 3D printer or a similar device.[39]

As for patents, they can now be obtained not only in the course of describing physical and visual embodiments, but also in the form of transferring CAD files intended for printing inventions. Various types of patents, which are often neglected due to higher costs and lengthy procedures, offer an indisputable strategy for protecting and controlling not only digital products themselves, but also new channels of information dissemination.[40] A more or less secure patent system is a contrast to the clearly demonstrated uncertainty in the field of copyright and trademarks in this period of digital innovation.

As for trademarks, they are the most frequently registered intellectual property objects in the world, and often constitute the central object of legal relations in the digital space. These range from a domain name to the sale of goods through various platforms and marketplaces. It can be noted that all the adopted laws on trademarks and service marks, as discussed above, can also be applied to legal relations in the digital

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[38] *Strelnik, V. V., Demchenko, A. M., Myronenko, A. O.* Legal Combination of Intellectual Property Rights and Artificial Intelligence Technology. Private and Public Law, Vol. 4, 2020, p. 52.

[39] *Bryntsev, O., Kokhan, V., Mamaiev, I., Novikov, Y., Pasmor, Y., Shevchenko, L., Shmatkov, D., Vodoriezova, S., Yefremova, K.* Basic aspects of digitalization.

[40] *Romanchyk, T.* Problematic Issues of Intellectual Property Rights Protection in Ukraine. Available: https://core.ac.uk/download/pdf/79660245.pdf [last viewed 20.01.2024].

space.[41] As of today, Ukraine allows for the possibility of applying the existing legal provisions governing intellectual property in the digital transformation era, although some provisions may be criticised and require changes. There is an option when a rational combination of various branches of law, such as information law, intellectual property law, digital economy instruments, etc., is proposed rather than a change or improvement of the existing legal framework or specific provisions.[42]

Digital technologies and innovation are an indicator of development as such. Therefore, it is not surprising that the level of intellectual property development has a direct impact on changes in the organisation of private enterprise, government agencies, on the quantitative and qualitative characteristics of competitiveness institutions, economic culture, and, in a large-scale aspect, on the main indicators of changes in mentality.[43] In view of the above and taking into account the current state of legal regulation of intellectual property, the authors propose to improve Ukrainian legislation in the field of intellectual property and adapt it to the realities of today. The following steps would be appropriate:

- Protection of copyright in the digital environment – this involves finding and approving optimal mechanisms for determining copyright infringement in the virtual space, as well as mandatory implementation of international standards for copyright protection.[44] For example, the authors can consider the following mechanisms for determining copyright infringement – firstly, content recognition technologies. It is advisable to introduce content recognition algorithms that can automatically detect copyrighted materials on various digital platforms. Accordingly, such technologies can easily detect potential infringements and identify content that belongs to another author, and therefore allow for a faster response to such infringements. The authors suggest using digital watermarking and fingerprinting technologies to embed unique identifiers in digital content. This will be the basis for facilitating the authentication of intellectual property. Furthermore, the authors propose to develop a reliable and user-friendly notification and takedown system that will allow rights holders to easily report infringements. With regard to the implementation of international copyright standards, the authors to focus on the standards set out in the Berne Convention for the Protection of Literary and Artistic Works, European Union Directives, etc. These standards are manifested, in particular, in the requirements for digital platforms to obtain licences for copyrighted content, establish a fair use regime that balances the interests of right holders and users, and provide for civil and administrative procedures, penalties and remedies;
- Complicating the processes of illegal copying and dissemination of other people's intellectual property by imposing additional encryption, etc., including imposing stricter liability on those who commit such acts;[45]
- Optimisation of public administration in the field of intellectual property. With this in mind, the authors propose several specific measures and strategies

[41] *Rybachek, V., Tsupor, D.* Issues of Improving the Legislation of Ukraine in the field of Intellectual Property Rights. Available: http://dspace.onua.edu.ua/bitstream/handle/11300/15208/Рибачек%20В.К.%2С%20Цупор%20Д.І..pdf?sequence=1&isAllowed=y [last viewed 20.01.2024].

[42] Intellectual Property Crime Threat Assessment Report. Available: https://www.europol.europa.eu/cms/sites/default/files/documents/Report.%20Intellectual%20property%20crime%20threat%20assessment%202022_2.pdf [last viewed 20.01.2024].

[43] *Strelnik, V. V., Kalita, A. V., Tarasenko, A. Y.* Protection of Intellectual Property Rights, p. 250.

[44] *Polishchuk, Y., Ivashchenko, A., Britchenko, I., Machashchik, P., Shkarlet, S.* European Smart Specialization for Ukrainian Regional Development: Path from Creation to Implementation. Problems and Perspectives in Management, Vol. 17, issue 2, 2019, p. 382.

[45] *Strelnik, V. V., Kalita, A. V., Tarasenko, A. Y.* Protection of Intellectual Property Rights, p. 250.

that can be implemented to achieve this optimisation. These include: creating a single central digital register of intellectual property; introducing a single and convenient mechanism for filing applications for intellectual property rights; strengthening interagency coordination to help combat intellectual property rights infringement; ensuring public reporting, transparency and accountability, etc;

- Adaptation of legal norms on patenting technologies related to artificial intelligence, including the development of specific criteria for determining the ownership of technologies created with the use of artificial intelligence;[46]
- Data confidentiality and security – this refers to the direct development of regulations aimed at regulating the collection, processing and use of intellectual property data, determining the mechanisms that will be used directly to protect information;
- Flexibility of legislation – first of all, it concerns patent legislation, and the main emphasis is to promote innovation in all possible ways by reducing the cost of obtaining patents;
- Ensuring proportionate, effective and dissuasive sanctions for copyright and related rights infringement. Examples of such sanctions include: establishing a multi-level system of penalties, including fines, which should be fair and consistent; ensuring the effectiveness of sanctions through transparent courts; creating separate units in law enforcement agencies that will focus exclusively on IP infringements; conducting regular reviews and assessing the effectiveness of sanctions in deterring infringements, etc;[47]
- Encouraging innovation in blockchain technologies – this involves developing legal frameworks for defining ownership and protecting rights in the field of blockchain technologies; it is also important to ensure a good interaction between intellectual property law and regulation of the cryptocurrency and blockchain industries.[48]

Summary

The concept of "intellectual property" is understood as specific rights to the results of one's intellectual activity in the field of science, technology, industry, art, and others, which are the objects of civil law relations in terms of the right of everyone to own, use, and dispose of the results of their intellectual and creative activity. This is not a material good, but the creators necessarily retain the above rights. Use by other persons is permitted subject to obtaining the permission of the relevant person, except as expressly provided by law. Given the rapid pace of development of modern technologies and large-scale digital transformation, these issues of protection and enforcement of intellectual property rights are gaining even greater momentum and wider horizons. At the same time, the transformation of digital technologies and the modification of every sphere of society's life encourage many unscrupulous individuals and organisations to violate intellectual property laws.

The main constitutional guarantees of intellectual property protection in the context of digital transformation include: direct recognition of intellectual property rights; adaptation to the digital environment; maintaining a balance between public and private interests; special laws mentioned in the introduction contain provisions on protection of intellectual property from unauthorised access, hacking

[46] *Strelnik, V. V., Demchenko, A. M., Myronenko, A. O.* Legal Combination, p. 52.

[47] *Bryntsev, O., Kokhan, V., Mamaiev, I., Novikov, Y., Pasmor, Y., Shevchenko, L., Shmatkov, D., Vodoriezova, S., Yefremova, K.* Basic aspects of digitalization.

[48] *Britchenko, I., Cherniavska, T.* Blockchain Technology in the Fiscal Process of Ukraine Optimization. Ikonomicheski Izsledvania, Vol. 28, issue 5, 2019, p. 143.

and other forms of cyber threats; development of technologies and innovations; active international cooperation, which in itself represents an increased regulation of the issue of intellectual property protection; access to fair justice. The main challenges and threats include the emergence of piracy, distribution and consumption of pirated products, i.e., illegal use of content; difficulties associated with overlapping patents for the protection of inventions and software directly related to artificial intelligence technology and algorithms; problematic aspects of patent archives; copying and distribution of information directly protected by intellectual property; the problem of determining copyright for the results of intellectual activity when using artificial intelligence; the problem of almost identical forgeries of works of art with the help of artificial intelligence technologies; plagiarism, manifested in the illegal use of industrial designs in the Internet environment; the threat of distribution of open source software; threat to commercial secrets; a challenge caused by the growing number of normative legal acts designed to regulate intellectual property issues; the global nature of digital technologies and the IT industry in general; moments of using blockchain technologies aimed at determining authorship in the absence of relevant legal norms; deciphering and providing one or another access to old and historical works, the right to which cannot be identified.

In view of the above and taking into account the current state of legal regulation of intellectual property, the authors propose the improvement of Ukrainian legislation in the field of intellectual property and its adaptation to the realities of today. It will be appropriate to take the following steps: copyright protection in the digital environment; complicating the processes of illegal copying and distribution of other people's results of intellectual activity by imposing additional encryptions, etc., including the imposition of stricter responsibility on persons who carry out such actions; optimization of state management in the field of intellectual property; adaptation of legal norms regarding the patenting of technologies related to artificial intelligence; data privacy and security; ensuring the flexibility of legislation; provision of proportionate, effective and deterrent sanctions for infringement of copyright and related rights; encouraging innovation in the field of blockchain technology.

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Searching for an Optimal Model for the Renewal of the Constitutional Court to Avoid a Constitutional Crisis: Dream or Reality?*

Dr. **Jolita Miliuvienė**
Mykolas Romeris Law School, Mykolas Romeris University
Associate Professor at the Institute of Public Law
E-mail: *Jolita.Miliuviene@mruni.eu*
ORCID ID: 0000-0001-6741-1574

The failed renewal of the Constitutional Court in Lithuania was not the first in Europe, and will not be the last. The appointment of constitutional judges, usually undertaken with the involvement of the political institutions, became a very sensitive issue closely linked to their independence. After a sequence of unsuccessful attempts to renew the composition of constitutional courts, some states fall into a deep democratic backsliding, while some take the initiative to reform the existing appointment procedure, seeking to prevent the politicisation of constitutional control institutions. A universal and standardised one-size-fits-all model does not exist, as each particular national context must be considered. However, certain lessons are to be learned and certain pitfalls to be avoided. Constitutional courts must correspond to the criteria of the tribunal established by law, as disclosed in international jurisprudence. For this purpose, the proper law is needed. This article analyses the advantages and shortcomings of some elements of the proposed and partly realised Slovak reform on the appointment of constitutional judges that Lithuania and other states could benefit from. This allows for the conclusion that the explicit criterion of professional reputation might prevent arbitrary nominations and ensure that the best judge for the court and the society would be appointed. Contrary to most convictions, a larger majority in the Parliament is not necessary to keep this procedure in line with the principle of the rule of law. The only requirement is that the law must be clear, unambiguous and provide for the steps to be taken if the rotation fails.

Keywords: constitutional court, judicial independence, appointment procedures, separation of powers, tribunal established by law, rule of law.

Contents

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Introduction

Constitutional courts, being entitled with the power to overrule the decisions of legislative or executive bodies, cannot engender doubts about their trustworthiness, otherwise the shadow of distrust would be cast upon their judgements. The existence and proper functioning of a constitutional court is proof that a democratic system is able to remedy deficiencies which have been caused by state power institutions.[1] Yet, only a genuinely independent constitutional court can fulfil this mission. The independence of judges, and by extension of constitutional justices, stands out as one of the mandatory elements of any democratic system, alongside the necessary separation of powers and intra-institutional checks and balances.[2]

However, regrettably, doubts about the independence of constitutional courts and the politicisation of the judicial system have been raised recently – not only with respect to authoritarian regimes or captured democracies, but also with reference to countries that are commonly perceived as consolidated democracies.[3] Often, these doubts are linked to the appointment procedure of constitutional judges, as constitutional judges are appointed by political institutions in most of the states that have opted for the Kelsenian model of constitutional control. The politicisation of judicial appointments is one of the most common threats to the rule of law at present.[4] However, it would be illusionary and utopic to think that politics can be eliminated from the procedure of composing and renewing constitutional courts when aiming to guarantee greater judicial impartiality and independence. The participation of elected representatives in the appointment of constitutional judges helps to avoid the so-called counter-majoritarian difficulty, which emerges from a situation where a small number of constitutional judges imposes legal constraints upon parliamentarians who obtain a legitimate mandate to act from the people they represent.[5]

The participation of politicians in the renewal of the composition of constitutional courts sometimes ends with the non-appointment of constitutional justices in the time

[1] *Farkašová, S.* Constitutional aspects of the current reform of the selecting constitutional judges in the Slovak Republic and the comparative perspectives in Europe. Juridical Tribune, Vol. 11, issue 2, 2021, p. 161.

[2] *Abat Ninet, A.* Kelsen versus Schmitt and the Role of the Sub-National Entities and Minorities in the Appointment of Constitutional Judges in Continental Systems. ICL Journal, Vol. 14, issue 4, 2020, p. 525.

[3] *Fałkowski, J., Lewkowicz, J.* Are Adjudication Panels Strategically Selected? The Case of Constitutional Court in Poland. International Review of Law and Economics, No. 65, 2021. Available: https://www.sciencedirect.com/science/article/abs/pii/S0144818820301630?via%3Dihub. [last viewed 15.05.2023].

[4] *Violante, T.* A Constitutional Crisis in Portugal: The Deadlock at the Constitutional Court. International Journal of Constitutional Law Blog, 22 February 2023. Available: http://www.iconnectblog.com/2023/02/a-constitutional-crisis-in-portugal-the-deadlock-at-the-constitutional-court/ [last viewed 15.05.2023].

[5] See: *Bassok, O., Dotan, Y.* Solving the countermajoritarian difficulty? International Journal of Constitutional Law, Vol. 11, issue 1, 2013, pp. 13–33.

provided by the Constitution. This might bring a state to a constitutional crisis, as happened in Poland or Hungary, or at least paralyse the work of the constitutional court for some time. Needless to say, without effective constitutional control the fundamental values of democracy, human rights and the rule of law become endangered by the possible unconstitutional decisions of state power institutions.

The analysis of unsuccessful rotations in different European countries shows that a failure to renew the composition of a constitutional court might occur because of two reasons: first of all, bodies empowered to participate in the procedure of the appointment of constitutional justices deliberately violate the rules of this procedure, acting *ultra vires* or ignoring the limits of their competences to select candidates or appoint justices in time in order to appoint a candidate who is loyal to the public authority; secondly, state institutions participating in this procedure act within the limits of their competences, but intentionally fail to coordinate their actions or find an agreement on the most appropriate candidate, and the constitutional court becomes hostage to the miscommunication of public authorities.[6]

Within the current article, the author does not analyse or compare appointment procedures in different European states. Similar research has been carried out by other scholars,[7] also involved in the search for an exemplary model for the selection and appointment of constitutional judges which is exempted from political influence, insofar as this is possible in the Kelsenian system of constitutional control. Instead, this paper focuses on the requirements for the formation of constitutional courts and reforms undertaken after failed rotations, which might serve as examples for states seeking to improve the procedure of the appointment of constitutional judges, as this procedure is directly related to the judicial independence of the institution performing constitutional control.

The failed rotation of constitutional justices in Lithuania in 2020 brought legal uncertainty and a number of questions. The first and the most important was the question of what to do next and how to proceed with the appointment of constitutional judges in the future in order to remain in line with the Constitution and the principle of the rule of law. All three candidates proposed by the President of the Republic, the Speaker of the Parliament and the President of the Supreme Court were rejected by parliamentarian vote. Thus, one may ask, whether any constitutional boundaries exist that limit politics in cases of disagreement about the candidacies nominated. Are there any constitutional rules that require officials who nominate candidates to make responsible selections? How long can the Constitutional Court function when its composition includes justices whose term of office has expired? Should it start new cases or wait until its composition is renewed? Should the three new justices be proposed and appointed at the same time, or is it at the discretion of every state official entitled to propose candidates to choose the right time for

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[6] *Miliuvienė, J.* Konstitucinio Teismo teisėjų sudėties atnaujinimo mechanizmas kaip konstitucinių teismų nepriklausomumo prielaida [The mechanism for the renewal of the composition of constitutional justices as a precondition for the independence of the constitutional court]. In: Konstitucija ir teisinė sistema. Liber Amicorum Vytautui Sinkevičiui [Constitution and legal system. Liber Amicorum Vytautas Sinkevičius], *Tvaronavičienė, A.* and others (eds). Vilnius: MRU, 2021, p. 242.

[7] See, among others: *Sadurski, W.* Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe. 2nd ed., London: Springer, 2014; *Farkašová, S.* Constitutional aspects, 2021, pp. 150–173; *Safta, M.* Appointment of constitutional judges. A comparative law perspective. In: Expanding Edges of Today's Administrative Law, *Shasivari, J., Hohmann, B.* (eds). Ad Juris, 2021, pp. 133–154; *Rodina, A.* Appointment of the Constitutional Justices: Some issues. Juridiskā zinātne, No. 4, 2021, pp. 129–145.

submitting a new or existing candidate? Should the limit of three months in advance be respected and, thus, the appointment postponed, or are there exceptions to this rule in order to implement the Constitution without delay?

It appeared that the Law on the Constitutional Court detailing constitutional provisions related to the renewal of the composition of the court did not regulate any of these issues. All of these questions led to the presumption that the existing legal regulation, including that of a constitutional nature, should be revised and amended in order to avoid such failures posing threats to the coherent existence of the institution of constitutional control in the future. The suggestion to provide in the law for a solution in cases where a decision cannot be reached between participating actors is also promoted by the Venice Commission.[8] Moreover, constitutional experts have underlined that it is important to ensure that the positions of constitutional court judges do not remain vacant for a prolonged period.[9] Therefore, the author aims to propose some legal solutions to the Lithuanian legislator that could contribute to preventing similar situations in the future. Perhaps these insights could also be useful for other states dealing with the same issue.

The first section of the paper examines the criteria for the composition of constitutional courts stemming from the rule of law. Like any other institution administering justice – or perhaps even more than any other judicial institution, given their mission to ensure the proper hierarchy of the legal system – constitutional courts should meet the criteria of a tribunal established by law. As disclosed in the jurisprudence of supranational jurisdictions, the requirement to respect this criterion is a *condition sine qua non* that must be met in order for a court to be considered independent and therefore able to perform its genuine function. The second section of the article reflects the search for good examples to implement in legislation seeking to improve the renewal of the constitutional court. After many failed rotations in Europe, the Slovak Republic was one of the few states that tried to reform their appointment system by adding some necessary elements.

The third and fourth sections contain the elements that might contribute to the improvement of legislation regulating the renewal of constitutional courts, along with some provisions that the author does not recommend. The third section focuses on the fundamental requirements for candidates to be selected for the office of a constitutional judge. Usually, these requirements are very vague and open to interpretation in national constitutions; therefore, their content should be determined. In the fourth section, the author seeks to propose some improvements for the Lithuanian legislator in order to prevent future failures in the re-composition of the Constitutional Court.

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[8] Opinion of Venice Commission of 19 December 2022 on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", No. CDL-AD(2022)054. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)054-e [last viewed 06.06.2023].

[9] Follow-up opinion of Venice Commission of 10 June 2023 to the opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", No. CDL-AD(2023)022. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)022-e [last viewed 05.04.2023].

1. The existence of a constitutional court is not a constitutional good *per se*, as far as it is not a tribunal established by law

Constitutional courts bear the obligation and the responsibility to guarantee the supremacy of the Constitution and the rule of law in national legal systems and beyond. However, the existence of a constitutional court *per se* does not ensure that the legal order will not only meet formal legality requirements, but will also be just.[10] Constitutional control institutions, as one of the fundamental pillars of a state governed by the principle of the rule of law, are submitted to the requirements of this principle themselves, including the requirement to correspond the criteria of 'a tribunal established by law'. This criterion imposes the obligation on the state to appoint judges in accordance with the respective legal framework.[11] These courts must be formed in a transparent way in order to avoid any uncertainty in their mission to administrate constitutional justice and ensure the reception of constitutional judgements by people and state power institutions.

It is widely accepted that the selection and appointment of constitutional judges is made by other state powers – mostly the executive, with the participation of the parliament. The case law of the European Court of Human Rights (hereinafter ECtHR) in Flux (No. 2) v. Moldova recognised already some time ago that the appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role. The nature of the Kelsenian constitutional control model, which is formed by politicians who, in this sense, deliberately authorise and enable those institutions to control them, requires the establishment of strict and precise rules to be respected and followed. Sometimes, this is not the case.

The right of everyone to a fair trial by an independent and impartial tribunal established by law is guaranteed by the EU Charter of Fundamental rights (hereinafter – the Charter; Article 47, part 2) and the European Convention on Human Rights (hereinafter – the ECHR; Article 6, part 1). For the ECtHR, the term established by law reflects in particular the principle of the rule of law[12] and focuses on judicial independence. Each citizen is entitled to have their case tried by a tribunal that is established in accordance with the law, and this includes the notion that the judges on the tribunal should also be appointed in accordance with the law.[13]

Constitutional courts are no exception to the imperatives stemming from this principle. A court that is not established according to the legal acts regulating the procedure of its formation cannot be considered an entity representing legitimate and lawful jurisdiction, as is required in a democratic state.[14] When it comes to the constitutional court, the importance of meeting these requirements is further magnified.

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[10] *Kūris, E.* On the rule of law and the quality of the law: reflections of the constitutional-turned-international judge. Teoria y Realidad Constitucional, No. 42, 2018, p. 132.

[11] *Karlsson, H.* The Emergence of the Established "By Law" Criterion for Reviewing European Judicial Appointments. German Law Journal, Vol. 23, issue 8, 2022.

[12] *Pech, L.* The Right to an Independent and Impartial Tribunal Previously Established by Law Under Article 47 of the EU Charter of Fundamental Rights. In: The EU Charter of Fundamental Rights: A Commentary, *Peers, S. et al.* (eds). Hart Publishing, 2021, p. 1345.

[13] *Karlsson, H.* The Emergence, p. 1069.

[14] *Costa, J.-P.* Qu'est-ce qu'un tribunal établi par la loi? [What is a tribunal established by law?]. In: Fair Trial: Regional and International Perspectives. Liber Amicorum Linos-Alexandre Sicilianos, *Branko, L., Motoc, I., Pinto de Albuquerque, P., Spano, R., Tsirli, M.* (eds). Anthemis, 2020, p. 103.

The constitutional crisis in Poland that emerged from the unlawful appointment of several constitutional justices permitted the broadening of the *expressis verbis* requirements of Article 6 of the ECHR to the scope of constitutional courts performing abstract constitutional control. In Xero Flor v. Poland, the legitimacy of the Polish constitutional tribunal was evaluated, and all previously formulated criteria for judicial appointments were applied to the constitutional courts. The illicit appointment of three constitutional justices in Poland led to the finding that the Polish Constitutional Tribunal, sitting in a certain composition, was not considered 'a tribunal established by law' anymore, and its role as the guardian of the Constitution was lost[15].

ECtHR jurisprudence confirms that the procedure for the selection and appointment of judges is one of the elements to be met in ensuring that a tribunal is established by law, as was indicated in Ástráðsson v. Iceland. According to the ECtHR, the criterion established by law was intended to ensure that an organisation of the judicial branch is not dependent on the discretion of the executive or the judicial authorities, but should instead be regulated by the laws of the legislature. Irregularities in the appointment procedures of judges could mean that a tribunal was not established by law. While assessing whether a tribunal was established by law, one must consider whether the composition of the court is in conformity with the relevant rules and the judges have been appointed in the correct way.[16]

Thus, respect for the procedural rules enshrined in the Constitution and detailed in ordinary legal regulation is of the utmost importance. The transparency, effectiveness and quality of the judge-selecting procedure obviously plays an important role in this endeavour. When disrespecting the requirement of stemming from the principle of the rule of law, judges appointed to the court might still be independent or impartial; however, the court will not be considered as legitimate and trustworthy. This it would be sufficient to find a violation of Article 6 of the ECHR like in Xero Flor v. Poland or Article 47 of the EU Charter,[17] the meaning and scope of which are in essence the same.[18]

Having paid due attention to the jurisprudence of ECtHR, in the case of Simpson v. Council, the Court of Justice of the European Union (hereinafter – the CJEU) found that an irregularity committed during the appointment of judges within the judicial system concerned entailed an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the state could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt as to the independence and impartiality of the judge or judges concerned.

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[15] *Wyrzykowski, M.* The Vanishing Constitution. In: European Yearbook on Human Rights, *Strohal, C., Kieber, S.* (authors), *Benedek, W. et al.* (eds). Intersentia, 2018, p. 4.

[16] *Sunnqvist, M.* Impartiality and independence of judges: the development in European case law. Nordic Journal of European Law, Vol. 5, issue 1, 2022, p. 91.

[17] Polish saga in CJEU: ECJ 24 June 2019, case No. C-619/18, Commission v. Poland (Independence of Supreme Court); ECJ 5 November 2019, case No. C-192/18, Commission v. Poland (Independence of Ordinary Courts). 21ECJ 19 November 2019, case No. C-585/18, A.K. (Independence of the Disciplinary Chamber).

[18] The CJEU has noted that it must ensure that the interpretation which it gives to the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6 ECHR, as interpreted by the ECtHR (judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, paragraph 118 and the case law cited).

The gravity of the infringements of the procedural rules was set out in the jurisprudence formulated in the Ástráðsson v. Iceland case. In order to determine the seriousness of procedural irregularities, one must consider three aspects: a) whether there has been a manifest breach of the law (the factual evaluation); b) whether the breach of the law pertained to any fundamental rule of the judicial appointment procedure (the substantive threshold for finding a breach); and c) whether the alleged violations were submitted upon the judicial review and the situation was rectified.

Thus, violations of national legislation of fundamental importance in the judicial appointment procedure clearly result in the violation of the requirement of a tribunal having been established by law. Indications of illegal interference or undue use of discretion by some state power institutions in the appointment procedure of judges are potentially significant in determining whether disrespect of the rules was of fundamental importance. Usually, the executive branch would be prone to overstepping its boundaries in this way, but by its wording, the judgment of the ECtHR does not exclude the possibility that other branches or organs of government might do the same[19].

A case of Polish origin, Xero Flor, might be considered a continuation of the logic of Ástráðsson. This allowed the test developed in the landmark ruling in the Icelandic case to be applied to a constitutional court.[20]

The finding that a constitutional court does not meet the requirement of a tribunal having been established by law gives space to doubt the forcibility and binding nature of its judgments. The ordinary courts in Poland, including the Supreme Court, took this path, proclaiming that judgements issued by wrongly elected persons are not binding, and can therefore be disregarded.[21] Moreover, in case such judgements would be applied in the jurisprudence of ordinary courts, the decisions of the latter might also cast doubt as to their legitimacy. Hence, public trust in the entire judicial system might be compromised, if the constitutional control institution was defectively shaped in order to be recognised as a tribunal established by law. This also means that constitutional judges appointed in violation of the legal rules are not protected by constitutional guarantees, such as the principle of irremovability.[22] Judges should not be entitled to such protection until they have been lawfully appointed.

The term 'established by law' covers both the legal basis for the very existence of a tribunal and the compliance by that tribunal with the particular rules that govern it.[23] In Ástráðsson v. Iceland, the court emphasised that it should be ensured "that the relevant domestic law on judicial appointments is couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive". Thus, the law itself should meet some quality criteria in order to prevent extensive interpretations.

Indeed, political actions based on their own understanding of the applicable legal framework on appointing judges might also mean that the requirements for a tribunal to have been established by law are violated. Extensive discretion in judicial appointments can undermine judicial independence and thus, the idea of a fair

[19] *Karlsson, H.* The Emergence, p. 1064.

[20] *Szwed, M.* The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights: ECtHR 7 May 2021, No. 4907/18, Xero Flor w Polsce Sp. z O.o. v. Poland, European Constitutional Law Review, Vol. 18, issue 1, 2022, p. 137.

[21] Ibid.

[22] Ibid.

[23] *Sunnqvist, M.* Impartiality, p. 89.

trial.[24] The guarantee of judicial independence demands an adequate, coherent and simultaneous approach to courts' configuration in law and practice, insofar as they are deeply interconnected.[25] To prevent the extensive discretion or abuse of powers, a clear and unambiguous law regulating the appointment procedure is needed. Courts should be established through the slow but sophisticated mechanism of law-making.

2. THE Law is needed: A Slovak lesson to be learned

To be 'a tribunal established by law', a law is needed – and not any law, but a law of sufficient quality. This means that the law should be clear, unambiguous and sufficient to regulate all possible outcomes – which was obviously not the case in Lithuania. Every state that has suffered an unsuccessful rotation in its constitutional courts might need to revise its legislation and consider whether there is some space to improve it. After failed rotations in 2014 and 2019, when 9 out of 13 constitutional judges were not appointed, Slovakia indeed began to think about improving its legislation, and some constitutional and legal reforms were proposed. The Slovak experience is of interest for other states to learn from – as the old proverb says, only a fool learns from his own mistakes; the wise man learns from the mistakes of others. Therefore, the proposed Slovak reform on the appointment of constitutional judges' merits analysis.

Slovakia did not belong to the Soviet Union; however, it was under its influence, and the Slovak story of reaching out for democracy is similar to that of other states in central Europe. Slovakia became an independent state in 1992 after the velvet divorce with the Czechs, and since that moment it has had to learn every democratic lesson by itself. Thus, Slovakia encountered problems common to new democracies: the implementation of the rule of law, the constant change of governing political parties, the scepticism and disappointment of society, and the search for reforms and improvements.

In Slovakia, the procedure for the appointment of constitutional judges is regulated by the part 2 of the Article 134 of the Constitution of the Slovak Republic. The President of the Republic is in charge of the appointment of constitutional judges from the candidates submitted by the National Council. The President must choose between two candidates for one position. In 2014, the new President had to appoint three constitutional judges. He chose one candidate and refused all others (four in total) due to their allegedly insufficient competences.[26] The President claimed that he had the discretion to choose or not to choose any of the proposed candidates if he did not like them. Then, the President also refused to appoint another justice. For several years, the Slovak Constitutional Court was missing three of the required judges. The workload of the remaining justices increased, the time it took to adjudge constitutional cases became longer, and, finally, the quorum of judges and the necessary vote for the adoption of every decision became difficult to reach. Drugda

[24] *Karlsson, H.* The Emergence, p. 1066.

[25] *Bustos Gisbert, R.* Judicial Independence in European Constitutional Law. European Constitutional Law Review, No. 18, 2022, p. 619.

[26] The shortcomings of the candidates for justices of the Constitutional Court pointed out by the President of the Slovak Republic were the lack of specialisation in constitutional law of the nominated candidates, the absence of significant academic achievements, and the lack of recommendations to the nominated candidates by a committee set up by the President himself.

states that because of the constitutional *modus operandi* of the Court, "a single vacancy may considerably disrupt the workflow of the Court".[27]

The unselected judges challenged the actions of the President in the Constitutional Court, which gave its verdict and evaluation of the situation. The Grand Chamber of the Constitutional Court in decision No. I.ÚS 549/2015 explained that when appointing judges to the Constitutional Court, the President is bound by the pre-selections made by the Parliament, and may not dismiss a candidate by introducing criteria other than those expressly specified for that position in the Constitution. After the Ruling of the Constitutional Court, the President fulfilled his task and appointed judges to the vacant positions.

However, Slovakia's troubled history with appointing constitutional judges was not over. In 2019, nine new judges to the Constitutional Court were due to be appointed. When the reform of the selection and appointment procedure had already been initiated, the former prime minister tried to become the President of the Constitutional Court. This seemed like a political attack on the Constitutional Court rather than an appropriate candidacy to fill the office. The legal regulation of the appointment of judges led to political disputes, with political deadlock in connection with the selection of candidates for constitutional judges in 2019. This caused the long-term vacancy of the Court.[28]

Trying to avoid the complete politicisation of the Constitutional Court, amendments to the existing legislation were proposed. They sought to make the procedure more transparent and predictable, with articulated requirements for candidates and procedures that should avoid blocking candidates either in the Parliament or by the President. The Slovak government succeeded in implementing some legislative reforms, while the constitutional amendments did not receive parliamentary approval.

Firstly, the proposal of the amendment to the Constitution was introduced. Although it did not obtain enough votes in the Parliament, this proposal is worth analysing when searching for the optimal model of the re-composition of a constitutional court. This reform was seen as one that might fulfil hopes and expectations for the improvement of the procedure: it intended to install a brake against the concentration of power in the hands of political representation, as well as functional mechanisms that could strengthen the independence and efficiency of the constitutional judiciary.[29]

What exactly was proposed, then? There were two objectives to achieve: to raise the parliamentary majority required for the selection vote from a simple to an absolute one; and to expand the eligibility requirements for future constitutional judges, including attributes such as personal renown, reputation for independence and impartiality, and high moral credit.[30]

The first proposition is a classical one, which prescribes to give more voice to the opposition, aiming to depoliticise the procedure and bring more credibility to the candidates. The aspiration is commendable, but in this case, the mechanisms to avoid possible deadlocks when the political majority and the opposition disagree might be foreseen. Moreover, the opposition might use its power to veto a candidate

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[27] *Drugda, S.* Changes to Selection and Appointment of Constitutional Court Judges in Slovakia. Pravny Obzor, No. 102 (special issue), 2019, p. 16.

[28] *Farkašová, S.* Constitutional aspects, p. 170.

[29] Op. cit., p. 153.

[30] *Drugda, S.* Changes to Selection and Appointment.

as a political tool in matters unrelated to the question of the appointment of constitutional judges. The necessity of preventing deadlocks and delays is also emphasised by the Venice Commission.[31]

The second initiative is especially interesting and appealing. This is because most Constitutions provide only for very vague criteria for the selection of constitutional judges,[32] and it is most often because of this that the appointment procedure is questioned. All of the elements provided in the Slovak proposal were not unknown to the officials charged with the selection of candidates in Lithuania (or in other states); however, being only soft law and more unwritten traditions than legal rules they allow actors participating in the appointment proceedings to disregard them when it is convenient. The Slovak proposition to amend the Constitution and the legislation is further analysed in light of its possible transposition into other legal systems.

3. A judge good for the court and the society: On criteria to be established

Resuming the discussion on the aspiration of having a legitimate constitutional court established by law, i.e., composed of judges that are nominated and appointed according to the law, one might note that the law – both constitutions and ordinary legislation – regulates two aspects of the appointment of constitutional judges: the procedure and the substantial matters on who can be a constitutional judge. The latter aspect is determined by the criteria to be fulfilled by a person nominated for the office of constitutional judge. One should not undermine those criteria because they characterise the future judge who will decide on the content of the Constitution. Interpreting laconic constitutional provisions means more than a simple clarification of the content of the text. The interpreter fills the text with their own convictions and respected values. Indeed, under certain circumstances, constitutional interpretation may take the form of indirect constitutional amendment: it can go beyond the text. Therefore, both the society and the politicians participating in the formation of the composition of the constitutional courts are more than interested in having the best – according to their beliefs – judge in the court.

Most European jurisdictions require a high level of legal knowledge and a certain age or professional experience. Usually, these criteria are not detailed in law so as not to create restrictions that are not provided in the constitution. However, they are reference points not only for lawyers aspiring to one of the highest positions in law, but also for officials who make selections. Being regulated by general provisions, they are difficult to impose on the bodies electing constitutional judges.[33] Therefore, lacking accuracy and certainty as to their content and meaning, constitutional formulations leave too much space for their interpretation. Thus, one might ask whether these criteria should be ascertained in the legislation, aiming to ensure that the candidate that is best for the court and the society is nominated for the office of constitutional judge.

Under the Article 103 of the Lithuanian Constitution, the requirements of eligibility are: to be a Lithuanian citizen with an irreproachable reputation; educated

[31] Opinion of Venice Commission of 13 March 2017 on questions relating to the appointment of Judges of the Constitutional Court of the Slovak Republic, No. CDL-AD(2017)001. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)001-e [last viewed 10.06.2023].

[32] *Safta, M.* Appointment, p. 202.

[33] *Toth, Z.* Composition and Structure of the East-Central European Constitutional Courts. Collected Papers of the Faculty of Law in Novi Sad, Vol. LVI, issue 2, 2022, p. 574.

in law; and with a minimum of 10 years of experience in the legal field as a professional or a legal scholar and educator. These requirements can be assessed as very typical, and without any particularities when compared to other states with centralised constitutional control. Nonetheless, they might be considered to somehow lack certain elements that might be added. Amendments to the Constitution might be made by altering the text of the Constitution or by way of its interpretation.

The Venice Commission emphasises that the procedure of the appointment of judges is essential in order to ensure the high quality of the decisions of the constitutional court, and none could argue against this.[34] The criteria of renown, professional reputation or professionalism, next to the requirement to have an irreproachable reputation in general, was proposed in the Slovak constitutional initiative. Indeed, professionalism might be the main principle to be ensured in the selection of candidates. Usually, constitutions require only a certain level of professional experience (10–15 years in the legal field). This is not the same as one's professional reputation, because not all lawyers having worked for a certain time are the best or most professional practitioners. All the persons working in the field of law after a certain time will have the necessary experience, but not all of them can become constitutional judges. Judicial and professional reputation might be a compliance mechanism which could ensure that only the best lawyers are nominated to the position of a constitutional judge.

The absence of an *expressis verbis* provision regarding professional reputation does not mean that the officials nominating candidates (the President of the Republic, the Speaker of the Parliament or the President of the Supreme Court, in Lithuania's case) are not obliged to take it into account, or that they were not assessing it before nominating a candidate. The analysis of the previous professions of Lithuanian constitutional judges shows that before entering the Constitutional Court, most of the candidates were either law professors or judges of the Supreme Court. One might like to think that it is the responsibility and constitutional duty of the nominators to select the candidates most appropriate for future work and most appropriate to society, as public trust in constitutional justice is also very important.

However, the recent failed renewals of the composition of the Constitutional Court implicitly suggest that the officials nominating candidates do not always have the same perception of professionalism as the rest of the legal community. The lack of professionalism was key in objections which caused unsuccessful rotations in Slovakia[35] and Latvia[36]. Of course, due to their imprecision, the nomination criteria also give space to manipulation when stating that even a renowned professor is not competent enough in the field of law. The solution to this might be the advisory opinions of professionals themselves – for instance, former constitutional judges who already know what skills are needed to be a constitutional judge and do not have any vested interest in a particular person being nominated, other than in ensuring the effective continuation of the work that they have commenced.

Another controversy regarding considerations of professionalism is engendered when politicians from legislative and executive bodies are appointed to the constitutional

[34] Urgent opinion of Venice Commission of 11 December 2020 on the Reform of the Constitutional Court, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure. No. CDL-AD(2020)039-e. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)039-e [last viewed: 4.06.2023].

[35] *Drugda, S.* Changes to Selection and Appointment.

[36] *Rodina, A.* Appointment.

court. This might also occur because of a lack of clarity when determining the criteria for becoming a constitutional judge. Constitutions usually do not provide for the direct prohibition of candidates with prior political careers from being chosen for the position of a constitutional judge. The requirement to be apolitical is not useful in this situation, as some political actors do not officially belong to any political party, even if their sympathies are well known.

The Lithuanian Constitution is no exception concerning the lack of clarity regarding the criteria for the constitutional judge-to-be. This convolutes the task of officials when selecting and nominating appropriate candidates, and allows for the notion that a political person might be chosen for the office of a constitutional judge. In some states, the participation of politicians in the composition of the constitutional court is a constitutional tradition, for instance, in Germany, or it is directly enshrined in the Constitution, for example, in France (Part 2 of Article 56 of the Constitution). However, those are states with older constitutional courts or deeper democratic traditions, and the question of judicial independence is less sensitive to them, although no less important. The new democracies that emerged after the fall of communism have many lessons to learn. The independence of the judiciary from other state power institutions is one of them.

After the failed rotation of the Lithuanian Constitutional Court in 2020, the next rotation, which took place in 2023, was awaited with concern. In the end, everything proceeded smoothly, although some considerations regarding the appropriateness of one of the nominated candidates could not be avoided. One of the three judges appointed to the Constitutional Court was an actual member of Parliament, who was also the head of the Committee of Legal Affairs, charged with ensuring the preliminary constitutional compatibility of laws before their adoption in the Parliament. Thus, the question is whether this candidate will be able to examine the constitutionality of laws that are challenged before the Constitutional Court, as his previous opinion has already been publicly expressed. The question of partiality soon arose in cases of constitutional justice, as the parties to these cases started to file demands that this judge be disqualified from their hearings. All of these demands were satisfied, but there were also some cases, where, without receiving such a demand, the judge did not recuse himself, and doubts about his independence were thus raised in the media.[37]

The fact that the judge is tied to a party, even when he is no longer an active member, still harms the independence of the Court and the separation of powers as the requirement to be apolitical has to be met. Usually, it is expected that judges, like any other member of society, have their beliefs, approaches, understandings and political preferences. It would be worrying if they did not. However, active politicians have overly close ties to political power. Several times in the history of the Lithuanian Constitutional Court judges have been appointed directly from a political post. However, they all had academic backgrounds and academic affiliations to be assessed when nominating the candidate.

The mission of the Constitutional Court and its assigned task does not allow its independence to be cast into doubt. This can cast a shadow of mistrust over any

[37] *Perminas, P.* Šedbaras Konstituciniame Teisme nenusišalino nuo sprendimo dėl migrantų, kurį palaikė Seime [Šedbaras did not disqualify himself in the Constitutional Court from the decision concerning migrants supported in *Seimas*], Lrt.lt, 29 June 2023. Available: https://www.lrt.lt/naujienos/lietuvoje/2/2010074/sedbaras-konstituciniame-teisme-nenusisalino-nuo-sprendimo-del-migrantu-kuri-palaike-seime [last viewed 02.05.2024].

decision adopted, especially when the decision concerns sensitive issues such as the management of the migrant crisis or a hybrid attack from undemocratic regimes. Although in drafting the Venice Commission the constitutional experts did not envisage a great threat being posed by participation in political activity, saying that "in order to prevent direct influence of political parties, it is not necessary to ask for complete political abstention,"[38] it may be pertinent to explore the introduction of a cooling-off period for high-level politicians interested in the position of a constitutional judge.

4. The model rotation mechanism: Myth or reality?

Some scholars argue that each of the currently applied models for the appointment of constitutional judges has both advantages and shortcomings, which are fully manifested when the process of appointing judges takes place in a tense socio-political atmosphere and in the conditions of a deficit of political and legal culture.[39] Others suggest that the best method for selecting constitutional judges should be able to a) guarantee or maximise political independence; and b) identify expert knowledge and professionalism.[40] This formula seems very agreeable. Finally, there are some that propose an unusual method: to select the judges by sortition from equally qualified professional candidates;[41] or even to reform constitutional courts, restricting their competence to the protection only of democracy and human rights and embedding judicial deference to the legislator in order to better preserve their independence.[42] One must agree then that a universal recipe does not exist, and the context of the country and its political and legal culture should be taken into account.

The procedure for appointing constitutional judges in Lithuania, enshrined in the Constitution and detailed in the law on the Constitutional Court, already has certain elements which allow it to strengthen judicial independence and ensure the depoliticization of nominations. All three branches of state power (legislative, executive and judiciary) are involved in the process, obliging each of them to coordinate their actions and search for agreement. Thus, the separation of power, the pluralism of opinions, and adequate checks and balances are ensured. The term of office of constitutional judges is limited and non-renewable, preventing judges from seeking re-election and thus pandering to the will of politics. Instead, they work to preserve the superiority of the Constitution.

The Law on the Constitutional Court also provides for a 3-month time limit to submit candidacies to the Parliament in order allow them to be discussed in public. Furthermore, this law prescribes minute details – for example, the term of office of judges terminating their duty ends on the third Thursday of March of the relevant year. When the institutions fail to appoint new judges after the expiry of the term of office of the previous judges, the functionality and continuity of the efficient work of the Constitutional Court is preserved by the provision which allows judges with

[38] Opinion of Venice Commission of 20 March 2006 on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania, No. CDL-AD(2006)006. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)006-e [last viewed 05.06.2023].

[39] *Farkašová, S.* Constitutional aspects, p. 167.

[40] *Vandamme, P. É., Hutt, D. B.* Selecting Constitutional Judges Randomly. Swiss Political Science Review, Vol. 27, issue 1, 2021, p. 109.

[41] Ibid.

[42] *Castillo-Ortiz, P.* The dilemmas of constitutional courts and the case for a new design of Kelsenian institutions. Law and Philosophy, No. 39, 2020, p. 653.

expired terms of office to continue their functions until a new judge is appointed. *Hélas*, the extended tenure of incumbent judges does not help to remove incentives to block the appointment of new judges, instead only attenuating the consequences of a blockage.[43]

What is lacked by this mechanism? The devil hides in the details of the interpretation of the law regulating the procedure of the appointment of constitutional judges. Therefore, explicit, precise and unambiguous legal regulation of this procedure is needed in order to avoid malfunction or failures.

For example, although the Lithuanian Law on the Constitutional Court seems to be explicit on every detail concerning the timeframe for carrying out the selection procedure and for submitting judicial candidates to the appointing bodies, providing 3 months for submission of the candidates and the exact day of the next composition, apparently it remains silent regarding time limits in cases of failed rotation. As the law regulating the appointment procedure according to which the tribunal has to be established must be clear, it should be amended to provide the time during the which new candidacies have to be submitted after a failed rotation. Taking into account the failed constitutional obligation to appoint judges, this period should not be long. The time limit of 3 months should apply, if a new candidacy is submitted, as this time period is needed to discuss the personalities of candidates and to verify all the relevant information. When the same candidacy is re-submitted to the Parliament, no time limit is necessary.

One of the questions that arose after the failed rotation in Lithuania was whether all three candidatures have to be presented at the same time in the same vote in the Parliament, or whether, as the first vote had failed, it was then up to each official with the power to nominate the candidates to choose the timeframe. In fact, the Law on the Constitutional Court does not provide that the appointment of the three judges during the usual rotation must be simultaneous – only the day when they enter office is the same. There is the requirement to nominate the candidates at least 3 months in advance and to appoint them no later than on the third Thursday of March. However, it is not prohibited to nominate and appoint one or two candidates earlier that the others. After the regular rotation fails, the requirement to coordinate the actions among all officials involved in the procedure and to have all nominations at the same time might complicate the appointments. For instance, after the failed rotation one of the officials entitled to nominate a candidate as a constitutional judge might decide to re-submit the same person. In this case, it is obvious that it is not necessary to wait for 3 months to appoint them.

The requirement to simultaneously fill all of the vacancies for the post of constitutional judge exists in Spain, which also joined the club of failed constitutional rotations in 2022. Here, the judges are appointed by the General Council of the Judiciary and the Government; however, if one of them fails to nominate a judge, the entire process is compromised. Since 2018, the Council of the Judiciary itself has not been able to be renewed because of a lack of agreement between the governing political party and the opposition, as a majority of 3/5 is needed to appoint the judges in the Council to avoid court-packing. Lacking around 20 members, the Council of the Judiciary is not capable of adopting any decision, including the appointment of constitutional judges. A governmental initiative to abolish the rule of simultaneity

[43] *Lübbe-Wolff, G.* Wie Verfassungsgerichte arbeiten, und wovon es abhängt, ob sie integrieren oder polarisieren [How constitutional courts work and what determines whether they integrate or polarize]. Berlin: Konrad-Adenauer-Stiftung, 2022.

and to lower the threshold needed for the Council of the Judiciary to vote was rejected by the opposition, who argued that such amendments would lead to the capture of the judiciary.[44] Thus, the Spanish example clearly shows that the rule of simultaneity might lead to a deadlock in the procedure if one of the participating officials or institutions finds itself incapable of fulfilling the obligation to nominate candidates.

Under the Lithuanian Constitution, the Parliament appoints constitutional judges by a simple majority. Although the examples of other states and the recommendations of the Venice Commission suggest that a qualified or absolute majority would be a better choice in order to ensure that the appointed judge would satisfy all political ideologies, this might not be the best option. First of all, the possibility to end in deadlock becomes more relevant. All propositions on how to overcome a deadlock end with the suggestion of lowering the majority requirement for the second or third round of voting.[45] Therefore, in order to achieve a result – the appointment of a constitutional judge – one would end up with the same simple majority. Secondly, appointments are usually voted for by a larger majority than is required. If a candidate is not suitable for a simple majority, they will also not be accepted by parliamentarians. Thirdly, only one candidate out of three in Lithuania can be guaranteed for the governing party, as the judiciary nominating another candidate is not involved in politics and the President of the Republic, being seen as the saviour of the nation, rarely belongs to the same political ethos. Therefore, even if the first impression would be that it is pertinent to introduce a stronger majority in the parliamentarian vote – and although, in the opinion of the Venice commission,[46] the appointment of constitutional judges by the Parliament via an ordinary majority deserves attention – it is not the most necessary improvement to undertake in the Lithuanian legal system.

Slovak reform on the re-composition of the Constitutional Court also encompasses an element worth considering and introducing into other judicial systems. The list of entities conferred with the power to propose candidates for consideration to the Parliament was extended. In other words, to ensure the professionalism of future candidates, the entities proposing the candidates to the proposers of candidates were provided. Thus, the selection of constitutional judge candidates might comprise sub-processes which feed into each other and also involve external actors[47].

Indeed, when creating the Constitutional Court in Lithuania, the officials empowered to find future judges addressed external institutions for advice, without any regulation. The Speaker of the Parliament charged with proposing three candidates to the first composition of the Constitutional Court recalls:

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[44] *Tsereteli, N.* Battle for the judiciary in Spain: how does it compare to Poland and Hungary? Democracy reporting international, 22 December 2022. Available: https://democracy-reporting.org/en/office/EU/publications/battle-for-the-judiciary-in-spain-how-does-it-compare-to-poland-and-hungary [last viewed 07.05.2023].

[45] *Miliuvienė, J.* Konstitucinio Teismo teisėjų sudėties atnaujinimo mechanizmas kaip konstitucinių teismų nepriklausomumo prielaida [The mechanism for the renewal of the composition of constitutional justices as a precondition for the independence of the constitutional court]. In: Konstitucija ir teisinė sistema. Liber Amicorum Vytautui Sinkevičiui [Constitution and legal system. Liber Amicorum Vytautas Sinkevičius], *Tvaronavičienė, A. et al.* (eds). Vilnius: MRU, 2021; *Lübbe-Wolff, G.* Wie Verfassungsgerichte arbeiten, 2022, p. 440.

[46] Compilation of Venice Commission opinions, reports and studies on constitutional justice of 14 April 2020, No. CDL-PI(2020)004. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)004-e [last viewed 05.04.2023].

[47] *Drugda, S.* Changes to Selection and Appointment, p. 27.

> *The task of finding the most appropriate candidates was not an easy one, as constitutionalists in Lithuania, in my opinion, were not numerous. […] I addressed six institutions for suggestions: the Supreme Court, the Office of the Prosecutor General, the Ministry of Justice, the Law Faculty of Vilnius University, the Lithuanian Lawyers' Association and the Bar Association. I did the same for the next rotation while searching for candidates, adding the Ombudsperson office to the list.*[48]

There was no obligation enshrined in law that before nominating candidates the nominators must consult external actors; it was only the weight of responsibility on the shoulders of the officials to carefully compose this brand-new institution charged with the power of constitutional control that spurred this.

However, the consolidation of this informal rule in the law and the involvement of additional actors in the process of appointment would create the preconditions for strong support behind the candidates submitted to the Parliament. The propositions of such advisors for the selection of candidates should not be seen as compromising the discretion of nominating officials, but they should ensure that this discretion is exercised after the screening of the constitutional and legal requirements necessary to become a constitutional judge. This would also prevent arguments surrounding the insufficient level of professionalism of submitted candidates.

The entity advising on the nomination of candidates or presenting an indicative list of nominees should be composed of legal professional and academic institutions, all of which should have an interest in the high quality of Constitutional Court judge appointments. It would be overstated and illusionary to request that the advisors be absolutely politically neutral, as every person naturally has their own beliefs and convictions, but participation in political activity should be avoided. In any case, it would be difficult to imagine, for example, that former presidents of the Constitutional Court who are also professors (or professors emeriti) in academia would have any other interest in the nomination of a constitutional judge than to have the most appropriate candidate. They better than anyone else understand the importance of the function to be performed, and would therefore see the sense in helping political institutions with both the recruitment of candidates for selection and the qualified assessment of candidates' merit. The national association of lawyers or even the bar association might suggest some interesting candidacies to one of the most interesting posts in the judiciary. Joint suggestions for nomination by several bodies might also be permissible, so that a candidate could enjoy the backing of more than a single nominator.

In most European countries there is no application system or similar procedure to the office of a constitutional judge. Appointment is purely at the will of the public entities assigned to it. Yet there is still another way for officials to have a list of nominees to choose from – to host an open competition. Candidates meeting the requirements set up in the Constitution might apply for the post themselves by submitting an application and proving their eligibility (as is the case in Croatia or Slovenia). In Lithuania, similar suggestions were expressed in media channels regarding the reform of the existing nomination system, which were initiated by a judge of the Supreme Administrative Court and a high-profile advocate.[49] They essentially argued that

[48] *Juršėnas, Č.* The search and appointment of first constitutional judges. In: Thirty years of constitutional justice: tempore et loco, *Jočienė, D. et al.* (eds). Lietuvos Respublikos Konstitucinis Teismas, 2023, p. 652.

[49] *Meškauskaitė, L., Ragulskytė-Markovienė, R.* Konstitucinio Teismo teisėjų skyrimo džiunglės [The jungle of the appointment of constitutional judges]. Delfi.lt, 27 April 2020. Available: https://m.delfi.lt/ringas/article.php?id=84145757 [last viewed 12.06.2023].

a lawyer with a strong professional reputation but without political support has no chance of becoming a constitutional judge; therefore, an open competition, like for the office of the other high courts, should be implemented. Their argument can be supplemented by the recent reform of the procedure for the selection of international judges, where after a call for candidacies everyone who intends to become a judge in the ECtHR or CJEU might present their documentation fulfilling the criteria.

The general principle of competitive selection by screening committees seeking to ensure a higher level of professionalism and the appropriate moral qualities, greater independence and impartiality was introduced in the Article 148 of the Ukrainian Constitution in 2016. This attempt was welcomed by the Venice Commission,[50] which was invited to express its opinion on the issue. Additionally, the Venice Commission recommended that the results of screening committees be made visible to the public, ranking the candidates who applied as "very suitable, suitable or not suitable". This proposition should be regarded somewhat dubiously for the following reasons, even if the particular context of the Ukrainian judiciary is taken into account.

One might recognise that the system of open competition itself is not free from shortcomings, especially regarding the element of publicity. For greater transparency, all of the persons who submit their candidacies should be known publicly, allowing society to ensure that the official entitled to nominate the candidate chooses the strongest one. The selection should then be made not by political actors, who are often not capable of evaluating the degree of professionalism, but by another screening commission or advisory body. However, the candidates who were not selected, in preserving their reputation, would refrain from entering the competition the next time, because no one would want to be among those who were not chosen. Thereby, the list of persons willing to participate in the selection procedure for the Constitutional Court risks becoming shorter and shorter with each rotation. Hence, even if this method works for the nomination of judges of general jurisdiction, formed on the basis of a judicial career, or for the selection of international judges, it might not work for the selection of constitutional judges.

Thus, certain improvements in the legislation might help to prevent future failures in the renewal of the composition of the Constitutional Court. However, each proposal for a change to the procedure of the selection and appointment of constitutional judges should be assessed against historical experience[51] to fully elucidate the strengths and shortcomings of the process.

Summary

The more independent the constitutional courts are, the more they will be able to protect democracy and human rights when these institutes are attacked by political actors. Hence, the tension between independence and accountability grows as judicial power increases,[52] and the constitutional courts are doubtlessly more powerful courts

[50] Opinion of Venice Commission of 19 December 2022 on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", No. CDL-AD(2022)054. Available: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)054-e [last viewed 06.06.2023].

[51] *Drugda, S.* Changes to Selection and Appointment, p. 32.

[52] *Kelemen, R. D.* Selection, Appointment, and Legitimacy. A political perspective. In: Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts, *Bobek, M.* (ed.). Oxford, 2015, p. 245.

in the state. The mere idea of a "puppet court" is like a *cauchemar* for any democracy governed by the rule of law. Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism.

The search for an ideal model that strengthens the independence of the constitutional judiciary is the focus of many researchers, preoccupied by the recent failed renewals of constitutional courts in Europe. Even if a unique etalon of appointments that fits all countries can barely exist, some proposals for the legal regulation of the selection of constitutional judges might be provided to strengthen and improve their independence.

The importance of having an efficient system of checks and balances should be the main objective when deciding on an optimal model for the renewal of the composition of constitutional courts. A focus on the merit-based selection of the members of constitutional courts, who are supposed to have both competence and integrity, should be the first purpose of the officials or institutions involved in the appointment procedure. Such a focus might be fostered by the common interest of having an independent judge who is good for the court, good for the society and good for all political powers. External actors with appropriate qualities might be mobilised to find those candidacies. A cooling-off period should be introduced for active politicians that fit the criteria necessary to become a constitutional judge. Finally, any legal gaps that allow differing interpretations of existing legislation should be filled by precise, clear, unambiguous provisions, containing time limits for every stage of the appointment procedure and every step to be undertaken if rotation fails.

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Legal Aspects of Membership in a Trade Union: A Case Study of Lithuania

Dr. **Ingrida Mačernytė-Panomariovienė**
Law School, Mykolas Romeris University
Professor at the Institute of Private Law
E-mail: *ingridam@mruni.eu*

Dr. **Rytis Krasauskas**
Law School, Mykolas Romeris University
Professor at the Institute of Private Law
Email: rytis_krasauskas@yahoo.com

The aim of this article is to address the questions of how the principle of freedom of association and the prohibition of discrimination on the basis of trade union membership are understood and to identify legal obstacles for an effective implementation of the right to join trade unions. International, EU regional and Lithuanian national legislation, as well as the case law of the European Court of Human Rights, the Court of Justice of the European Union and Lithuanian courts have been explored to carry out the current study. The results confirm that membership can be interpreted broadly; therefore, members of a trade union may be required to possess certain working and legal capacities, as well as meet other requirements related to the trade union's objectives, which are sometimes unreasonable. Due to possible exceptions, various members may be subject to different collective rights, for example, certain officers may not be permitted to strike, and some may not even be allowed to join associations.

Keywords: trade unions, freedom of association, discrimination, collective bargaining, collective agreements.

Contents

Introduction

Equality is one of the principles of social partnership. Because an employee is considered the weaker party[1] to the employment relations, not only because he is economically dependent on his employer, but also because the employee is legally subordinate to the employer,[2] such inequality can be addressed in two ways: by establishing the entirety of the guarantees and rights granted to employees by regulatory acts, or by enabling them to assert their rights and interests through collective bargaining.

The International Labour Organisation's (hereinafter – ILO) fundamental conventions No. 87 and 98 were designed to implement the principle of "Freedom of Association and Collective Bargaining". As a result, the countries are laid under an increased obligation to implement this principle. What does this principle mean? What are the benefits of being a member of the association? How is the right to collective bargaining understood? In other words, what can an employee gain from negotiations performed through representatives in addition to the benefits already provided by laws or employment contracts? Do these benefits depend on membership status, the outcome of collective bargaining or the contractual level? Are there restrictions or membership requirements?

Workers can be represented by trade unions or elected workers' representatives (i.e. work councils or employee trustees in Lithuania). In this article, the meaning behind the term "employee" is construed in a broad sense, i.e. it denotes not only employees working under an employment contract, but also civil servants, officers and other individuals. However, the question is whether they can all join organisations and ask them to represent their interests, enter into collective agreements and request additional guarantees.

T. Davulis noted that because of their special status and field of activities, trade unions are more privileged in terms of competence and legal safeguards.[3] The trade union, as an organisation, has its own statute, governing bodies, a settlement account, and operates independently of the employer whose employees it represents. According to *Eurofound*, there are different practices regarding the application of the collective agreement and its extension to non-members,[4] which raise concerns about the benefits of such membership.

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[1] This doctrine is also recognised by the courts: "The legislator, taking into account the unequal economic and social status of the employee and the employer, has established certain characteristics related to the examination of labour cases. These characteristics have been established in order to better protect the interests of the employee as an economically and socially weaker party to the employment relations." See Decisions of 28 February 2005 of the Supreme Court of Lithuania in a civil case D. D. v. UAB „V-supis". Available: https://www.teisesgidas.lt/modules/paieska/lat.php?id=27823 [last viewed 04.05.2024]. See: *Nekrošius, I. et al.* Darbo teisė [Labour Law]. Teisinės informacijos centras: 2008, p. 238; *Ambrazevičiūtė, K.* Darbuotojo ir darbdavio interesų derinimas nutraukiant darbo sutartį Lietuvos teismų praktikoje [Balance of Interests Between Employer and Employee Terminating Employment Contract in Lithuanian Case Law]. Jurisprudencija, Vol. 22, issue 1, 2015, pp. 64–83. DOI: 10.13165/JUR-22-29-2-03

[2] *Zekić, N.* The Normative Framework of Labour Law. Law and Method, Vol. 9, issue 2, 2019. p. 8. DOI: 10.5553/REM/.000044

[3] *Davulis, T.* Savarankiškai dirbančių asmenų teisė į kolektyvines derybas ir teisė į streiką [The Right to Collective Bargaining and the Right to Strike of Self-Employed Persons]. In: Darbo teisės iššūkiai besikeičiančiame pasaulyje: For Liber Amicorum et Collegarum professor Genovaitė Dambrauskienė [Darba tiesību izaicinājumi mainīgajā pasaulē: Liber Amicorum et Collegarum profesorei Genovaitei Dambrauskienei], *Mačernytė-Panomariovienė, I.* (ed.). Mykolas Romeris University, 2020, p. 48.

[4] Eurofound (2022). Extension of collective agreements, European Industrial Relations Dictionary, Dublin. Available: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/extension-of-collective-agreements [last viewed 04.05.2024].

The aim of this article is to address the questions of how the principle of freedom of association and the prohibition of discrimination on the basis of trade union membership are understood, and to identify legal obstacles for an effective implementation of the right to join trade unions. In order to accomplish the aforementioned aim, it was sought to determine who may form or join professional associations (including trade unions and other elected workers' representatives) for the protection of social, economic and professional interests, as well as whether all members are subject to the same collective rights. International, European Union regional and Lithuanian national legislation, as well as extensive case law of the European Court of Human Rights, the Court of Justice of the European Union and Lithuanian courts were examined, and the content of randomly selected Lithuanian collective agreements and the statutes of Lithuanian trade unions was then analysed and summarised.

1. Restrictions on the application of freedom of association

According to the provisions set down in Article 6 of ILO Convention 98, a state must guarantee the right to form or join organisations to everyone, including civil servants, with the exception of public servants engaged in the administration of the state.[5] In Lithuania, workers can form trade unions, elect works councils (must be concluded at the initiative of the employer when the average number of employees of the employer is twenty or more[6]) or a trustee (may be elected if the average number of employees of the employer is less than twenty[7]) to defend and represent their rights.[8]

As noted by T. Davulis the Labour Code of the Republic of Lithuania (2017) [hereinafter – LabCod] "has *de lege* extended the application of certain legal regulations governing collective employment relations to include not only employees *stricto sensu* (as specified in Article 32[9]), but also non-employees, i.e. persons working on the basis of legal relations deemed the equivalent of employment relations"[10]. These could include civil servants, officers, military personnel, judges, diplomats, working convicts and members of various commissions. Having examined Lithuanian legislation, it was found that internal service officers,[11] prosecutors,[12] judges,[13] and civil servants[14] are allowed to form or join trade unions or other organisations representing their interests.

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[5] Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Available: https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C098. [last viewed 04.05.2024].

[6] Labour Code of the Republic of Lithuania (14.09.2016), Article 166. Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

[7] Ibid., Article 177.

[8] Ibid., Article 165.

[9] Labour Code of the Republic of Lithuania (14.09.2016). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

[10] *Davulis, T.* Savarankiškai dirbančių, p. 47.

[11] Lietuvos Respublikos vidaus tarnybos statuto pakeitimo įstatymas [Statute of the Internal Service of the Republic of Lithuania] (2023-12-19). Art. 62. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/07a8f3509ff911ee8172b53a675305ab?jfwid=1bw1iwada9 [last viewed 04.05.2024].

[12] Lietuvos Respublikos prokuratūros įstatymas [Law on the Prosecution Service of the Republic of Lithuania] (13.10.1994). Art. 21. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.5956/asr [last viewed 04.05.2024].

[13] Lietuvos Respublikos teismų įstatymas [Law on Courts of the Republic of Lithuania] (31.05.1994). Art. 44(3) and 115. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.5825 [last viewed 04.05.2024].

[14] Lietuvos Respublikos valstybės tarnybos įstatymo Nr. VIII-1316 pakeitimo įstatymas [Republic of Lithuania Civil Service Law no. Act to amend VIII-1316] (08.05.2023). Para. 4 of Art. 17(1)l. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/45f12782ed6711edb649a2a873fdbdfd [last viewed 04.05.2024].

Attention should also be paid only to other entities representing employees – works councils. The case law indicates that the courts have questions in this regard. For example, the position of the Supreme Administrative Court of Lithuania (hereinafter – SACL) stated that "works councils are exclusively representatives of employees (Article 165 of the LabCod) and have no rights in the legal relations of the civil service".[15] Such a position of the SACL is difficult to reconcile with the *ex lege* regulation enshrined in the Law on Civil Service[16] and the Statute of the Internal Service,[17] which enshrines the right of representatives of the works council to participate in the activities of selection and evaluation commissions as observers,[18] and should be adjusted in the light of the case law of this Court.[19]

According to the provisions of Article 5 of ILO Convention 98, the states shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention. Exceptions to the application of Convention's provisions to the police and the armed forces may be created only by laws or other legislation. According to the European Court of Human Rights (hereinafter – ECHR) "police officers must enjoy the main trade union rights, which are the right to negotiate their salaries and working conditions, and freedom of association".[20]

ECHR has accepted that trade-union activity has to be adapted to take into account the specific nature of the armed forces' mission and that even significant restrictions can be imposed on the forms of action and expression of an occupational association and its members. However, such restrictions should not deprive them of the general right of association to defend their occupational and non-pecuniary interests.[21] A blanket ban on forming or joining a trade union by military personnel encroaches on the very essence of their freedom of association and is as such prohibited by the Convention.[22] However, Lithuanian laws strictly prohibit intelligence officers, officers of the Special Investigation Service and servicemen in professional military service from being members of a trade union (forming trade unions, joining them and participating in their activities).

The study showed that there may also be exceptions to restrictions on other persons. For example, the ECHR noted in particular that, like prisoners' other

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[15] Decision of 20 February 2019 of SACL in administrative case R. A., A. D. ir Ž. V. v. The State of Lithuania and the Environmental Project Management Agency of the Ministry of the Environment of the Republic of Lithuania, para. 60.

[16] Lietuvos Respublikos valstybės tarnybos įstatymas [Law on the Civil Service of the Republic of Lithuania] (08.07.1999). Articles 2(2), 25(1). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.84605/asr [last viewed 04.05.2024].

[17] Lietuvos Respublikos vidaus tarnybos statuto pakeitimo įstatymas [Law on the Approval of the Statute of the Internal Service of the Republic of Lithuania] (2023-12-19). Art. 28(3), 35(2), p. 61. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/07a8f3509ff911ee8172b53a675305ab?jfwid=1bw1iwada9 [last viewed 04.05.2024].

[18] Lietuvos Respublikos vidaus tarnybos statuto pakeitimo įstatymas [Statute of the Internal Service of the Republic of Lithuania] (2023-12-19). Articles 28(3), 35(2). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/07a8f3509ff911ee8172b53a675305ab?jfwid=1bw1iwada9 [last viewed 04.05.2024].

[19] *Krasauskas*, R., *Mačernytė Panomariovienė*, I. Social Partnership as a Method of Legal Regulation of Employment Relations: The Case of Lithuania. Baltic Journal of Law & Politics, Vol. 15(2), 2022, p. 19.

[20] European Council of Police Trade Unions (CESP) v. Portugal, 2002; European Council of Trade Unions (CESP) v. France 2016; European Confederation of Police (EuroCOP) v. Ireland, 2013; European Organisation of Military Associations (EUROMIL) v. Ireland, 2017.

[21] Judgment of 2 October 2014 of the Matelly v. France, 2014, § 71. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-10230%22]} [last viewed 04.05.2024].

[22] Ibid.

Convention rights, their right to form and to join trade unions could be restricted for security, in particular, for the prevention of crime and disorder.[23]

It should be noted that according to legal regulation of Lithuania, "self-employed persons are not the same as employees the way they are defined in the Law on Employment".[24] It means that collective relations cannot be applied to them, despite the fact that, as T. Davulis points out, both the Committee on Freedom of Association[25] and the CEACR recognise (subject to certain conditions) that self-employed persons[26] can also fully enjoy freedom of association rights.

According to the Lithuanian Department of Statistics, in 2021, trade union members accounted for only 9.2%, while in 2022 – 8.1 % of the total number of persons employed.[27] According to statistics of the ILO, the number of members is gradually increasing in comparison to the previous year (7.3% in 2017 and 7.4% in 2019). Therefore, it cannot be claimed that the number of members has decreased as a result of amendments in the legal regulation.

The authors pointed out that, at the beginning of 2022, around 83.9% of all enterprises operating in Lithuania had less than 10 employees,[28] making them subject to fewer requirements in the LabCod, including the process of social partnership. Therefore, there was no need for employees in such enterprises to be represented by trade unions.[29] In such a case, the question arises as to whether the legislator can adjust the activities of such enterprises by adding or removing certain powers, imposing requirements on their activities and members (for example, the national-level trade union organisation must consist of at least 15% of all Lithuanian trade union members,[30] etc. For example, the amendment to the Labour Code of the Republic of Lithuania on 1 July 2017 stated that work councils are not entitled to conclude collective agreements at the employer level and to initiate a collective labour dispute on any interest, thereby limiting the respective collective rights of employees. Nevertheless, these rights of employees have not been denied, hence, such legal regulation is not contrary to constitutional imperatives and should be regarded as a legitimate instrument of social engineering that the legislator may use to promote social partnership.[31] In other words, such regulation seeks to strengthen the powers of

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[23] Judgment of 7 December 2021 of the Yakut Republican Trade-Union Federation v. Russia. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-213908%22]} [last viewed 04.05.2024].

[24] *Davulis, T.* Savarankiškai dirbančių, p. 47.fgv

[25] The Committee, therefore, like the Committee of Experts, requests the Government to take the necessary measures, including where necessary, the amendment of the legislation in order to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed on the basis of civil law contracts, enjoy the right to form and join organizations of their own choosing within the meaning of Convention No. 87. In: Reports of the Committee on Freedom of Association – the 363rd Report of the Committee on Freedom of Association, the 313th Session, Geneva, 15–30 March 2012, pp. 292–294. Available: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176577.pdf

[26] *Davulis, T.* Savarankiškai dirbančių, pp. 55.

[27] Data of the Lithuanian Statistics Department. Available: https://osp.stat.gov.lt/statistiniu-rodikliu-analize?indicator=S3R335#/ [last viewed 04.07.2024].

[28] Data of the Lithuanian Statistics Department. Available: https://osp.stat.gov.lt/ [last viewed 04.07.2024].

[29] *Krasauskas*, R., *Mačernytė Panomariovienė*, I. Social Partnership, pp. 13. DOI: https://doi.org/10.2478/bjlp-2022-0008

[30] Labour Code of the Republic of Lithuania (14.09.2016). Article 179(4). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

[31] *Krasauskas, R.* Lietuvos darbo tarybų teisinio statuso ypatumai [Features of the Legal Status of Lithuanian Works Councils]. Jurisprudencija, Vol. 29, issue 2, 2022, p. 229. DOI: https://doi.org/10.13165/JUR-22-29-2-02

trade unions, because collective bargaining, the conclusion of collective agreements and the initiation of collective labour disputes on interests are an exclusive right of trade unions. On the other hand, even though works councils were not very widespread in Lithuania and, according to the experts, agreements signed by them had no material effect on the social and working conditions of employees, the introduction of the new legal regulation might reduce collective bargaining coverage even more.[32] If this conclusion is accepted, the legal regulation of Lithuania will have to deal with the issues of the representation of employees of small companies and the bargaining power of the collective.

In summary, all persons recognised as employees (except for the employees of special investigation services, servicemen in professional military service and intelligence officers) in Lithuania can join and form associations (trade unions and other organisations), regardless of whether they work in the public or private sector.

2. Functions (rights) of trade unions

An analysis of the laws has shown that the collective rights of certain members may vary. The statutes of organisations also describe functions and obligations of trade unions. Trade unions are primarily established to represent their members, promote partnership, assist in defending the violated rights of their members, educate members and submit proposals for the improvement of legal regulation, etc. One of the most significant functions for which trade unions are established and work councils or trustees are elected is the representation of people both individually and collectively.

The effective defence of their members as well as themselves is another important function of trade unions. In addition, they are subject to additional guarantees. According to ILO Convention No. 135 concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, (1971) workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, insofar as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements. In other words, it refers to the benefits and guarantees bestowed upon the workers' representatives themselves (both representatives of trade unions and other individuals elected to represent workers and act in accordance with the exclusive prerogative of trade unions) while they are carrying out their duties. This ensures their legitimacy in the organisational structure. In Lithuania, employee representatives (trade unions, work councils and employee trustees) are also granted the guarantees.[33] According to the ECHR, the aim of the guarantee of labour rights (protection of members implementing employee representation from termination of employment relations) is "to provide those members with adequate freedom and independence from the employer, and to avoid potential abuses of the employer's right to dismiss employees, thereby eliminating trade union leaders who are unfavourable to the employer and who are in conflict with him. Consequently, the rules in question

[32] *Blažienė, I., Kasiliauskas, N. and Guobaitė-Kirslienė, R.* Chapter 18. Lithuania: will new legislation increase the role of social dialogue and collective bargaining? In: Collective bargaining in Europe: towards an endgame. *Müller, T., Vandaele, K. and Waddington, J.* (eds). European Trade Union Institute (ETUI), Vol. II, 2019, p. 387.

[33] Labour Code of the Republic of Lithuania (14.09.2016). Article 165(2). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

provide additional guarantees of rights for the members of elective bodies of trade unions in exchange for the assumed additional risks".[34]

The fact that the guarantee in question is not absolute is relevant. The head of the territorial office of the State Labour Inspectorate shall give consent to terminate an employment contract or change indispensable employment contract terms if the employer presents data confirming that the termination of the employment contract or the amendments to the indispensable employment contract terms are not related to the employee representation activities being carried out by the employee and that the employee is not being discriminated against due to his or her employee representation activities or trade union membership.[35] The case law demonstrates this as well. In one of the cases, the court ruled that a civil servant applying for a specific position had to meet both general and special requirements outlined in the job description, and that while he had the right of priority as a member of the Work Council to serve as a deputy director, his qualifications did not meet to the proposed position, so his dismissal was lawful.[36] The law also granted the employer the right to appeal the decision of the relevant body to refuse to give consent to dismiss a member of the elective body of a trade union operating in the enterprise in accordance with judicial procedure. The court may annul such a decision if the employer proves that the employee has substantially violated his interests.[37]

In summary, it can be concluded that an organisation can select its members by establishing requirements in its business papers, such as the statute. The main requirement for members is to possess working and legal capacities, regardless of whether they have employment relations or not; hence, both employees who have been dismissed or have retired can be members.

Membership grants various additional employment guarantees, most notably the prohibition on dismissing an employee solely on the basis of his membership. The nature of the guarantees (benefits) depends on the membership status, i.e. the governing bodies have more privileges than an ordinary members. Some Lithuanian laws restrict certain collective rights of some members, for example, internal service officers, prosecutors and civil servants in managerial positions do not have the right to strike.

3. Benefits of collective bargaining with respect to the type of collective agreement

When exercising the right to bargain collectively, the Parties undertake: "to promote machinery for voluntary negotiations between employers or employers' organisations and workers' organisations".[38] The European Committee of Social Rights has clarified that if necessary and useful, in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate

[34] Decision of 25 January 2011 of the Supreme Court of Lithuania in civil case UAB "Eiginta" v. the defendant Kaunas County trade unions.

[35] Labour Code of the Republic of Lithuania (14.09.2016). Article 168(3). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

[36] Decision of 15 April 2020 of SACL in administrative case T. R. v. State Consumer Rights Protection Authority.

[37] Decision of 25 January 2011 of the Supreme Court of Lithuania in civil case UAB "Eiginta" v. the defendant Kaunas County trade unions.

[38] European Social Charter (Revised) (3.V.1996) Article 6 Available: https://rm.coe.int/168007cf93 [last viewed 04.05.2024].

and encourage collective agreements; however, whatever the procedures put in place are, collective bargaining should remain free and voluntary.[39] Attention is drawn to the fact that one of the latest directives of the European Union stipulates that member states with collective bargaining coverage of less than 70% of employees[40] must take measures to promote the development of collective bargaining. In Lithuania, the coverage of collective agreements has been increasing since 2015 (from 14.8% in 2019, 21.03% in 2020, to 25% in 2021[41]), but it does not reach 70%. Therefore, Lithuania will have to continue making more efforts to encourage employees to sign collective agreements, especially, as already mentioned, when solving the issue of collective bargaining of employees of small companies.

From the perspective of employees, the principle of freedom of collective bargaining is one of the most important principles because, typically, a single employee lacks the authority to unilaterally dictate or even request or negotiate improved working conditions; however, by concluding a collective agreement, it becomes possible to establish mutually acceptable conditions that would serve as a satisfactory compromise for both the employees and the employer. Based on the aforementioned agreements, the parties involved in the employment relations may independently establish the regulations of labour law through mutual agreement, taking into account the labour market and other economic and social factors.[42] According to Zekić, collective bargaining is one of the two main mechanisms[43] of self-regulation in labour law, aiming to balance the inequality of bargaining power between workers (i.e. the weaker party to the employment relations) and their employer.

Employees, acting through their designated representatives, have the right to negotiate favourable conditions with their employer in terms of social, labour and economic interests. On the other hand, in the public sector all main employment and working conditions, including remuneration issues, are strictly regulated by national legislation; thus there is little room for manoeuvre for collective bargaining.[44]

Each level (company, sectoral, territorial or national) at which the trade union operates has different set of opportunities or the scope of negotiation. Both employees and employers can act as equal social partners, capable of making social compromises among themselves, as well as with the state, preventing social conflicts and maintaining stability of their ties with one another.[45] Higher membership level and corresponding involvement should provide more guarantees and, accordingly, more duties for its members to ensure its activities. It is imperative to emphasize the role of social partnership here because "employers' and employees' organisations must not avoid their responsibilities to the entire society [...] and must seize opportunities to

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[39] *Petrylaitė, D., Jaselionytė, V*. Kolektyvinės darbuotojų teisės Europos socialinėje chartijoje (pataisytoje) ir jų realizavimas Lietuvoje [Employees' collective rights in the European Social Charter (revised) and their implementation in Lithuania]. Verslo ir teisės aktualijos: mokslo darbai. Vol. 5, issue 2, 2010.

[40] Directive of the European Parliament and of the Council on adequate minimum wages in the European Union. Brussels, 28.10.2020 COM(2020) 682 final 2020/0310(COD), Article 4(2). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0682 [last viewed 04.05.2024].

[41] Minimalaus darbo užmokesčio nustatymas: kas keisis ateityje? [Setting the minimum wage: what will change in the future?] (2023-02-22). Available: https://socmin.lrv.lt/lt/naujienos/minimalaus-darbo-uzmokescio-nustatymas-kas-keisis-ateityje/ [last viewed 04.05.2024].

[42] *Petrylaitė, D., Petrylaitė, V.* Socialinės teisės [Social Rights]. In: Krizė, teisės viešpatavimas ir žmogaus teisės [Crisis, the Rule of Law and Human Rights in Lithuania]. Vilnius University, 2015, p. 290.

[43] *Zekić, N.* The Normative Framework of Labour Law, p. 8.

[44] *Blažienė, I., Kasiliauskas, N. and Guobaitė-Kirslienė, R.* Chapter 18, p. 384.

[45] *Petrylaitė, D., Petrylaitė, V.* Socialinės teisės, p. 289.

build the basis for new quality labour relations".[46] As D. Petrylaitė noted more than 15 years ago, "collective labour law faces new challenges because it can no longer be limited to protection of collective rights of employees in a single enterprise or in the field of industrial relations".[47] Accordingly, in the absence of powerful trade unions, negotiating traditions and a culture of collective agreements, a much more effective approach is to develop dialogue on a tripartite basis, where the government or its institution may get involved in the negotiations. Such traditions regarding the minimum monthly wage approved upon recommendation of the Tripartite Council have also established in Lithuania, particularly since the new version of the LabCod entered into force on 1 July 2017.[48]

The peculiarities of the conditions of collective agreements in the public sector are governed by provisions of the LabCod. Collective agreements give autonomy to both employers and trade unions in respect of decisions taken by governments. The parties may reach an agreement without prejudice to the legislation and the guarantees set forth therein. However, similar to several other post-Soviet countries, the LabCod and other legislation strictly regulate the terms and conditions of employment in Lithuania. Lithuanian social partners have not realized the full benefits of collective bargaining.[49] For example, the authors note that because of the current statutory regulation, the Government of the Republic of Lithuania, as a party to collective bargaining at the national level, does not have the real power to negotiate the remuneration of public sector employees.[50] However, as stated in the Labour Code of the Republic of Lithuania, negotiations on a national or sectoral collective agreement must be completed before the Ministry of Finance of the Republic of Lithuania begins to draft the law on the approval of financial indicators of the state budget and municipal budgets for the corresponding year. A conclusion must be obtained from the Ministry of Finance of the Republic of Lithuania regarding a draft sectoral (industry, services, professional) collective agreement drawn up and agreed by the parties.[51] Otherwise, it makes no sense because the additional guarantees (not necessarily only for the salary, but also for additional paid annual leave, educational leave, etc.) are linked to additional funding – budgetary expenditures. For example, under the National Collective Agreement, the Government decided to raise the basic rate of salary by 5 euro in 2023, for a total of 186 euro. However, this increase affected not only the members of the trade unions that participated in the negotiations, but all employees in the public sector because the basic rate of salary is determined by a law passed by the *Seimas* of the Republic of Lithuania, and it is evident that such an increase requires budget funds to be planned in advance. On the other hand, the established basic rate only applies to certain employees in the public sector (such as judges, politicians, researchers, etc.). That is contrary to the minimum monthly wage, which must apply to everyone, regardless of their occupational sector and throughout the entire territory of Lithuania.

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[46] *Petrylaitė, D.* Kolektyviniai darbo santykiai amžių sandūroje: uždaviniai ir galimybės [Collective Labour Relations in the Centuries Crossing: Tasks and Possibilities]. Teisė, Vol. 65, 2007, p. 110.

[47] Ibid.

[48] Lietuvos Respublikos darbo kodeksas [Labour Code of the Republic of Lithuania]. (14.09.2016). Article 141(3). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

[49] *Blažienė, I., Kasiliauskas, N. and Guobaitė-Kirslienė, R.* Chapter 18, p. 399.

[50] *Krasauskas*, R., *Mačernytė Panomariovienė*, *I.* Social Partnership, p. 16.

[51] Labour Code of the Republic of Lithuania (14.09.2016). Article 194(3). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

When analysing national, sectoral or territorial collective agreements, it should be noted that they were concluded after the new version of the LabCod was adopted (i.e. 01-07-2017). The first National Collective Agreement for the year 2020 was concluded on 10 July 2019[52]. It was renewed in subsequent years, since it had a particularly significant impact on the entire public sector because the basic rate of salary was also negotiated.

Upon examination of the content of the National Collective Agreement (from 2023 to 2025), it is apparent that trade union members also receive additional benefits that are inaccessible to employees and civil servants who do not belong to the trade union. The benefits package comprises a provision for 2 extra days of paid annual leave for self-education, 5 extra days for health promotion, and up to 10 days of educational leave for upskilling by paying an employee either the average salary (hereinafter referred to as "the AS") or 50% of the AS for up to 20 days. However, the additional guarantees outlined in the National Collective Agreement for trade union members "were not applicable to those who became trade union members after signing this agreement".[53] Thus, while the authorities "protected themselves from further expenses", they also "passed up an excellent opportunity to strengthen trade unions operating in this sector".[54]

The application of individual provisions of a national (cross-sectoral), territorial or sectoral (industry, services, professional) collective agreement may be compulsorily extended by order of the Minister of Social Security and Labour of the Republic of Lithuania to cover all employers in a certain territory or sector if both parties to the collective agreement submit such a proposal in writing.[55] A decision to extend the scope of application of a collective agreement shall be valid insofar as the collective agreement itself is, unless otherwise specified in the order of the Minister of Social Security and Labour of the Republic of Lithuania. If such a collective agreement is supplemented or amended, application of the amendments or supplements shall not be considered to be compulsorily extended without a separate order of the Minister of Social Security and Labour of the Republic of Lithuania.[56] Unfortunately, there is no order to extend the application of the national collective agreement, and it is also clear from the content of the agreement itself that the application of the additional guarantees is limited to trade union members, i.e. the additional guarantees apply solely to trade union members, who work in private sector companies, rather than all trade union members. It means that, with the exception of the agreed basic rate of salary, the national collective agreement did not benefit employees in the public sector. In this instance, trade unions should be more active at the territorial, sectoral, and

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[52] The National Collective Agreement, 2019. Available: https://socmin.lrv.lt/uploads/socmin/documents/files/veikla/paslaugos/sutartys/kolektyvines/Nacionaline%20kolektyvine%20sutartis2019%2007%2018.pdf. [last viewed 04.05.2024].

[53] *Krasauskas, R.* Lietuvoje sudaromų kolektyvinių sutarčių turinys: teisiniai aspektai [Content of Collective Agreements Concluded in Lithuania: Legal Aspects]. In: Darbo teisės iššūkiai besikeičiančiame pasaulyje: For Liber Amicorum et Collegarum professor Genovaitė Dambrauskienė [Darba tiesību izaicinājumi mainīgajā pasaulē: Liber Amicorum et Collegarum profesorei Genovaitei Dambrauskienei], *Mačernytė-Panomariovienė, I.* (ed.). Mykolas Romeris University, 2020, p. 143.

[54] Ibid.

[55] Lietuvos Respublikos darbo kodeksas [Labour Code of the Republic of Lithuania] (14.09.2016). Article 198(1). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

[56] Lietuvos Respublikos darbo kodeksas [Labour Code of the Republic of Lithuania] (14.09.2016). Article 198(6). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.05.2024].

institutional levels in order to negotiate better conditions. Moreover, the extension of the Collective Agreement of the National Health System (2018) stipulated that the collective agreement between institutions could permit the application of the provisions outlined in the said collective agreement to all employees within institution and that certain clauses of this agreement should be applicable to all employees of the institutions, who had entered into such an agreement, regardless of their membership status. It is also important to highlight an unusual provision, which stipulates that "in the event that a trade union of an institution agrees to extend the application of the provisions outlined in the collective agreement to all employees, the employer may agree to transfer an administration fee of the collective agreement to the trade union for the performance of its activities".[57] The aforementioned regulation imposes a burden on the employer to pay membership fees to the trade union on behalf of those, who have not yet joined a trade union but seek to acquire additional guarantees that have been negotiated by a trade union.

One of the most important features of the lowest-level collective agreements is that they can agree on specific economic and other occupational conditions for the employees, which typically apply only to trade union members, who have entered into a collective agreement and are binding on the employer. Although collective bargaining coverage is generally low, collective bargaining and collective agreements are usually in place in companies with unionized workers.[58] On the other hand, although the LabCode provides for an exception allowing for the application of collective agreement provisions to trade union members, who have not concluded such an agreement, subject to certain conditions, this does not imply that such application may alter the provisions of the collective agreement negotiated by the parties to the social partnership, or that the negotiated differentiated benefits can be applied to all employees rather than a clearly defined group of entities. The contrary interpretation would deny the principle of freedom of collective bargaining.[59]

The subject matter of negotiations between the employees and their employer can be revealed by analysing the content of these agreements. It can be noted that the content of the agreements has slightly changed compared to the previous regulation of the LabCode – the initial agreements were primarily composed of provisions that were transferred from the legislation; meanwhile, the current agreements are regularly supplemented by new, additional guarantees (benefits) compared to the existing legal regulation. Collective agreements concluded by employers in the private sector, with certain exceptions, contain far more reference conditions than those concluded by employers in the public sector. Collective agreements[60] often contain provisions aimed at improving working conditions for employees, such as employee promotion, extended periods of leave, leave for the improvement of qualifications, expenses of educational leave; additional rest days, and occupational health and safety (for example, insurance coverage, vaccination paid by employer, reimbursement for expenses related to the treatment of disabled children of employees), shorter working

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[57] Lietuvos Respublikos darbo kodeksas [Labour Code of the Republic of Lithuania] (14.09.2016). Article 167(2).

[58] *Blažienė, I., Kasiliauskas, N. and Guobaitė-Kirslienė, R.* Chapter 18, p. 386

[59] Decision of 16 December 2020 Supreme Court of Lithuania of in civil case joint stock company "Lietuvos Geležinkeliai" v. T. Ž.. Available: https://www-infolex-lt.skaitykla.mruni.eu/tp/1953588 [last viewed 04.07.2024].

[60] Lithuanian Register of Collective Agreements. Available: https://socmin.lrv.lt/lt/paslaugos/administracines-paslaugos/kolektyviniu-sutarciu-registras-ir-kolektyviniu-sutarciu-registravimo-tvarka?lang=lt [last viewed 04.07.2024].

hours, teleworking arrangements, etc.[61] Particular attention should be paid to issues of remuneration[62]. It should be noted that the LabCode[63] does not provide an obligation for the employer to conduct collective negotiations regarding the wage system in the workplace, when there is no collective agreement in the company, institution or organization, even if a trade union is elected in the organization. Information and consultation procedures must be carried out before the payment system is approved or changed. This provision does not meet the expectations of the new Directive.[64] Therefore, the provisions of the LabCode in Lithuania will have to be revised to oblige the employer, in the absence of a collective agreement in the enterprise, institution or organisation, to adopt the pay system by collective bargaining with all workers' representatives, unless the employees has delegated this right to a higher level trade union.

Negotiations must be not only beneficial to trade union members but also appealing to employers. Similarly, responsibilities that pertain to trade unions and are agreed upon through negotiation with employers can be found in national or sectoral collective agreements, for example, regarding the education of their members, the establishment of measures to prevent problematic situations in the workplace, such as the right to disconnect, psychological violence at work, coordination of work and family responsibilities, aspects of gender equality, etc.[65] Collective agreements concluded at the employer level operating within the private sector contain "far more reference conditions meeting the employer's interests".[66] Employers frequently include provisions in such agreements that are beneficial for them, such as limitations on overtime hours not exceeding 260 hours per year,[67] which is more than the maximum of 180 hours per year stipulated in the LabCod; shorter probationary period in certain cases;[68] a contractual clause regarding learning expenses[69] (for example, expenses

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[61] *Krasauskas, R.* Lietuvoje sudaromų, pp. 149–153

[62] Ibid., p. 155

[63] The labour payment system at the workplace or in the employer's company, institution, or organization is determined by a collective agreement. In the absence of a collective agreement establishing this, in workplaces where the average number of employees is twenty or more, the employer must approve the payment systems and make them available for all employees to familiarize themselves with. See: Labour Code of the Republic of Lithuania (14.09.2016). Article 140(3). Available: https://www.e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89 [last viewed 04.07.2024].

[64] Directive of the European Parliament and of the Council on adequate minimum wages in the European Union. Brussels, 28.10.2020 COM(2020) 682 final 2020/0310(COD), Article 4(2). Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0682[last viewed 04.07.2024].

[65] The National Collective Agreement, 2022. Available: https://socmin.lrv.lt/uploads/socmin/documents/files/veikla/paslaugos/sutartys/kolektyvines/nacional%20ks2022%2010%2013.pdf]; and the National Collective Agreement, 2023. Available: https://socmin.lrv.lt/uploads/socmin/documents/files/veikla/paslaugos/sutartys/kolektyvines/nacional%20ks%20su%20parasais2023%2010%2020.pdf [last viewed 04.05.2024]

[66] *Krasauskas, R.* Lietuvoje sudaromų, p. 155

[67] Collective Agreement of Working Belonging to the Trade Union of Lithuanian Furniture and Woodworking Companies, 2019, (15-03-2019). Reg. No. PV3-277. Available: https://socmin.lrv.lt/uploads/socmin/documents/files/veikla/paslaugos/sutartys/kolektyvines/Lietuvos%20mediena%20ks2019%2004%2010.pdf [last viewed 04.05.2024].

[68] Collective agreement of Užvenčio Šatrijos Raganos gymnasium of Kelmė district, Reg. No. PV3-670 (2023). Available: https://socmin.lrv.lt/uploads/socmin/documents/files/veikla/paslaugos/sutartys/kolektyvines/Kelmes%20Uzvencio%20gimanz%20ks2023%2001%2010.pdf [last viewed 04.05.2024].

[69] Collective agreements No. PV3-670 (2023), PV3-217 (2019), PV3-749 (2023) and PV3-187 (2019). Available: https://socmin.lrv.lt/lt/paslaugos/administracines-paslaugos/kolektyviniu-sutarciu-registras-ir-kolektyviniu-sutarciu-registravimo-tvarka/?lang=lt [last viewed 04.05.2024].

incurred during business trips are not considered reimbursable;[70] expenses that were necessary for the performance of job functions are not included; expenses are calculated only for the previous year and reimbursed in equal instalments but for no longer than six months after agreement on their amount,[71] etc.

The benefits for both employees and employers are apparent. Notwithstanding strong ideological and dogmatic foundations, certain aspects of collective labour rights cause or may cause tension in modern legislation or case law.[72] One of the examples is Supreme Court of Lithuania in its ruling of 26 August 2021, where the Supreme Court of Lithuania recognized, that the discrimination on the basis of trade union membership is occurred in such a situation in which a more favourable procedure for granting and calculating leave was approved, by the order of the a director, for non-union members than the one established in the Collective Agreement in force for employees, who are were members of trade union.[73] However, there were instances in which the identical problem was solved differently. The judicial panel ruled that the courts acted reasonably in not classifying the provisions outlined in subparagraph 4.9.7 of the collective agreement, providing an added value for members of trade unions, who have signed the collective agreement, allowing them to receive an allowance on the occasion of their anniversary, as a violation of the principle of equal treatment, discriminating against the defendant, who was not a member of the trade unions that signed the collective agreement, in terms of salary.[74]

In conclusion, the essence of collective bargaining and representation of the collective interest of employees lies in the fact that a group of entities possesses significantly greater bargaining power than a single individual, thereby increasing the likelihood of resolving issues that affect them with their employer.

There is also a legal basis for engaging in higher-level negotiations in Lithuania. Members can benefit from them but they must use them wisely in their interests and rights. Providing benefits to everyone (not only to trade union members) burdens the entire society because it is critical to understand that "more guarantees mean more duties". The outcomes of negotiations are visible, albeit limited in number, but over time a culture, practice and tradition of negotiations will develop, thereby strengthening partnership and improving mutual benefit.

Summary

Workers in Lithuania can be represented by trade unions or elected workers' representatives (such as work councils or employee trustees). In Lithuania, trade unions are formed in accordance with the principle of freedom of association, which is well-regulated at international, regional, and national levels. Employees have the right to join or refrain from joining trade unions, withdraw from them, join one or several unions, form an organization by making a voluntary decision,

[70] Collective agreements No. PV3-670 (2023) and PV3-217(2019)). Available: https://socmin.lrv.lt/lt/paslaugos/administracines-paslaugos/kolektyviniu-sutarciu-registras-ir-kolektyviniu-sutarciu-registravimo-tvarka/?lang=lt [last viewed 04.05.2024].

[71] Collective agreement of Užvenčio Šatrijos Raganos gymnasium of Kelmė district, Reg. No. PV3-670 (2023). Available: https://socmin.lrv.lt/uploads/socmin/documents/files/veikla/paslaugos/sutartys/kolektyvines/Kelmes%20Uzvencio%20gimanz%20ks2023%2001%2010.pdf [last viewed 04.05.2024].

[72] *Davulis, T.* Savarankiškai dirbančių, p. 41.

[73] Decision of 26 August 2021 of the Supreme Court of Lithuania of in civil case The trade union of employees of the public institution "Ambulance Station" v. Public institution "Ambulance Station".

[74] Decision of 16 December 2020 Supreme Court of Lithuania of in civil case joint stock company "Lietuvos Geležinkeliai" v. T. Ž.

receive additional benefits or rights, and choose to be protected by the trade union or not. Associations cannot be restricted by legal regulations imposed by the state or employers. Lithuanian laws strictly prohibit intelligence officers, officers of the Special Investigation Service, and soldiers performing professional military service from establishing, joining, or participating in trade unions, although this is contrary to international conventions.

On the other hand, Lithuanian courts have interpreted the law to mean that civil servants cannot elect other representative bodies, such as work councils, which necessitates clearer legal regulations.

The study revealed that the benefits provided by trade union membership depend on membership status, the type of collective agreement, and the level of negotiation. The nature of the benefits also depends on membership status, with governing bodies having more privileges than ordinary members. Additionally, the timing of joining a trade union affects the benefits; under the national contract for the public sector, employees who join after a collective agreement is made do not receive its benefits. Certain Lithuanian laws also restrict collective rights for some members, such as internal service officers, prosecutors, and civil servants in managerial positions, who do not have the right to strike.

A lack of clear legal frameworks restricts self-employed workers from forming associations in Lithuania.

The main benefit of trade union membership is representation, which ranges from representation to the employer and third parties, advocacy in labour dispute commissions or courts, to negotiating and supervising collective agreements. The essence of collective bargaining and representation lies in the greater bargaining power of a group compared to an individual, thereby increasing the likelihood of resolving issues with the employer. Therefore, there remains a problem for employees regarding collective bargaining who work in small companies, and there are mostly such companies in the Lithuanian market.

The content of collective agreements in Lithuania shows some advancement in benefits acquired through mutual negotiations between employees and employers, though it remains insufficient to make membership broadly appealing.

While the State's efforts to promote trade union activity through legal regulation are commendable, they should not exclude other opportunities for workers to represent and defend their rights within the broader concept of freedom of association. In particular, in order to implement the new directive on an adequate minimum wage, it is necessary to promote collective bargaining up to 70%. Therefore, the provisions of the Lithuanian Labour Code will have to be revised in order to oblige the employer to approve the remuneration system by collective bargaining with all employee representatives, unless the employees have ceded this right to a higher-level trade union.

The analysis of Lithuanian cases shows that workers are often discriminated against based on trade union membership, with employers avoiding giving union members more annual leave, including them in higher-paid activities, and refusing to extend collective bargaining guarantees to all workers, even though the law allows this.

Applying collective agreements at national or sectoral levels in the public sector to non-unionized workers is legally possible, but restrictions on applying such agreements to workers who unionize after the agreement is concluded are questionable. This, in the authors' view, violates workers' rights to the benefits provided by membership.

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A Turning Point in the Understanding of the Legal Consequences of the Conclusion of a Preliminary Contract in Latvian Case Law

Dr. iur. **Erlens Kalniņš**
Faculty of Law, University of Latvia
Docent at the Department of Civil Law Sciences
E-mail: *erlens.kalnins@lu.lv*

Mg. iur. **Germans Pavlovskis,** *LL. M.* (Tübingen)
Faculty of Law, University of Latvia
Doctoral student at the Department of Civil Law Sciences
E-mail: *germans.pavlovskis@gmail.com*

On 5 July 2023, the Supreme Court (Senate) delivered its judgement in case No. SKC-19/2023, departing from the current case law regarding the legal understanding and legal consequences of a preliminary contract, regulated in Section 1541 of the Civil Law, recognising that both the right to claim conclusion of the main contract and the right to claim compensation for losses could arise from the preliminary contract, as well as providing other important findings, *inter alia*, regarding the possibility for the claimant to join the claim for conclusion of the main contract in one with the claim for performance of the main contract. This article provides detailed insight into this judgement by the Senate, at the same time referring to the findings made in the current case law and legal literature, as well as pointing to possible future challenges.

Keywords: preliminary contract, case law, right to claim real performance, "one step theory".

Contents

Introduction

On 5 July 2023, the Senate, in expanded composition, delivered its judgement in case No. SKC-19/2023,[1] by which it departed from its existing practice regarding the legal understanding and legal consequences of the preliminary contract, regulated in Section 1541[2] of the Civil Law[3] (hereafter – CL), recognising that both the right to claim conclusion of the main contract and the right to claim compensation for losses could arise from the preliminary contract, as well as providing other important findings, *inter alia,* regarding the claimant's right to join the claim for performance of the preliminary contract (i.e., conclusion of the main contract or recognising it as being entered into) in one with the claim for performance of the main contract (i.e., collection of the contracted purchase price).

This Senate's judgment marks departure from the finding, cultivated and maintained over a long period by Professor Kalvis Torgāns (1939–2021), that only the right of contracting parties to claim compensation for losses or, also, only expenditure, followed from the concluded preliminary contract, as the preliminary contract, allegedly, is only "a gentlemen's agreement". The existence of the right to claim conclusion of the future or the main contract, in turn, would contradict the principle of private autonomy.[4]

The Senate, referring in its reasoning to the sources of Baltic private law, the Senate's inter-war case law, findings made in the Pandect law doctrine and the present-day legal doctrines of Switzerland, Austria and Germany, as well as findings from the case law,[5] has applied not only the historical method for construing legal provisions (thereby confirming continuation of the Latvian civil law) but also the comparative method, thus, attesting also in practice to the kinship of the Latvian civil law with the Swiss, Austrian and German law and its belonging to the Germanic system of law.

To clearly highlight the significance of the Senate's judgement, the first part of the article focuses on the understanding of the preliminary contract before of the said judgement was pronounced. The second part provides a concise account of the findings, included in the Senate's judgement. The third part, in turn, points to possible future challenges related to further development of the institution of preliminary contract.

1. Understanding of the preliminary contract after restoration of Latvia's independence

In 1998, Prof. K. Torgāns noted: "An agreement between parties regarding another contract to be entered into in the future is called a preliminary contract. A preliminary contract becomes effective only after the parties have reached agreement on essential

[1] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819). Available: https://www.at.gov.lv/downloadlawfile/9239 [last viewed 11.03.2024].

[2] CL Section 1541 stipulates: "A preliminary contract with the purpose of entering into a future contract shall take effect as soon as the essential elements of the contract have been established by it."

[3] Civillikums [Civil Law] (28.01.1937). Available: https://likumi.lv/ta/en/en/id/225418 [last viewed 11.03.2024].

[4] See: *Torgāns, K.* Komentārs 1541. pantam [Commentary on Section 1541]. In: Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības (1401.–2400. p.). Autoru kolektīvs prof. K. Torgāna vispārīgā zinātniskā redakcijā [Commentaries on the Civil Law of the Republic of Latvia: Part Four. Law of Obligations (Sect. 1401–2400). Team of authors, general scientific editing by Prof. K. Torgāns]. Rīga: Mans Īpašums, 1998, p. 97.

[5] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), paras 10.3.,10.4., 11.5.

elements of the future contract. A preliminary contract does not create rights, e.g., to claim the property, regarding which and the price of which agreement has been reached in the preliminary contract, but only to claim conclusion of a contract regarding this property and for the said price. Pursuant to this, liability for non-compliance with the preliminary contract may set in not for the failure to transfer the property but for not concluding the contract, and this liability may be manifested as compensation for losses."[6]

Prof. K. Torgāns continued to maintain this finding, supplementing it with the following: "A preliminary contract is a contract regarding conclusion of another contract in the future. Sometimes, proceeding towards the conclusion of a contract is gradual, first of all reaching agreement on some provisions of the contract, leaving the agreement on others for later, hoping that, finally, it will be possible to align all the rules, important for the contracting parties. A memorandum of understanding, negotiations agreement or a preliminary contract can serve this purpose. [...] A preliminary contract is binding in the sense that one of the parties has the right to claim continuation of negotiations and, as recognised in case law, conclusion of the said contract, but if the other party is avoiding it – compensation for the expenditures incurred. There are no grounds to speak, instead of expenditures, about compensation for losses because this concept comprises also lost profits, and this could be claimed also in the case of non-performance of a concluded purchase or other type of contract. A preliminary contract does not give the right to claim mandatory conclusion of the intended contract, that would be contrary to the principle of contracting parties' autonomy."[7]

I.e., although a preliminary contract is a contract, in the opinion of Prof. K. Torgāns, a preliminary contract, nonetheless, is not a genuine contract because its performance cannot be claimed. This understanding conforms with the one that was quite prevalent even in mid-19th century and, pursuant to which, a preliminary contract was deemed to be a stage or a phase in the conclusion of the main contract,[8] from which, logically, followed that none of the contracting parties could have the right to claim performance of the preliminary contract, i.e., entering into the main contract.

On the basis of the said findings by Prof. K. Torgāns, in the period from 2017 to 2019, the following findings were reiterated in the Senate's judgements. Firstly, the wording, included in CL Section 1541, "established essential elements of the contract", is compared to the sufficient grounds for entering into contract, referred to in CL Section 1533,[9] thus, a preliminary contract includes these essential elements, however, the will to bind immediately is absent. Secondly, if a preliminary purchase contract has been concluded, it cannot be the grounds for the right to claim transfer of the purchase object or payment of the purchase price; however, one of the parties has the right to claim continuation of negotiations and entering into the said contract but,

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[6] *Torgāns, K.* Komentārs 1541. pantam, pp. 96–97.

[7] *Torgāns, K.* Saistību tiesības. I daļa. Mācību grāmata [Law of Obligations. Part I. Textbook]. Rīga: Tiesu namu aģentūra, 2006, pp. 55–56; *Torgāns, K.* Saistību tiesības. Mācību grāmata [Law of Obligations. Textbook]. Rīga: Tiesu namu aģentūra, 2014, p. 56; *Torgāns, K.* Saistību tiesības [Law of Obligations]. 2nd revised edition. Rīga: Tiesu namu aģentūra, 2018, p. 54.

[8] *Savigny, F. C. von.* Das Obligationenrecht als Theil des heutigen Römischen Rechts [The Law of Obligations as Part of today's Roman Law]. Bd. II. Berlin: Veit und Comp., 1853, p. 245.

[9] CL Section 1533 stipulates: "A contract shall be considered to be finally entered into only when the contracting parties have reached complete agreement regarding the essential elements (Section 1470) with the purpose of mutually binding each other."

if the other party avoids it, – claim compensation for the expenditures incurred. It has been noted in some of the Senate's judgements that the preliminary contract, although not giving rise to right, e.g., to claim the property, regarding which and the price of which agreement has been reached, nevertheless, gives the right to claim entering into contract on this property and for the said price. Liability for the non-performance of a preliminary contract may not set in for not transferring the property but may set in for not concluding the contract, and this liability can be manifested as compensation for losses. Thirdly, entering into a preliminary contract does not grant the right to claim mandatory conclusion of the intended contract, as it would be contrary to the principle of the autonomy of contracting parties or the principle of freedom of contracts. It is noted, simultaneously, that, in view of the differences existing between a purchase contract and a preliminary purchase contract, the buyer's right to claim transfer of property follows from the purchase contract, whereas the right to claim conclusion of the main contract – from the preliminary contract.[10]

The Senate has concluded, at least in one judgement, that if the contracting parties had concluded a preliminary purchase contract, the right to claim compensation for the loss of expected profit (in the amount of purchase price set) from a third person, due to the unlawful actions of which the main contract had not been concluded, did not follow from such a contract and CL provisions on compensation for losses because, in difference to a purchase contract, a preliminary purchase contract does not give the right to claim payment of the purchase price.[11]

At the same time, it must be noted that different findings had been expressed in the case law at the turn of the century. Thus, in 2007, the Senate left unchanged the appellate court's judgement, by which the appellate court, partly satisfying the claimant's claim, on the basis of the preliminary purchase contract concluded by the parties, imposed the obligation upon the defendant to conclude a contract regarding the purchase of immovable property by a certain date.[12] In 2004, the Chamber of Civil Cases of the Supreme Court, in turn, concluded that an obligation that followed from a preliminary contract could be reinforced by earnest money.[13] It follows from CL Section 1725,[14] in systemic conjunction with CL Section 1728,[15] that by giving earnest money, it is possible to secure not only the performance of a final contract entered into but also the performance of a preliminary contract, therefore a preliminary contract is to be deemed a final contract entered into, in the meaning of CL Section 1725. The Senate has reaffirmed this finding also in 2013, pointing, in addition, to the right

[10] *Kalniņš, E.* Priekšlīguma saistošais spēks [Binding Force of the Preliminary Contract]. 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]. Riga: LU Akadēmiskais apgāds, 2020, p. 220.

[11] The Senate's Judgement of 14.09.2018. in case No. SKC-245/2018 (C20186514), para. 15.2. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/362368.pdf [last viewed 11.03.2024].

[12] The Senate's Judgement of 11.04.2007. in case No. SKC-261/2007 (C04344704), reasoned part. Available: https://www.at.gov.lv/downloadlawfile/726 [last viewed 11.03.2024].

[13] Judgement by the Chamber of Civil Cases of the Supreme Court of 14.03.2002. in case No. PAC-98. In: *Tihonovs, V.* Tiesu prakse civillietās [Case Law in Civil Matters]. Rīga: Tiesu namu aģentūra, 2004, pp. 56–64.

[14] CL Section 1725 stipulates: "Earnest money shall mean that which is given by one party to the other party at the time of entering into a contract not only as proof that a contract has been entered into, but also to secure its performance."

[15] CL Section 1728 stipulates: "Upon earnest money being given a contract shall be considered to be entered into if otherwise it complies with all requirements of law, and either party may demand its performance."

of a contracting party to claim compensation for such losses that they have incurred because the other contracting party, contrary to the provisions of the preliminary contract (unlawfully), has refused to enter into a purchase contract.[16] Moreover, the Senate has recognised that the obligation, which follows from the preliminary contract, may be reinforced also by contractual penalties, the payment of which can be claimed if the main contract is not concluded.[17] At the same time, it has been recognised that, although the contracting party has the right to claim payment of contractual penalties, they do not have the right to claim imposing the obligation upon the other contracting party to take certain actions, without the performance of which the conclusion of the main contract is impossible.[18]

Although the abovementioned Senate's findings are quite contradictory, they lead to several conclusions. First, although a preliminary contract is a contract that contains the essential elements of the main contract it, nevertheless, is not a "genuine" contract of the obligations law. Secondly, although a preliminary contract contains and it must contain the essential elements of the main contract, a preliminary contract cannot be equated to it. Thirdly, legal remedies that can be used in the case where the preliminary contract is not performed voluntarily are limited, although, on the basis of the Senate's judgements examined above, unequivocal conclusion as to what the legal consequences of a preliminary contract are cannot be reached, i.e., whether the right to claim conclusion of the main contract, compensation of losses or only compensation of expenditures follows from a preliminary contract.

2. The Senate's judgement of 5 July 2023 in case No. SKC-19/2023

2.1. Description of a preliminary contract

The Senate, analysing the content of CL Section 1541, has recognised, first and foremost, that a preliminary contract is mutual expression of the will, based on agreement (concerted) between the contracting parties to enter into another contract in the future or the so-called main contract. A preliminary contract acquires binding effect if the essential elements of the main contract, to be concluded in the future, have been determined in it or can be determined pursuant to it, expect for the case where, in establishing the essential elements of the main contract to be entered into in future, one or both contracting parties have reserved the right to negotiate certain ancillary provisions, in this case, the agreement can be recognised as being only the so-called "preliminary discussion", in the meaning of CL Section 1534.[19] Obligation to enter into a specific main contract, with specific content, is established by a preliminary contract.[20] In other words, a preliminary contract is a genuine contract of obligations law, by which one or both parties assume the obligation, upon

[16] The Senate's Judgement of 28.02.2013. in case No. SKC-294/2013 (C30522209), para. 9 (unpublished).

[17] The Senate's Judgement of 11.05.2011. in case No. SKC-123/2011 (C04284905), paras 21.3–21.5 (unpublished).

[18] The Senate's Judgement of 11.05.2011. in case No. SKC-123/2011 (C04284905), para. 20.3.

[19] CL Section 1534 stipulates: "The agreement which has been made between the contracting parties regarding essential elements of the contract, if they have directly reserved the right to still negotiate certain ancillary provisions, shall be regarded only as a preliminary discussion. But when they have not reserved such a right concerning ancillary provisions, the contract shall be regarded as finally entered into, unless it indicates opposite intention, and in such case the natural elements (Section 1471) of the transaction shall be settled in accordance with the provisions of the law concerning the nature of this transaction, but the incidental elements (Section 1472) – pursuant to the discretion of the court."

[20] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), paras 10.3.1, 10.3.6, 10.5.

the setting in of certain preconditions, to enter into another contract of obligations law or the main contract, having specific content. Although the preliminary contract does not create an immediate obligation to perform the main contract, to be entered into in future, the preliminary contract, nevertheless, establishes the obligation to enter into this main contract.[21]

It follows from the above that a preliminary contract is a genuine unilateral or bilateral (mutual) contract of obligations law, from which the right to claim conclusion of the main contract arises. At the same time, it has been recognised that a preliminary contract, although being a contract of obligations law, has a different subject-matter than the main contract. This is in full conformity with CL Section 1412,[22] which provides most extensive definition of the subject-matter of a contract. Thus, if a preliminary contract is directed at, e.g., conclusion of an alienation contract then the subject-matter of such a preliminary contract is taking certain actions (entering into the main contract), and the transfer of the title to property to the acquirer is the subject-matter of the alienation contract as the main contract. Hence, the Senate has recognised that the subject-matter of a preliminary contract that is directed at entering into a consensual contract is the commitment of one or both contracting parties to make mutual and concerted expressions of will with predetermined content, thus concluding the main contract.

2.2. Private autonomy

It is essential that the Senate has attributed[23] the preliminary contract regulated by CL Section 1541 to the legal consequences set out in CL Section 1587[24] and Section 1590.[25] By this, the Senate, firstly has logically recognised that the principle *pacta sunt servanda*, enshrined in CL Section 1587, applies not only to the types of contracts regulated by law itself but also to such contracts or acts, the basic content of which is not regulated by law and for the protection of the rights derived from these, historically, the principle *pacta sunt servanda* was created.[26] In providing explanation of private autonomy and the principle of freedom of contracts, the Senate, essentially, has recognised that the obligation assumed by a preliminary contract, instead of imposing inadmissible restriction upon private autonomy of contracting parties, creates such manifestation of private autonomy, in the framework of which the contracting parties have limited their freedom of contracts, by assuming contractually the obligation to enter into the main contract in the future.[27] Secondly,

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[21] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.3.3.

[22] CL Section 1412 stipulates: "The subject-matter of a lawful transaction may be not only an action, but also an inaction, or also an action the purpose of which is to establish or to transfer a property right, as well as an action with some other purpose."

[23] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.4.1.

[24] CL Section 1587 stipulates: "A contract legally entered into shall impose on a contracting party a duty to perform that which was promised, and neither the exceptional difficulty of the transaction, nor difficulties in performance arising later, shall give the right to one party to withdraw from the contract, even if the other party is compensated for losses."

[25] CL Section 1590 stipulates: "Each party shall have the right of claim for the performance of the contract by the other party [...]."

[26] *Pavlovskis, G. Pacta sunt servanda* principa attīstība romiešu tiesībās [Development of *Pacta Sunt Servanda* Principle in Roman Law]. In: Tiesību ierobežojumu pieļaujamība un attaisnojamība demokrātiskā tiesiskā valstī. Latvijas Universitātes 81. starptautiskās zinātniskās konferences tiesību zinātnes rakstu krājums [Admissibility and Justifiability of Restrictions of Rights in a Democratic State Governed by the Rule of Law. Article collection in legal science, the 81st international scientific conference of the University of Latvia]. Rīga: LU Akadēmiskais apgāds, 2023, pp. 51–59.

[27] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.4.5.

the Senate has clearly recognised that, also in the case of a preliminary contract, the primary legal remedy is claiming performance of the preliminary contract, i.e., entering into the main contract, which was recognised in the law of the Baltic Provinces already at the end of the 19th century.[28]

2.3. Claims and joining thereof in one action

As concluded by the Senate, a party to a preliminary contract is entitled to claim the fulfilment of the promise by the other party, i.e., concluding the main contract with the content stipulated in the preliminary contract, hence, the appropriate claim would be to impose upon the defendant the obligation to conclude the main contract, by making appropriate expression of will. However, it might be difficult to enforce a judgement that imposes an obligation upon the defendant to take such an action as the conclusion of a contract. Hence, in an action for performance of a preliminary contract, the claim requesting recognising the main contract as being entered into would be a more effective and appropriate, as the result of which such a judgement replaces the consent, unlawfully withheld by the defendant, to entering into the main contract, and drawing up of another deed.[29]

In this regard, it should be added that, although the Civil Procedure Law[30] regulation permits imposing an obligation, by a court's judgement, upon the defendant to enter into the main contract, this action – expression of one's will – can be taken only by the defendant personally, and they are under the threat of public law liability in the case of non-compliance (see Section 197 (1) and Section 620 (4) of the Civil Procedure Law). Therefore, bringing the claim of recognition and a court's judgement, by which the main contract is recognised as being entered into, from the practical perspective, represents more appropriate and, also, more effective legal solutions.[31]

As regards the right to claim compensation for losses, the Senate has noted that a party to the preliminary contract may have the right to claim also a compensation for losses that they have incurred because the main contract had not been concluded or its conclusion had been delayed. Moreover, claiming compensation for losses does not exclude the possibility to claim also a conclusion of the main contract (recognising it as being entered into), if only it is possible to conclude the main contract. Thus, the claim regarding conclusion of the main contract (recognising it as being entered into) and the claim regarding collection of compensation for losses may be both alternative and compatible legal remedies.[32]

Finally, the Senate has turned to a matter, very significant from the practical perspective, of whether the claimant may join the claim regarding performance of the preliminary contract (i.e., recognising the main contract as being entered into) into one with the claim regarding performance of the main contract (e.g., regarding collection of the contractual purchase price). Taking into account considerations of procedural economy, as well as the fact that the parties to the preliminary contract, in entering into the contract, wish not only to conclude the preliminary contract (*per se*) but also to achieve, finally, the performance of the main contract, the Senate

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[28] *Erdmann, C.* System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland [System of Private Law of the Baltic Provinces of Livonia, Estonia and Curland]. Bd. IV. Obligationenrecht [Law of Obligations]. Riga: N. Kymmel's Verlag, 1894, p. 125.

[29] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.4.2.

[30] Civilprocesa likums [Civil Procedure Law] (14.10.1998). Available: https://likumi.lv/ta/en/en/id/50500 [last viewed 11.03.2024].

[31] *Kalniņš, E.* Priekšlīguma saistošais spēks, p. 227.

[32] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), para. 10.5.

has given an affirmative answer to the question referred to above. Namely, by accepting the legal findings of the Swiss[33] and German[34] law, the Senate has joined the so-called "one step theory" and recognised that both the respective claims may be joined in one if the actual and legal circumstances of the case allow it, and, in this respect, at least the following pre-conditions should be met: 1) both claims should be litigated between the same parties (the main contract should be concluded between the same parties that have to perform the contract), and 2) it should be feasible to fulfil the obligation that follows from the main contract as soon as the main contract is concluded. Moreover, no other obstacles to joining the claims may be present in the circumstances of the particular case.[35]

3. Future challenges

3.1. Variations of preliminary contracts and related particularities

As the judgement, examined above, reveals, the Senate has provided a sufficiently detailed interpretation, complying with the contemporary requirements of civil law circulation for the preliminary contract, regulated in CL Section 1541, and its legal consequences.

However, CL Section 1541 is not the sole provision that regulates the preliminary contract. Thus, CL Part on Obligations Law includes provisions that regulate a preliminary contract for a loan contract (CL Section 1935) and a preliminary contract for bailment (the second sentence in CL Section 1970), and these legal provisions should be considered, *vis-à-vis* CL Section 1541, *lex specialis*. A preliminary contract as an institution of law is not totally unknown also in other Parts of the Civil Law. Thus, e.g., a betrothal, regulated in CL Sections 26–31, can be considered as being a preliminary contract *sui generis* (because it is aimed at concluding marriage in the future),[36] as well as the contract, regulated in the second sentence of CL Section 640, which includes "a promise to appoint someone as his or her heir in the future" (a preliminary contract to an inheritance contract).

The said legal provisions have not been mentioned and analysed in the Senate's judgment that was examined above. However, already in its judgement of 15 November 2023 in case No. SKC-19/2023, the Senate linked *obiter dictum* the constituent elements of the provision of CL Section 1935[37] to the conclusion that a preliminary contract is a genuine civil law contract, the failure to perform it voluntarily gives the right to claim recognising the main contract as being entered into.[38] Although there are no doubts that a preliminary contract for a loan contract is

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[33] *Zellweger-Gutknecht, C.* In: *Widmer Lüchinger, C., Oser, D.* (Hrsg.) Obligationenrecht I. Basler Kommentar [Law of Obligations I. Basel Commentary]. 7. Aufl. Basel: Helbing Lichtenhahn Verlag, 2020, Art. 22 OR, N 19.

[34] *Busche, J.* In: Münchener Kommentar zum Bürgerlichen Gesetzbuch. Bd. 1 [Munich Commentary on the Civil Code. Vol. 1] *Schubert, C.* (ed.). 9. Aufl. München: C. H. Beck, 2021, Vorbemerkung (Vor § 145), Rn. 70.

[35] The Senate's Judgement of 05.07.2023 in case No. SKC-19/2023 (C29244819), paras 11–11.6.

[36] *Kalniņš, E.* Privāttiesību teorija un prakse. Raksti privāttiesībās [Theory and Practice of Private Law. Articles on Private Law]. Rīga: Tiesu namu aģentūra, 2005, pp. 9–11.

[37] CL Section 1935 stipulates: "A contract whereby one party promises to grant a loan and the other party undertakes to accept it, shall take effect only from the time that the contracting parties mutually agree on the amount of the loan. If the promisor thereafter refuses to perform it, then he or she shall compensate the other party for all losses."

[38] The Senate's Judgement of 15.11.2023. in case No. SKC-25/2023 (C24086817), para. 9.4. Available: https://www.at.gov.lv/downloadlawfile/9586 [last viewed 11.03.2024].

a genuine contract of obligations law; however, pursuant to CL Section 1935, the right to claim conclusion of a loan contract as a real contract or giving the loan does not follow from it, and the contracting party has the right to claim only compensation for losses. At the same time, it should be noted that, already at the end of the 19th century in the Baltic literature on private law, such understanding of the preliminary contract to the loan contract was deemed to be outdated and incompatible with the requirements of contemporary civil law circulation.[39] The said can be attributed also to the solution, envisaged in the second sentence of CL Section 1970, pursuant to which, if one party to the preliminary bailment contract refuses to conclude a contract of bailment or accept an object for bailment, the other contracting party has only the right to claim compensation for losses. Whereas CL Section 1541 is applicable to preliminary contracts for other real contracts, on which special regulation is not provided for in law (e.g., a preliminary contract for a lending contract[40]), pursuant to which the right to claim conclusion of the respective main contract is derived from it. Moreover, it should be taken into account that, in difference to a preliminary contract to a consensual contract, the subject-matter of which is entering into the main contract by consensus as such, the subject-matter of a preliminary contract to a real contract is entering into the real contract, which requires both the consensus between the contracting parties and transfer of the respective property (*res*).

3.2. Form of a preliminary contract

In the judgement examined above, the Senate was not required to examine the question regarding the form of a preliminary contract and, thus, it remains unanswered. An opinion has been expressed in legal literature that, by analogy with the Swiss[41] and Estonian[42] law, the requirements set for the form of the main contract should be applicable.[43] This opinion cannot be upheld (moreover, it ignores the fact that the nature of regulation of the second part of Article 22 in the Swiss Law of Obligations Act on the form of a preliminary contract is not absolute[44]), as it ignores the rather liberal regulation, set out in CL Section 1485 and Section 1487, on the legal consequences for disregarding the written form, envisaged in the law, and the right of each party to demand the other party to prepare "the relevant deed", if the parties agree regarding all the essential elements of the transaction. Moreover,

[39] *Erdmann, C.* System des Privatrechts, p. 257.

[40] Ibid., p. 268.

[41] Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) [Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)], Art. 22. Available: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en [last viewed 11.03.2024].

[42] Võlaõigusseadus [Law of Obligations Act of Estonia], para. 33. Available: https://www.riigiteataja.ee/en/eli/507022018004/consolide [last viewed 11.03.2024].

[43] *Ķesteris, L.* Nodomu protokols un priekšlīgums – dokumenti pirms galvenā līguma noslēgšanas [Memorandum of agreement and preliminary contract – documents before conclusion of the main contract]. Jurista Vārds, No. 41 (1047), 09.10.2018.

[44] *Henrich, D.* Vorvertrag, Optionsvertrag, Vorrechtsvertrag. Eine dogmatisch-systematische Untersuchung der vertraglichen Bindungen vor und zu einem Vertragsschluß [Preliminary Contract, Option Contract, Prerogative Contract. A Dogmatic-systematic Examination of Contractual Obligations before and at the Conclusion of a Contract]. Berlin, Tübingen: Walter de Gruyter & Co, J. C. M. Mohr (Paul Siebeck), 1965, p. 151; *Zellweger-Gutknecht, C.* In: *Widmer Lüchinger, C., Oser, D.* (Hrsg.) Obligationenrecht I, Art. 22 OR, N 69 f.

as recognised in legal literature[45] and case law, [46] if the written form is needed to corroborate in the Land Register, on the basis of the transaction, the title to property or other right to immovable property (see CL Section 1487), instead of demanding that the relevant deed be drawn up, a party has the right to bring a claim against the other party regarding recognition of the particular right because a court's judgement on satisfying this claim replaces the respective written deed as the ground for entering the respective corroboration in the Land Register.

At the same time, it should be taken into account that, in those cases where demand for a written form is based on considerations related to protection of the interests of one or both contracting parties, CL Section 1485 is not applicable to an agreement incompatible with the written form envisaged in law, and only the rules of CL Section 1488 are applicable, which make the validity of the transaction dependent on its performance.[47] The said applies also to a preliminary contract, unless the main contract has to be concluded in the form of a notarial deed, because the aim of concluding a preliminary contract cannot be directed at circumventing the requirements set for the form of a notarial deed, and, pursuant to CL Section 1475(1), such a preliminary contract must be recognised as being invalid.[48]

3.3. Limitation period of claims arising from a preliminary contract

Similarly to the German law[49] and at variance with the Austrian law, in which, pursuant to the second sentence in para. 936 of the General Civil Code,[50] the right to claim conclusion of the main contract, derived from the preliminary contract, ends with the expiry of the preclusive term of one year,[51] the Latvian law does not have a special legal regulation on the limitation period for a claim that follows from a preliminary contract.

If the contracting parties have agreed, by a preliminary contract, on the term of its performance (e.g., by defining a certain period or a final term by which the main contract should be entered into), then this should be considered as the term for fulfilling obligations but not as the term when the claim and the corresponding obligations end. Hence, the claims that are derived from the preliminary contract are subject to the general regulation on limitation period.[52] I.e., claims that follow from a preliminary contract, pursuant to CL Section 1895, are terminated within ten years, however, if, pursuant to Sections 388–390 of the Commercial Law,[53] a preliminary contract is a commercial transaction, then the limitation period for claims derived

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[45] *Vīnzarājs, N.* Prasība par formāla līguma noslēgšanu [Claim to Conclude a Formal Contract]. Tieslietu Ministrijas Vēstnesis, 1935, No. 2, pp. 323–324, 326.

[46] The Senate's Judgement of 15.10.2008. in case No. SKC-338/2008 (C04293105), reasoned part. Available: https://www.at.gov.lv/downloadlawfile/3356 [last viewed 11.03.2024].

[47] *Fillers, A.* Darījumu rakstiskas formas regulējums Civillikumā [Regulation on the Written Form of Transactions in the Civil Law]. Jurista Vārds, 29.10.2013., No. 44 (795).

[48] Ibid.

[49] *Busche, J.* 2021, Vorbemerkung (Vor § 145), Rn. 67.

[50] Allgemeines bürgerliches Gesetzbuch [The General Civil Code of Austria]. Available: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 [last viewed 11.03.2024].

[51] *Koziol, H., Bydlinski, P., Bollenberger, R.* (eds). Kurzkommentar zum ABGB [Brief Commentary on General Civil Code]. 5. Aufl. Wien: Verlag Österreich, 2017, § 936, Rz 5.

[52] *Henrich, D.* Vorvertrag, p. 218.

[53] Komerclikums [Commercial Law] (13.04.2000). Available: https://likumi.lv/ta/en/en/id/5490-commercial-law [last viewed 11.03.2024].

from such a preliminary contract is three years, pursuant to Section 406 of the Commercial Law.

Summary

The Senate's judgement of 5 July 2023 in case No. SKC-19/2023 marks a significant turning-point in the Latvian law regarding the understanding of a preliminary contract as a legal institution.

Firstly, the Senate has clearly recognised that a preliminary contract is a genuine contract of obligations law, the subject-matter of which is entering into another contract of obligations law. Although the conclusion of a preliminary contract restricts the private autonomy (freedom of contracts) of the contracting parties, this restriction is not contrary to the principle of private autonomy because it is based on a concerted decision by the contracting parties themselves, by which they limit their own private autonomy and which is binding upon them.

Secondly, the Senate has recognised that the right of claim might follow from the preliminary contract both with respect to conclusion of the main contract and compensation for losses if such had been incurred. Moreover, the right to claim regarding conclusion of the main contract should be regarded as the primary legal remedy.

Thirdly, by accepting the findings of the Swiss and German law, the Senate has joined the "one step theory" and recognised the claimant's right to join the claim regarding performance of the preliminary contract (i.e., regarding conclusion of the main contract or recognising it as being entered into) into one with the claim regarding performance of the main contract if both claims are to be litigated between the same parties and if it is feasible to fulfil the obligation, derived from the main contract, as soon as the main contract is concluded, insofar as there are no other obstacles to joining the claims.

The Senate's judgement of 5 July 2023 in case No. SKC-19/2023 did not and could not cover the entire range of legal issues related to the institution of preliminary contract; moreover, only a preliminary purchase contract is examined in the judgement. At the same time, CL regulates also other types of preliminary contracts, e.g., to loan and bailment contracts, in the case of non-performance of which it is not possible to claim conclusion of the main contract or recognising it as being entered into. In the case of a preliminary contract to other real contracts, special regulation on which is not envisaged in law (e.g., a preliminary contract for a lending contract), the general rules of CL Section 1541 are applicable, with the difference that the claim regarding performance of the preliminary contract should be directed not only at recognising the main contract as being entered into but, simultaneously, at the transfer of the respective property (*res*).

The requirements set for the form of the main contract are not applicable to the conclusion of a preliminary contract, unless the main contract should be concluded in the form of a notarial deed or the demand for a written form is based on considerations related to protecting the rights of one or both contracting parties.

The general regulation on limitation period is applicable to claims derived from a preliminary contract, therefore, if a preliminary contract should be qualified as a commercial transaction, the limitation period for the claims derived from it is three years, whereas if a preliminary contract is not a commercial transaction, then the limitation period for the derived claims is ten years.

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Disinformation in the EU Law: Moral Theories and the Context

Dr. iur. **Johanas Baltrimas**
Vilnius University
Associate Professor, the Faculty of Law
E-mail: *johanas.baltrimas@tf.vu.lt*

In recent years, there have been scandalous cases of information warfare acts in the Western world committed by hostile foreign governments. The effect of such acts is dramatically amplified by the widespread use of the internet media and ongoing military conflicts. Accordingly, the EU has taken steps in the battle against disinformation. The legal definition of disinformation contains attributes that need further explanation, particularly, lying and deception. Philosophical theories contain valuable insights on the morality of lying and deception, which can be adapted for interpretation of the disinformation concept.

Keywords: law and security, information warfare, disinformation, legal theory.

Contents

Introduction

Not all disinformation is untruthful and, conversely, not all lies are disinformation. This is apparent in the light of a publicly accepted truism – that some lies can be regarded as "white lies". Accordingly, in some of the prominent theories of morality, the falsehood of information does not make an act of lying immoral.[1] The complexity of the concept of lies can further be illustrated by a folklore paradox: is it a lie or truth, if someone says, "I am lying"? Although it cannot be truth, because the statement indicates otherwise, simultaneously, it cannot be a lie, because then it would be truth. This demonstrates that concepts of truth and lie can be insufficient. A common

[1] Most notably, utilitarianism, as presented further in this article.

addition to them is the concept of deception, which can be used to describe statements that are not lies in a strict sense, but may lead the recipient to an untruthful belief. The described paradox is neither truth, nor a lie, as paradoxes are wont to be. Therefore, the speaker who says "I am lying", leads the listener to believe something that is untruthful. A similar description can be applied to lying by omission. Consider an example, where a spouse has been unfaithful on a work trip, and the other spouse asks, "What did you do on your trip?". If the answer is detailed but fails to mention the fact of infidelity, what was the wrongdoing – is the spouse guilty only of cheating or, also, of not admitting it? Some might call this misleading or lying by omission, although, technically, no false statement has been given. A relevant real-life example is the publication of truthful information under a false name – once again, it is not lying in the strict sense. Nonetheless, it might be considered a deception, because a person implicitly lies about her identity. This could have significant ramifications, if one pretends to be a public figure, e. g. an important politician. The issue becomes even more complicated when we begin to consider what sort of lying and deception should be outlawed (perhaps, some could be left to self-regulation by social norms). Overly extensive tolerance for lying can lead to a state of constant uncertainty, where we never know which information can be trusted, and this can form a very attractive ground for hostile foreign governments to carry out their information warfare.

This illustrates how complex is the concept of lying. Legal relevance of this concept is highly amplified by emerging cases of information warfare in the Western countries committed by hostile foreign governments.(e.g., the authorities of the United States have indicted Russian citizens for the interference with the elections of US President,[2] acts of information warfare by Russia have been documented in the British Intelligence and Security Committee of Parliament "Russia Report",[3] by the Atlantic Council, which highlights Russia's foreign disinformation campaigns,[4] the Center for Strategic and International Studies (CSIS),[5] the Council on Foreign Relations,[6] and others). One of the central issues in the legal battle against is that applying the same concept of lying for them and the domestic citizens can lead to results that were not intended. EU law provides a definition of disinformation but there is a need to clarify how it must be interpreted in different cases. So far, the European Court of Justice has not had cases regarding this matter and the academic publications on disinformation[7] has not dealt with the particular matter discussed in this paper.

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[2] Russian troll farm, 13 suspects indicted in 2016 election interference. Washington Post. Available: https://www.washingtonpost.com/world/national-security/russian-troll-farm-13-suspects-indicted-for-interference-in-us-election/2018/02/16/2504de5e-1342-11e8-9570-29c9830535e5_story.html [last viewed 09.06.2024].

[3] Russia Report. Intelligence and Security Committee of Parliament of Great Britain. Available: https://isc.independent.gov.uk/wp-content/uploads/2021/01/20200721_HC632_CCS001_CCS1019402408-001_ISC_Russia_Report_Web_Accessible.pdf [last viewed 09.06.2024].

[4] Atlantic Council. Undermining Ukraine: How Russia widened its global information war in 2023.. Available: https://www.atlanticcouncil.org/in-depth-research-reports/report/undermining-ukraine-how-russia-widened-its-global-information-war-in-2023/ [last viewed 09.06.2024].

[5] CSIS. Going on the Offensive: A U.S. Strategy to Combat Russian Information Warfare. Available: https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/181002_Russia_Active_Measures_FINAL1.pdf [last viewed 09.06.2024].

[6] Council on Foreign Relations. Why the U.S. Ramped Up Its Information War with Russia. Available: https://www.cfr.org/in-brief/why-us-ramped-its-information-war-russia [last viewed 09.06.2024].

[7] For example, *Bennett, W. L., Livingston, S.* The disinformation age: politics, technology, and disruptive communication in the United States. Cambridge University Press, 2021; *Leber, A., Abrahams, A.* A Storm of Tweets: Social Media Manipulation During the Gulf Crisis. Review of Middle East Studies, 53(2), 2019, pp. 241–411; and other works mentioned in the following sections of this paper.

The aim of the present research is to establish how the concept of disinformation in the EU law can be interpreted. The methods for the analysis are the philosophical method, contextual, and teleological methods of legal interpretation. They are used, firstly, by describing the modus operandi of disinformation. It provides the context and clarifies the aim of the law for battling disinformation – by defining what the law should seek to eradicate. Secondly, EU law is analysed in the aspect of how it defines disinformation. Lastly, the EU law on disinformation is calibrated with the most prominent philosophical views on the morality of lying[8]. This means that the philosophical criteria for determination whether lying is immoral, are distinguished and adapted for the context of disinformation with necessary amendments. The necessary amendments are carried out according to the previously described *modus operandi* of disinformation.

1. Psychological effects

One of the conventional methods of legal reasoning is the purposive interpretation.[9] In the battle against disinformation, the purpose might seem obvious, however, to fully comprehend it, purposes and forms of disinformation must be taken into account. There is a plethora of mechanisms for how disinformation functions, but one of the ways to understand it is through the phenomenon of the so-called "herd mentality", which disinformation might seek to manipulate.

The famous Solomon Asch conformity experiments from the 1950s are useful in understanding the core mechanism of disinformation effects. In one of those experiments, participants were shown a drawing of lines and were asked which two lines were of the same length. The task was simple, but the key factor was that the room contained other pretend "participants" who were secret collaborators of the researchers, and they intentionally provided the wrong answer. Following their wrong answers, many of the actual participants conformed to their view and gave the wrong answer, although it was quite obviously false.[10]

In understanding disinformation, it is crucial to bear in mind this psychological conformity effect, because it might be the most important tool of hostile foreign actors who commit acts of information warfare. Modern psychology has formulated a related term – "metacognitive myopia", which describes an obstacle to thinking rationally – our judgments often follow the given information uncritically, even when it is easy to find out that information samples are misleading or invalid.[11] Because of this, even when we receive information that we clearly perceive as false, it still might affect our perception. Cass Sunstein described it with an example of the scandal in US President election regarding leaked e-mails of the candidate Hillary Clinton: according to him, even her sympathizers who might not have believed the accusations, afterwards

[8] The foundations of utilitarianism, as well as deontology – in the section "Criteria to evaluate lies".

[9] *Barak, A*. Purposive Interpretation in Law. Princeton, 2005.

[10] *Asch, S. E.* Effects of group pressure upon the modification and distortion of judgments. In: Groups, leadership and men; research in human relations, *Guetzkow H.* (Ed.). Carnegie Press: 1951, pp. 177–190; *Asch, S. E.* Opinions and social pressure. Scientific American, Vol. 193, No. 5, 1955, p 31–35; *Asch, S. E.* Studies of independence and conformity: I. A minority of one against a unanimous majority. Psychological Monographs: General and Applied, 70(9), 1956, pp. 1–70.

[11] *Fiedler, K., Schott, M., Kareev, Y., Avrahami, J., Ackerman, R., Goldsmith, M., Mata, A., Ferreira, M. B., Newell, B. R., Pantazi, M.* Metacognitive myopia in change detection: A collective approach to overcome a persistent anomaly. Journal of Experimental Psychology: Learning, Memory, and Cognition, 46(4), 2020, pp. 649–668; *Fiedler, K., Prager, J., & McCaughey, L.* Metacognitive Myopia: A Major Obstacle on the Way to Rationality. Current Directions in Psychological Science, 32(1), 2023, pp. 49–56.

might have had a subconsciously less favourable picture of the candidate as a result of metacognitive myopia.[12]

C. Sunstein also noted another study regarding the influence of public information that focused on the COVID-19 pandemic:[13] research by Leonardo Bursztyn, Akaash Rao, Christopher Roth, and David Yanagizawa-Drott that explored COVID-19 repercussions among viewers of certain television programs. The study examined the two most popular cable news shows in the United States: Hannity and Tucker Carlson Tonight. These shows were aired back-to-back on the same network (Fox News) and had relatively similar content prior to January 2020, yet differed sharply in their coverage of the COVID-19 pandemic. The host of one of these shows T. Carlson from early February warned viewers that the coronavirus might pose a serious threat, while the host of the other show, S. Hannity, first ignored the topic on his show and then dismissed the risks associated with the virus, claiming that it was less concerning than the common flu. The study found a disturbing fact that the "greater exposure to Hannity relative to Tucker Carlson Tonight increased the number of total cases and deaths in the initial stages of the coronavirus pandemic"[14].

2. How it works

Perhaps the most dangerous disinformation occurs as a result of information warfare by hostile foreign governments. However, foreign information warfare takes plenty of forms, only a part of which includes the spread of false information. Besides various forms of individual psychological operations (often called "PsyOps"), information warfare can occur as a spread of information that is not verifiably false or directly misleading[15] but is intended to polarize society and disrupt its proper functioning.

In January of 2024, it was announced that there was a Germany oriented pro-Russia disinformation campaign on the social network "X". According to media sources, more than 1 million German-language posts were sent from an estimated 50 000 fake accounts. The posts contained messages suggesting that the German government was neglecting the needs of Germans as a result of its support for Ukraine, both in terms of weapons and aid, as well as by taking in more than a million refugees; the analysts reported that they were convinced the source of the campaign was in Russia; operators of the message-sending system appeared to take breaks at the weekends and on Russian holidays – on those days, the number of posts noticeably decreased; the analysts found that the tone and rhetoric of messages was similar to the one used by far-right political party "Alternative für Deutschland"[16]. In some sources, this form of information warfare is called cognitive intrusion, which might

[12] *Sunstein, C. R.* Liars: Falsehoods and Free Speech in an Age of Deception. Oxford Academic, 2021, pp. 73–76.

[13] Ibid., pp. 109–111.

[14] *Bursztyn, L., Rao, A., Roth, C., Yanagizawa-Drott, D.* Misinformation during a Pandemic. Becker Friedman Institute, Working Paper No. 2020-44, 2020.

[15] These are the defining attributes of disinformation established by EU law. This definition is explored in greater detail in the following chapters.

[16] Spiegel Politik. Baerbocks Digitaldetektive decken russische Lügenkampagne auf [Baerbock's digital detectives uncover Russian campaign of lies]. Available: https://www.spiegel.de/politik/deutschland/desinformation-aus-russland-auswaertiges-amt-deckt-pro-russische-kampagne-auf-a-765bb30e-8f76-4606-b7ab-8fb9287a6948 [last viewed 11.03.2024]; The Guardian. Germany unearths pro-Russia disinformation campaign on X. Available: https://www.theguardian.com/world/2024/jan/26/germany-unearths-pro-russia-disinformation-campaign-on-x [last viewed 11.03.2024].

occur as the deliberate manipulation of individual and collective mental processes to promote political violence within a liberal democratic society.[17]

An avalanche of such opinions can manipulate the aforementioned psychological effects of conformity or metacognitive myopia and result in a higher spread of such opinion among the citizens of the targeted country – after seeing many supporters of the view (pushed by a hostile foreign government), an undecided citizen can succumb to it, just as the participants in the Asch experiments surrendered to the opinion which directly contradicted what was in front of their eyes, merely because they had the impression that this opinion was held by others. Such phenomena of foreign influence on EU domestic affairs are hardly compatible with the principles of democratic governance and national sovereignty.

From the teleological point of view, a vitally important factor is that the purpose of disinformation by hostile foreign governments might be different depending on the targeted country. For example, disinformation by agents of the Russian government might have certain goals in such countries as Germany, France, the United Kingdom, and wholly different goals in Ukraine, Moldova, Georgia, or the Baltic states. It is recognized in the mass media that there is a threat of some extent to see a Russian military invasion in the latter countries (and in some of them, it already has occurred, as demonstrated by the NATO policy to strengthen its military presence in the Eastern flank in the Vilnius Summit Communiqué[18]). Among other goals of disinformation, in these countries it might be seeking to convince people to support the Russian government instead of their own. Watching the events in Ukraine that unfolded since 2014, it can be seen that it served Russia's interest – as a result, there was a considerable amount of people in Donbass who supported the Russian annexation of Ukrainian territories. This might serve a vital military purpose – since the times of Machiavelli, it has been well known that conquering and holding an occupied territory are two separate challenges. Without any supporters, it might be nearly impossible to hold an occupied foreign territory, therefore foreign disinformation might be one of the preparatory steps toward this goal. Obviously, foreign disinformation by the Russian government does not have such a goal in Germany, France, or the United Kingdom. This difference repeatedly affirms the necessity for different approaches in the battle against disinformation – the countries that might be more militarily vulnerable (e.g., Eastern European countries) might require stricter measures against disinformation than their Western partners.

3. Legal definition of disinformation

26.4.2018. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions "Tackling online disinformation: a European Approach" defines disinformation, as follows:

[17] *Tzu-Chieh, H., Tzu-Wei, H.* How China's Cognitive Warfare Works: A Frontline Perspective of Taiwan's Anti-Disinformation Wars. Journal of Global Security Studies, 7(4), 2022, pp. 1–18; *Kubica, L.* Eastern Partnership countries in flux: From identity politics to militarization of foreign relations. The European Centre of Excellence for Countering Hybrid Threats, 2023; *Leber, A., Abrahams, A.* A Storm of Tweets: Social Media Manipulation During the Gulf Crisis. Review of Middle East Studies, 53(2), 2019, pp. 241–411; *Lebrun, M.* Anticipating cognitive intrusions: Framing the phenomenon. The European Centre of Excellence for Countering Hybrid Threats, 2023.

[18] Vilnius Summit Communiqué (Issued by NATO Heads of State and Government participating in the meeting of the North Atlantic Council in Vilnius 11 July 2023). Available: https://www.nato.int/cps/en/natohq/official_texts_217320.htm [last viewed 09.06.2024].

> *[d]isinformation is understood as* ***verifiably false or misleading*** *information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and* ***may cause public harm****. Public harm comprises threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens' health, the environment, or security. Disinformation does not include reporting errors, satire, and parody, or clearly identified partisan news and commentary.*[19]

The aforementioned information warfare acts do not necessarily operate with verifiably false or misleading information. Stating that it is displeasing how the government provides support to a foreign country and "neglects the needs" of its citizens might be immoral, cynical, unreasonable, but legally it is hard to prove that such a statement is "verifiably false or misleading". Therefore, such information in its nature does not fall within the EU definition of disinformation in a strict sense, because the definition tends to hold that disinformation is either false, or misleading information.

Besides other attributes, the difference between "false" and "misleading" can be addressed first. Misleading is a concept that is somewhat related to deception, which was compared with lying by T. L. Carson. He defined deception as (1) a "successful" act resulting in someone having false beliefs, and (2) not necessarily involving falsehoods – whereas a lie must be a false statement, a deception need not involve making a false statement; true statements can be deceptive, and many forms of deception do not involve making statements of any sort.[20] Thus, many instances of deception do not constitute lying. The first of these differences is not necessarily applicable to the concept of misleading information since it does not naturally require success. A commonality here is that neither deception nor misleading requires information to be false. A *mutatis mutandis* relevant concept is widely used in the law on advertising. Article 2 of the Directive 2006/114/EC concerning misleading and comparative advertising contains a prohibition on misleading advertising, which is defined as "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor".[21]

It might be challenging to prove that information is likely to deceive because for any piece of misleading information we can find people who will be deceived by it and people who will not. Accordingly, it is worth to *mutatis mutandis* take into account a provision from the Unfair Commercial Practices Directive regarding a question who is likely to be misled by a commercial practice: according to the Article 6 of this directive, "A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either

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[19] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling online disinformation: a European Approach. EUR-Lex, COM(2018) 236 final, 2018. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236 [last viewed 09.06.2024].

[20] *Carson, T. L.* Lying and Deception: Theory and Practice. Oxford, 2010, p. 4.

[21] Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising. OJ L 376, 27.12.2006. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0114 [last viewed 09.06.2024].

case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise [...]".[22] An important element here is the standard of an average consumer – this has the potential to be applied in disputes, where doubts are raised about whether misleading information can be regarded as disinformation. The smartest person will likely recognize the deceptive nature of information and, conversely, someone who has very little knowledge on a relevant subject can be misled. In such instances, opposing parties of the dispute will point to different people and claim different conclusions. It would not be easy to refute one of these conflicting reasons without *mutatis mutandis* using the aforementioned rule that information can be regarded as misleading when an average person can be reasonably expected to be deceived by it.

Another relevant document in the EU law is the Action Plan against Disinformation laid out in 5.12.2018 Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.[23] It repeats the same definition of disinformation with a reference to the Communication on Tackling online disinformation. The Code of Practice on Disinformation (hereinafter referred to as "Code") contains certain indications about how the authors of the code perceived the concept of disinformation. The Code's commitment 23 contains provisions stating that "Signatories commit to provide users with the functionality to flag harmful false and/or misleading information that violates Signatories policies or terms of service"; "Signatories recognize and agree with the European Commission's conclusions that "[t]he exposure of citizens to large scale Disinformation, including misleading or outright false information, is a major challenge for Europe"." These excerpts underscore the importance of the aforementioned two prerequisites – the information is (1) false and/or misleading, and (2) can be harmful.

However, the Code also accounts for the aforementioned acts of information warfare as manipulative acts of "coordinated inauthentic behaviour" (detailed in the Code's commitment 14). The Code indicates another form of malevolent online behaviour: according to the Code, signatories recognize the importance of intensifying and demonstrating the effectiveness of efforts to ensure the integrity of services by implementing and promoting safeguards against both misinformation and disinformation, including impermissible manipulative behaviours and practices across their services. The Code states that such behaviours and practices include:

- The creation and use of fake accounts, account takeovers and bot-driven amplification,
- Hack-and-leak operations,
- Impersonation,
- Malicious deep fakes,
- The purchase of fake engagements,

[22] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. OJ L 149, 11.6.2005. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029 [last viewed 23.08.2024].

[23] European Commission, Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan against Disinformation, EUR-Lex, JOIN(2018) 36 final, 2018. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN:2018:036:FIN [last viewed 09.06.2024].

- Non-transparent paid messages or promotion by influencers,
- The creation and use of accounts that participate in coordinated inauthentic behaviour,
- User conduct aimed at artificially amplifying the reach or perceived public support for disinformation.[24]

4. The issues

It appears that the EU definition of disinformation has been designed according to the principle "one size fits all", and, as a result, it can be too strict for application to domestic citizens, and too lenient for malicious foreign actors. A direct textual application of this definition for domestic citizens might restrict various forms of self-expression which is protected as a basic human right and is important for a free democracy; furthermore, a direct application for malicious foreign actors would omit various forms of information warfare attacks. This is a serious inadequacy that leaves no other way but to apply the definition of disinformation contextually, with the whole assortment of methods of legal interpretation, first of all – the purposive interpretation, which would account for a comprehensive understanding of information warfare forms and their impact, as well as the principles of democracy and the right to self-expression.

This paper does not seek to raise doubt that the discussed legal regulation is a positive step in the right direction. Instead, it attempts to raise a question – what is the next step?

It was already briefly shown that the concept of untruthfulness is complicated. What follows is the necessity to develop criteria for evaluation, whether a piece of information is truth or disinformation, whether it is protected by the freedom of expression or illegal. Besides the lack of legal certainty, a concrete problem that will be discussed further is that disinformation is not differentiated according to the source – whether it came from a domestic citizen or from a hostile foreign government as a part of psychological operation in the information warfare. When it is the latter, does it actually matter, whether it is truth in a strict sense? Satire, that is not strictly untruthful, can demoralize and result in many sorts of negative consequences, among them: to increase the number of citizens who try to avoid the military draft; to decrease the confidence in law and public institutions, etc. It is difficult to find any reason to treat any sort of such activity by a hostile foreign government as legal, even if it does not strictly match all the general features of disinformation. It would hardly serve the purposes of legal regulation to apply the same standards of permissible level of truthfulness both to foreign agents who are executing a psychological operation (hereinafter – PsyOp) and to *bona fide* citizens. Any sort of attempt to do it would lead either to tolerance of various PsyOp information, or to disproportionally restricting the citizen's freedom of expression. However, the current EU legal definition of disinformation is the same concerning these two groups.

[24] European Commission. Strengthened Code of Practice on Disinformation. EUR-Lex, 2022. Available: https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation [last viewed 09.06.2024].

5. Criteria to evaluate lies

There is perhaps no better place to search for a bird's eye view of the discussed issue than the theories of morality. They contain various, often – contrasting views on discerning whether an act of lying is immoral.

Plato

One of the earliest prominent views in this regard has been expressed in Plato's "Republic".[25] Plato promoted personal virtues of wisdom, courage, justice, temperance and encouraged such organization of the state, where everyone performs their own work that is best suited for each individual. Plato's political model of the state is quite paternalistic and far from liberal, hence, it requires a lot of social engineering. The means to achieve the best possible political model include a thorough attention to the upbringing of children:

> *a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts.*[26]

Furthermore, Plato famously included a suggestion to spread a "white" lie to grown-ups in order to ensure that everyone performed their own work and did not desire to veer to an unsuited position[27] – he offered to devise a "needful" falsehood, according to which some of the citizens would have the power of command, and, according to Plato, in the composition of these citizens the gods have mingled gold, whilst others they have made of silver to be auxiliaries; yet others, who are to be husbandmen and craftsmen have been composed of brass and iron.[28] This Plato's suggestion resonates with his view expressed in the third book of the "Republic", where Socrates states:

> *…if any one at all is to have the privilege of lying, the rulers of the State should be the persons; and they, in their dealings either with enemies or with their own citizens, may be allowed to lie for the public good. But nobody else should meddle with anything of the kind; and although the rulers have this privilege, for a private man to lie to them in return is to be deemed a more heinous fault than for the patient or the pupil of a gymnasium not to speak the truth about his own bodily illnesses to the physician or to the trainer, […] If, then, the ruler catches anybody beside himself lying in the State, […] he will punish him for introducing a practice which is equally subversive and destructive of ship or State*[29].

This demonstrates that Plato did not set a universal standard for permissibility of a lie – it was differentiated according to the person that is expressing false information and the person's purpose. The ultimate objective that persuasively justified lying was the main goal of Plato's theory, – the fair and prosperous republic. His test led to a result where only the elite was permitted to lie but not the governed citizens, however, only when the goal justified these means. These criteria can be useful, since,

[25] *Plato*. Republic. Translation by Jowett, B. Roman Roads Media, 2013.
[26] Ibid., p. 79 (377b).
[27] According to Plato, the "correct" position for each person should have been mostly determined not by gods, but rather by a careful selection in the education process, which considered person's abilities.
[28] *Plato*. Republic, pp. 124–125 (414c).
[29] Ibid., p. 90 (389c).

by altering the standard of how "high up the ladder" the person is and the standard of how noble his purpose is, these criteria can be used in a different context.

Consequentialism

An extremely amplified version to justify lying can be found in N. Machiavelli's "The Prince".[30] Although his propositions have been based on a noble purpose, they do not seem noble themselves – in this book, it is suggested that "a leader doesn't have to possess all the virtuous qualities […] but it's absolutely imperative that he seems to possess them […] It's seeming to be virtuous that helps".[31] Toleration of lying is pervasive throughout the entire book, and in chapter 18 Machiavelli has addressed it directly by noting that it is worth lying, when it is useful. According to him, "a sensible leader cannot and must not keep his word if by doing so he puts himself at risk, and if the reasons that made him give his word in the first place are no longer valid".[32]

Similar criteria have been expounded in J. S. Mill's "Utilitarianism", although his conclusion, after applying these criteria, is vastly less radical. Being a utilitarianist, Mill, of course, recognized the principle of utility, that dictates morality of acts depending on how they increase overall happiness and decrease the suffering. However, in the moral evaluation of lying, he introduced a factor of a similar kind that was used by Machiavelli. Mill noted:

> *…even unintentional, deviation from truth, does that much towards weakening the trustworthiness of human assertion, which is not only the principal support of all present social well-being, but the insufficiency of which does more than any one thing that can be named to keep back civilisation, virtue, everything on which human happiness on the largest scale depends.*[33]

However, utilitarianism justifies exceptions and, according to Mill, an overarching exception is withholding some fact, when such concealment "would preserve some one (especially a person other than oneself) from great and unmerited evil, and when the withholding can only be effected by denial"[34]. The qualitative similarity with a view of Machiavelli here is not only the suggestion to weigh the risks and benefits of lying, but also the insight that the act of lying can be harmful in itself. This is reflected in Machiavelli's theory as a danger that when a lie is revealed, it damages the good image of the ruler. Mill saw the harm of lying that was more deeply rooted and abstract. Meanwhile, a common denominator is that lying can create mistrust, leading to uncertainty about the truth, and this must be included into consideration as part of the harm brought about by a particular lie. This has potential for practical application because a different person and different sort of lie can exacerbate public mistrust to a different extent and manner: a lie involving an ordinary citizen has a lesser effect in this regard than a deepfake video depiction of a high-ranking official propagating lies.

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[30] *Machiavelli, N.* The Prince. Translation by Parks, T. Penguin Random House UK: 2009.
[31] Ibid., p. 70.
[32] Ibid., pp. 69–70.
[33] *Mill, J. S.* Utilitarianism. 1879 edition. The Floating Press, 2009, p. 41.
[34] Ibid.

Deontology

Immanuel Kant's elaborate contemplation on the morality of lying contains a particularly illuminating point in the comment on the "murderer at the door" dilemma. This is found in his essay "On a supposed right to lie from philanthropy".[35] This essay was a rebuttal, offered after Kant's moral theory received some criticism by Benjamin Constant, who wrote that "The moral principle 'it is a duty to tell the truth' would, if taken unconditionally and singly, make any society impossible. We have proof of this in the very direct consequences drawn from this principle by a German philosopher, who goes so far as to maintain that it would be a crime to lie to a murderer who asked us whether a friend of ours whom he is pursuing has taken refuge in our house".[36]

In his reply, Kant defined a lie as an intentionally untrue declaration to another, and noted that a person who lies contributes to an outcome "that statements (declarations) in general are not believed, and so too that all rights which are based on contracts come to nothing and lose their force; and this is a wrong inflicted upon humanity generally".[37] Kant's view is that a lie is always harmful – even when it does not harm a particular individual, it harms humanity in its entirety, as much as it makes "the source of right unusable".[38] This resonates with his famous commentary on a case of taking a financial loan without intent to return it[39] – such a deed is likely to contribute to public mistrust. However, to Kant, this is not a matter of weighing the extent of harm against the benefits – to him, lying is always wrong: according to T. L. Carson, Kant argues that lying (in the ethical sense) is (or can be) wrong, even if it does not harm others;[40] and one ought not lie, no matter how great the benefits to himself or others might be;[41] according to Kant's definition of lying (in the ethical sense), lying in the sense bearing on right requires an additional condition – the intentional untruthful statement (that purports to express one's thoughts and is intended to deceive another person) must violate another person's right.[42] Additionally, it is worth noting that some interpretations regard the harm of lying in a wider sense than just the harm occurring after a particular act of lying – it is rather that the system of right is constituted by a set of laws that are universally valid; it is contrary to the very concept of right that it could be right to make an untruthful declaration when the truthfulness of that declaration is required by rational laws of right.[43]

Directly following Kant's view would likely be as utopian as achieving the state of perpetual peace described by Kant. Digital space is not likely to be devoid of lies in the foreseeable future, but an adaptable takeaway from Kant's contemplations is similar to the implication from the aforementioned authors: that lying creates public mistrust. Instances of false information create a state of uncertainty, in which we are in constant

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35 *Kant, I.* On a supposed right to lie from philanthropy (1797). In: Practical Philosophy. The Cambridge Edition of the Works of Immanuel Kant, *Gregor, M. J.* (ed.). Cambridge University Press, 1996.

36 Ibid., p. 611.

37 Ibid., p. 612.

38 Ibid., pp. 605–616.

39 *Kant, I.* Groundwork of the metaphysics of morals (1785). In: Practical Philosophy. The Cambridge Edition of the Works of Immanuel Kant, *Gregor, M. J.* (ed.). Cambridge University Press, 1996, p. 72.

40 *Carson, T. L.* Lying and Deception, p. 72.

41 Ibid., p. 73.

42 Ibid., p. 72.

43 *Wood, A. W.* What Is Kantian Ethics? In: Groundwork for the Metaphysics of Morals, *Wood, A. W.* (ed.). Yale University Press, 2008, pp. 157–182.

doubt about whether the information in front of our eyes is truthful. Naturally, in different cases, the impact on this point can be vastly different. A casual internet user's untruthful comment does not have the same consequences triggering public mistrust as a high-ranking government official's blatant lie. Turning back to the EU definition of disinformation, one of its attributes is public harm which can manifest itself as "threats to democratic political and policy-making processes". The connection between these concepts is the possibility that democratic processes can be affected by the state of public mistrust. Accordingly, certain cases of disinformation could be regarded as a threat to these processes (i.e., causing public harm) if they significantly contribute to public mistrust, in certain steps or background of democratic processes.

Modern theories

Unsurprisingly, there are views that lying is sometimes permissible and more criteria are offered to back these notions. Besides the utilitarian test, a way to distinguish the permissible cases is to ascertain the conflict between relevant duties. It is reasonable to infer that the duty to tell the truth to a murderer is in conflict with (and, likely, outweighed by) the duty to help others, *inter alia*, by protecting people from murderers. As H. Sidgwick puts it, if we are allowed to kill in defence of ourselves and others, it is strange if we may not lie for such cause.[44] This perspective is pervasive in the contemporary Western legal thought, where typically legality of a restriction on a certain human right (such as the freedom of expression) is ascertained according to its balance with competing values (e.g., interests of national security, public safety, prevention of disorder or crime, the protection of health or morals, etc.). This sort of framing corresponds with the theory by W. D. Ross on the *prima facie* duties: he suggested this concept (which he also called a "conditional duty") as a characteristic (quite distinct from that of being a duty proper) which an act has, in virtue of being of a certain kind (e.g., the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind, which is morally significant.[45] In other words, moral duties could be regarded as presumably mandatory, and this presumption can be denied, if there are strong reasons against it (such as competing duties). As Carson put it, Ross thinks that it is wrong to tell a lie in order to bring about a very small amount of good or prevent a very small amount of bad; one would not be justified in telling a lie to spare a momentary distress or embarrassment; on the other hand, Ross is not an absolutist; he thinks that lying can be justified, if it is necessary to produce a great good or avoid a great evil.[46] What follows is a theory where the morality of an act is not to be evaluated by how it contributes to common happiness (as in utilitarianism) but is grounded on self-sustaining moral grounds. Under this interpretation, a lie can still be moral even if telling the truth would benefit common happiness more and, conversely, a lie could be immoral if it benefits common happiness more than telling the truth. For the context of legal measures against disinformation, this distinguishing feature of Ross's theory could imply that no single reason (which either justifies the disputed information, or condemns it) should be treated as decisive – a decision regarding whether certain information is illegal, should be made on the whole entirety of relevant reasons and their weight could vary based on specific nuances. This principle might presuppose that information could be legal even when it fits all the characteristics of punishable

[44] *Sidgwick, H.* The Methods of Ethics. Dover, 1966, p. 315.
[45] *Ross, W. D.* The Right and the Good. Oxford University Press, 1930, p. 21.
[46] *Carson, T. L.* Lying and Deception, p. 105.

disinformation. Such a conclusion might be necessary because it can be impossible to predict all the subtle nuances which might be morally relevant, therefore, without an exhaustive list of them, in every new set of circumstances it must be checked, whether it does not require an exception of previously established rules.

Another relevant view is scepticism,[47] which has a relation with, perhaps, the most difficult attribute of disinformation to determine – whether the information in dispute "may cause public harm". Without a deeper dive, moral scepticism can be described as raising doubts about whether we actually know or are able to identify the contents of morality and determine the morality of a certain act. The same can be said about the prediction, whether an act may cause public harm – it is a matter of forecasting the future which would be confidently possible for those who master the time travel. The verb "may" lightens the burden (as opposed to the verb "will"), and enables us to recognize disinformation without the necessity to be certain that harm will be caused – instead, it requires to prove the likelihood of it. The essential questions here are (1) what can be regarded as harm, and (2) what is the required likelihood of it.

The latter question is difficult, because any sort of act can possibly result in good or bad consequences. Saving a child's life would be a good deed, but if it turns that the child were Adolf Hitler, it logically follows that saving him has indirectly resulted in public harm – the holocaust. And, conversely, imprisoning V. Lenin or J. Stalin for their political views in the early days might seem like an immoral restriction on freedom of expression but it may had led to a positive outcome by alleviating the world from communist atrocities. Therefore, without a certain reasonable standard of likelihood, the attribute "may cause public harm" would be meaningless. When disinformation is used as a psychological operation in information warfare, its purpose might be to demoralize society, public officials, military personnel, to spread political views which are useful for an external aggressor state government, influence election or referendum results, etc. As the previously described examples show, such campaigns can be massive, and the likelihood of one single act of disinformation to cause public harm can be incredibly small. On the other hand, when an independent political opposition leader is sharing views which can result in similar consequences, even when they are more likely, restricting her speech could be detrimental to the foundations of democracy (unless it is proven that her actions were a result of a cooperation with a hostile foreign government). Accordingly, a rigid universal standard for the likelihood of public harm could either lead to disproportional restrictions of free speech, or toleration of foreign information warfare attacks. This danger could be avoided if the disinformation definition was amended or the discussed standard (for the likelihood of public harm) would be determined in each case individually, depending on the context.

The same can be said about the nature of harm. The definition of disinformation provides a specification of the public harm concept: it "comprises threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens' health, the environment or security".[48] No rational person could deny that politicians and their team members occasionally include lies in their electoral

[47] *Joyce, R.* The Myth of Morality, Cambridge University Press, 2001; *Mackie, J. L.* Ethics: Inventing Right and Wrong, Penguin, 1977; *Sinnott-Armstrong, W.* Moral Skepticisms. Oxford University Press, 2006.

[48] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling online disinformation: a European Approach, EUR-Lex, COM(2018) 236 final, 2018. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236 [last viewed 09.06.2024].

political campaigns. As much as we would like to outlaw such actions, politicians cannot be punished for spreading disinformation solely because their lies somehow influence democratic political and policy-making processes. However, it is hard to find any reason to tolerate the same act by information warfare agents. Consequently, applying a uniform standard for the interpretation of the public harm concept would be just as counterproductive as with the previously described likelihood of harm.

Presumptive truth

Turning back to the essence of scepticism, the usual solution to the problem of uncertainty about truth is the presumptive truth. In criminal law, the suspect is presumed innocent until proven otherwise. Presumptions similarly function in other branches of public law and the same applies to the restrictions on freedom of expression. A presumption is a rational way to avoid dangers that we use both in law and in our everyday lives. We might not presume that the ice is too thin to walk on, if it covers a shallow puddle. Conversely, if the ice covers a deep river, it is reasonable to assume that it is thin until proven otherwise – we sometimes alter presumptions, if the consequences of a mistake are very harmful.

Additional complication is presented by the growing importance of internet media. While we can confide in courts to properly adjudicate disputes in this field, since the judges have no other significant motive, besides to adopt a fair judgment, private corporations operate social media platforms with the intention to gain monetary profit, which is completely understandable. However, sometimes this might not be in harmony with the best interests of the battle against disinformation. Profits might be negatively impacted by the emergence of cases where social media platform violates the law. In this context, the relevant violation could be the failure to fulfil their duties regarding disinformation or manipulative behaviours and practices – these are the main duties prescribed by law. However, legal liability for such failure would not be very probable, because the law can be described as raising the duties to invest reasonable efforts into reaching this goal. The platform can be charged with a violation of the law when its actions or inactivity is unlawful in the sense contained in the letter of law, not in the sense of nuanced, delicate interpretation of law. The more profitable choice, naturally, does not necessarily coincide with the nuanced interpretation, but with the text of the law and other paths which correlate with higher profits. An obvious example of such paths is high user engagement, which has been widely associated with controversial online content and can lead to colossal amplification of engaging news and opinions, regardless of their source – perhaps even when the source is a hostile foreign government.

In this context, regarding presumptions, the difficulty is that the model for battling disinformation is more complicated than giving a monetary fine: it involves intricate schemes where private subjects – internet intermediaries – have certain duties. Should they follow a presumption that certain information is not disinformation? Or should the public institutions follow a presumption that internet intermediaries act lawfully (either by restricting, or allowing some information)? The overall spirit of free speech should favour a presumption that information is legal, therefore, if an internet intermediary restricted it, a logical presumption would be that the intermediary acted unlawfully. However, taking into account their incentives, such presumption would likely lead to a situation where the information warfare perpetrated by foreign agents thrive. In order to avoid it, presumptions could be set according to specific conditions. For example, if there would be factual grounds for reasonable suspicion that a social

network profile is fake, information that has been shared could be presumed to be disinformation. The source for a set of facts which could lead to such presumption could be sought in the Code of Practice on Disinformation and other documents, which reveal the functioning of disinformation. However, this particular aspect requires elaborate further research because of the numerousness of different sorts of duties that are assigned for internet intermediaries.

Conclusions

1. It appears that the EU definition of disinformation was designed according to the principle "one size fits all", but it would be in conflict with the purposes of law and would not be in harmony with the relevant context to outlaw disinformation with rigidly universal standards. The other cases, where the EU legal definition of disinformation needs differentiation, include the context of targeted countries: the same standard is not suitable in countries which are at war, or can be regarded as militarily vulnerable, and in countries where the threat of military aggression is negligible. The need for a differentiated definition of disinformation also emerges when the nature of the person expressing himself is taken into account: it is too strict to apply to the country's citizens who participate in public discussions, and too lenient to apply to hostile foreign governments that commit acts of information warfare.
2. This inadequacy leaves no other way to either amend the definition, or to apply it contextually, with the whole assortment of methods of legal interpretation, amongst them, firstly, the purposive interpretation that would account for a comprehensive understanding of information warfare forms and their impact, as well as the principles of democracy and the right to self-expression. The issue could also be aided by the theories of moral philosophy.
3. Moral philosophy and teleological legal interpretation offer criteria which can help to properly enforce the legal instruments against disinformation: these include (1) applying the standard of an average person in the evaluation, whether information is misleading (information can be regarded as misleading when an average person can be reasonably expected to be deceived by it). Also, (2) permissibility of untruthful information can be evaluated by taking into account the goal of the person who is expressing it; (3) in the evaluation, whether information may cause public harm to democratic processes, it might be relevant, whether disinformation significantly contributes to public mistrust, in certain steps or background of democratic processes; (4) no single reason (which either justifies the disputed information, or condemns it) should be treated as decisive – information could be legal even when it fits all the characteristics of punishable disinformation, thus, in every new set of circumstances it must be checked, whether it does not require an exception of previously established rules; (5) battle against disinformation in the digital context and involvement of internet intermediaries requires complex principles for presumptions (and, consequently, distribution for burden of proof) that requires further research.

Summary

EU has defined disinformation as verifiably false or misleading information that is created, presented, and disseminated for economic gain or to intentionally deceive the public, and may cause public harm. The two main issues with it are

(1) the uncertainty of the concepts of lying and deception, and (2) its mismatch for different contexts. If the definition is not amended or explained in greater detail, both of these issues can be at least partly remedied by employing teleological interpretation and the philosophical theory on the morality of lies.

Disinformation can be a very impactful tool, and a good illustration of how it influences people is provided by the psychological effects of herd mentality and metacognitive myopia. Disinformation can manipulate these effects and create consequences that may be desired by foreign hostile governments, which initiate the spread of disinformation or directly create and distribute it.

It shows the necessity to differentiate legal measures on disinformation according to the source – whether the information has come from a domestic citizen or from a hostile foreign government as a part of psychological operation in the information warfare. In the latter case, it might not even matter whether it is truth in a strict sense. Satire, which is not strictly untruthful, can demoralize and result in many sorts of negative consequences, among them an increase in the number of citizens who try to avoid the military draft; a decrease in the confidence in law and public institutions, etc. It is difficult to find a reason for treating any sort of such activity by a hostile foreign government as legal, even if it does not strictly match all the general features of disinformation. It would hardly serve the purposes of legal regulation to apply the same standards of permissible level of truthfulness both to foreign agents who are executing a psychological operation and to domestic citizens. Any sort of attempt to do it would lead either to tolerance of various psychological operations or to a disproportional restriction of citizen's freedom of expression. However, the current EU legal definition of disinformation for these different cases is the same.

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The Concept of "Patriotism" in Legal Regulation in the Republic of Latvia: Current Situation and Challenges

Dr. iur. **Ēriks Treļs**
State Police College
Docent in the Department of Police Law
Riga Stradiņš University
Lecturer at Faculty of Social Sciences
E-mail: *eriks.trels@gmail.com*

Dr. iur. **Ivans Jānis Mihailovs**
Riga Stradiņš University
Docent at Faculty of Social Sciences
Latvian Academy of Culture researcher
E-mail: *ivans.mihailovs@rsu.lv*

Several recent events in Latvian society, especially after 24 February 2022, raised issues related to patriotism. These include the discussions about the National Defense Service and the National Defense Training, about the possibility of losing (revoking) Latvian citizenship, if the naturalized citizen violates his promise of loyalty to the Republic of Latvia, about the loyalty of Latvian citizens and readiness to defend their country. Patriotism, in this context, is one of those concepts that is very widely used by politicians of opposite ideological views, other publicly recognised personalities, justifying their position on one issue or another. Patriotism is a multifaceted concept that draws insights from psychology, sociology, history, political and law science. It shapes national identity, influences civic engagement, and plays a role in international relations. The authors of the article will present their perspective on the concept of patriotism in legal regulation in the Republic of Latvia, analysing in depth the understanding and regulation of patriotism in Latvian regulatory acts.

Keywords: patriotism, homeland, state, government, loyalty, officials with special service ranks, pedagogues, state workers.

Contents

Introduction

The Preamble of the Constitution (*Satversme*) of the Republic of Latvia states: "The people of Latvia protect their sovereignty, national independence, territory, territorial integrity and democratic system of government of the State of Latvia. Since ancient times, the identity of Latvia in the European cultural space has been shaped by Latvian and Liv traditions, Latvian folk wisdom, the Latvian language, universal human and Christian values. Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society. Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature."[1]

Although The Preamble of the Constitution of the Republic of Latvia does not explicitly use the concept of "patriotism", it includes several important words that are directly related to this concept and its understanding: "freedom", "sovereignty", "independence", "loyalty", etc. The normative uncertainty of the content of the concept "loyalty" has already become the reason for the authors of this article to join forces to clarify it within the framework of the article "The Concept of Loyalty in Legal Regulation in the Republic of Latvia: Current Situation and Challenges".[2] The amendments to the regulatory framework envisaged in the current article were also reflected in the work of the Latvian legislator. On 18 January 2024, Amendments to the State Administration Structure Law entered into force, supplementing this law with the new Article 102 "Obligation of Loyalty"[3]. The above shows that the vision of the authors regarding the improvement of the regulatory framework has been justified and timely. This article is a logical continuation of the previously commenced research.

The invasion of Ukraine by the Russian Federation and the hostilities in its territory contributed to the activities of persons disloyal to the Republic of Latvia, including the dissemination of hostile content both in the internet environment and in public places during unauthorized events.[4] In contrast to these activities, the highest degree of loyalty – examples of proof of the expression of patriotism – became actualized in Latvian society.[5]

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[1] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Latvijas Vēstnesis, No. 43, 01.07.1993; Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (19.06.2014). Latvijas Vēstnesis, No. 131, 08.07.2014.

[2] *Treļs, Ē., Mihailovs, I. J.* The Concept of Loyalty in Legal Regulation in the Republic of Latvia: Current Situation and Challenges. Journal of the University of Latvia. Law, No. 16, 2023, pp. 226–242. Available: https://doi.org/10.22364/jull.16.14 [last viewed 04.02.2024].

[3] Grozījumi Valsts pārvaldes iekārtas likumā [Amendments to the State Administration Structure Law] (21.12.2023). Latvijas Vēstnesis, No. 3, 04.01.2024.

[4] *Treļs, Ē.* Normatīvā regulējuma problēmjautājumi lietās par naida izraisīšanu [Problems of the legal framework in cases of incitement to hatred]. Jurista Vārds, No 25/26 (1239/1240), 21.07.2022, p. 20. Available: https://juristavards.lv/doc/281551-normativa-regulejuma-problemjautajumi-lietas-par-naida-izraisisanu/ [last viewed 04.02.2024].

[5] *Treļs, Ē., Mihailovs, I. J.* The Concept of Loyalty, p. 235.

As part of a study commissioned by the Ministry of Defence, it was found that 41% of Latvian residents hold the opinion that the war in Ukraine has made them evaluate their role in strengthening national defence. During two months, from 24 February to 22 April 2022, the National Guard of the Republic of Latvia (Latvian: *Latvijas Republikas Zemessardze*) received 2 516 applications.[6]

The aim of the current paper is to analyse the concept of patriotism in legal regulation and practice of its application, to identify possible problems and to propose solutions.

In the article, general research methods were used, such as comparison and summarization, causal relationship detection, analysis and synthesis, as well as the methods of legal norms' interpretation.

1. Concept behind the term "patriotism"

University of Latvia Professor Harijs Tumans points out that the word "ὁ φιλόπολις" appears for the first time in Thucydides' (*Thucydides*, 460 – around 400 BC) "History" and is translated as "fatherland's friend", "one who loves the motherland" or, in other words, "patriot".[7]

In the Latvian Literary Language Dictionary, the term "patriotism" is explained, as follows: love of one's homeland, nation; loyalty to one's homeland, nation, readiness to selflessly work for them.[8] The Cambridge Dictionary defines "patriotism" as "the feeling of loving your country more than any others and being proud of it"[9]. The Oxford English Dictionary states that "patriotism" means "love of or devotion to one's country"[10].

The President of Latvia Edgars Rinkēvičs in his speech dedicated to the 105th anniversary of the proclamation of the Republic of Latvia, quite rightly remarked: "There is no single definition of patriotism. There is no one right way to prove your love for the Motherland. But it seems important to me not only to talk about patriotism, but to show it in actions. We cannot teach our children to love Latvia theoretically. Love must be shown to them."[11]

Opinions about the importance and necessity of patriotism can also be found in the speeches of all the previous presidents of Latvia. Several of them had linked patriotism with the development of our country. As the former President Valdis

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[6] Aizsardzības ministrija: 41% Latvijas iedzīvotāju karš Ukrainā ir licis izvērtēt savu lomu valsts aizsardzības stiprināšanā [Ministry of Defense: The war in Ukraine has made 41% of Latvian residents to evaluate their role in strengthening national defense] (25.04.2022). Available: https://www.mod.gov.lv/lv/zinas/aizsardzibas-ministrija-41-latvijas-iedzivotaju-kars-ukraina-ir-licis-izvertet-savu-lomu [last viewed 04.02.2024].

[7] *Tumans, H.* Kas ir patriotisms Senajā Grieķijā? [What is patriotism in Ancient Greece?] Antiquitas viva, No. 5, 2019, p. 72. Available: http://doi.org/10.22364/av5.07 [last viewed 04.02.2024].

[8] Latviešu literārās valodas vārdnīca [Latvian Literary Language Dictionary]. 6. sējums, 1. daļa. N–P. Rīga: Zinātne, 1986, p. 524.

[9] Patriotism. The Cambridge Dictionary. Available: https://dictionary.cambridge.org/dictionary/english/patriotism [last viewed 04.02.2024].

[10] Patriotism. The Oxford English Dictionary. Available: https://www.oed.com/search/dictionary/?scope=Entries&q=patriotism [last viewed 04.02.2024].

[11] Valsts prezidenta Edgara Rinkēviča uzruna Latvijas Republikas proklamēšanas 105. gadadienai veltītajā svētku koncertā Latvijas Nacionālajā teātrī [Address by the President of the State Edgars Rinkēvičs, at the celebration concert dedicated to the 105th anniversary of the proclamation of the Republic of Latvia at the National Theatre of Latvia] (18.11.2023). Available: https://www.president.lv/lv/jaunums/valsts-prezidenta-edgara-rinkevica-uzruna-latvijas-republikas-proklamesanas-105-gadadienai-veltitaja-svetku-koncerta-latvijas-nacionalaja-teatri [last viewed 04.02.2024].

Zatlers has emphasized, "patriotism of the 21st century is much more than just emotions. It means practical action that shows: I understand that the future of this country depends on me. It means doing more myself and much less expecting others to do things for me."[12]

Ieva Bērziņa, a researcher at the Latvian National Defence Academy, is one of the few scientists who has studied patriotism in Latvian society for a long time. She has concluded that the role of nationalism in Latvian society's understanding of patriotism has increased, and so has the importance of Latvia as a nation state. The level of civic patriotism and understanding of the crucial role of democratic values in the development and security of the country is still low. Latvian society's understanding of patriotism is minimally related to the civic duty to defend the country in the event of a military conflict. However, the number of Latvian patriots has increased from 73% in 2008 to 84% in 2022. The number of Russian patriots has decreased from 12% in 2008 to 4% in 2022, there is also a slight decrease in the number of people who do not consider themselves a patriot of any country.[13]

The Scottish-American philosopher Alasdair MacIntyre once asked the question of whether patriotism is a virtue. His own answer was ambiguous. Basically, he concluded that patriotism can be dangerous, but it is necessary for the existence of society.[14] The danger that comes from patriotism was also highlighted by Latvian film and theatre director Viesturs Kairišs. When asked if patriotism should be cultivated in people in cinema, he replied in negative. Explaining his answer, he noted that a film of the lowest quality can be called patriotic and sell well. V. Kairišs calls it "commercial patriotism" and points out that it is too developed in Latvia. In his view, this has nothing to do with true patriotism. The question whether a someone is a patriot should not be answered, because it can be concluded from a person's life and deeds. As a dangerous trend, he points out that many people who flaunt this term, hiding behind it, simply make money in a duller way. Patriotism has become very comfortable in Putin's Russia, everyone is a patriot, – if you are not a patriot, you should be put in jail. V. Kairišs concludes that this word is dangerous, it is easy to conceal malicious and manipulative thoughts behind it. Too often this word is used indiscriminately – in right place, as well as in the wrong place.[15]

According to General Charles de Gaulle, patriotism is when love of your own people comes first, whilst nationalism is the case when hate for people other than your own comes first.[16] The term "patriotism" as opposed to the term "nationalism" is also used in scientific research. In some cases, the term "positive nationalism" is used as a synonym for the word "patriotism", other researchers explore the positive and negative sides of nationalism. Professor Mark L. Movsesian points out that nationalism

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[12] Valsts prezidents: 21. gadsimta patriotisms ir aktīva rīcība [State President: Patriotism in the 21st century is an active deed] (15.11.2010). Available: https://www.president.lv/lv/jaunums/valsts-prezidents-21gadsimta-patriotisms-ir-aktiva-riciba [last viewed 04.02.2024].

[13] *Bērziņa*, I. Latvijas sabiedrības un valsts attiecības Krievijas-Ukrainas kara kontekstā [Latvia's societal and state relations in the context of the Russia-Ukraine war]. Riga: Center for Security and Strategic Research of The National Defense Academy of Latvia, 2023, p. 3. Available: https://www.naa.mil.lv/sites/naa/files/document/I.Berzina_Latvijas_sabiedriba_%20un_valsts_attiecibas_Krievijas_Ukrainas_kara_konteksta.pdf [last viewed 04.02.2024].

[14] *Makintairs,* A. Vai patriotisms ir tikums? [Is Patriotism a Virtue?]. In: Kiss, J., red. Mūsdienu politiskā filosofija. Rīga: Zvaigzne, 1998, pp. 420–435.

[15] *Vilcāne, V.* Viesturs Kairišs: Patriotisms ir bīstams vārds [Viesturs Kairišs: Patriotism is a dangerous word]. Latvijas Vēstnesis, 17.11.2017. Available: https://lvportals.lv/viedokli/291376-viesturs-kairiss-patriotisms-ir-bistams-vards-2017 [last viewed 04.02.2024].

[16] *Gary, R.* To Mon General: farewell, with love and anger. Life, Vol. 66, No. 18, 1969, p. 26.

can be positive or negative: "Nationalism can be a malign force or a beneficial one. Especially when tied to ethnic claims, it has led to great horrors. On the other hand, it had a major role in resisting, and ultimately defeating, fascism and communism in the 20th century. And a cultural nationalism such as the United States has had for much of its history, which welcomes immigrants from across the globe provided they assimilate to local traditions, can do much to promote social peace and tolerance."[17] British academic John Hutchinson claims that cultural nationalism could be seen as a positive form of nationalism: "Cultural nationalism is a movement quite independent of political nationalism. It has its own distinctive aims – the moral regeneration of the national community rather than the achievement of an autonomous state – and a distinctive politics".[18]

From the perspective of scientists, it is also suggested to categorize patriotism in various ways. For Professor Stephen Nathanson, patriotism can be moderate, extreme or hostile, and peaceful.[19] For Professor Ervin Staub, in turn, patriotism can be blind or constructive.[20] Professors Robert T. Schatz, Ervin Staub and Howard Lavine in their article "On the Varieties of National Attachment: Blind Versus Constructive Patriotism" gives the following definitions of those terms: "Blind patriotism is defined as an attachment to country characterized by unquestioning positive evaluation, staunch allegiance, and intolerance of criticism. Constructive patriotism is defined as an attachment to country characterized by support for questioning and criticism of current group practices that are intended to result in positive change."[21]

Professor Pauline Kleingeld, in turn, distinguished *three types* of patriotism: civic patriotism, nationalist patriotism and trait-based patriotism. In her article "Kantian Patriotism", she contrasts the types of patriotism: "Civic patriotism is the love of political freedom and the institutions that sustain it. [...] Nationalist patriotism does not focus on the political commonwealth in which one is a citizen, but on the national group to which one belongs. What counts as a nation can be defined in different ways, e.g., in terms of native language, cultural community, shared ancestry, common history, or other factors, or combinations of these. [...] This third kind of patriotism is the love of one's country that results from reflection on or direct appreciation of its qualities. I may come to love my country because it is beautiful; because my personal identity is connected with it in a positive way; because it enables me to live comfortably; because it has laws that promote my well-being; or because I recognize its laws as just or my fellow citizens as virtuous."[22] It should be noted that all the above-mentioned suggestions are only a part of several possible classifications of patriotism that enable understanding the content of this term.

Overall, the authors of the article acknowledge that patriotism is a concept characterizing the existence of the modern state, in which one can find various components: legal, social, ideological, nationalistic, emotional, cultural, etc.

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[17] *Movsesian, M. L.* The New Nationalism (08.12.2016). Available: https://lawliberty.org/the-new-nationalism/ [last viewed 04.02.2024].

[18] *Hutchinson, J.* The Dynamics of Cultural Nationalism. London: Taylor & Francis, 2023, p. 8.

[19] *Nathanson, S.* Should patriotism have a future? In: Patriotism: In the lives of individuals and nations, *Bar Tal, D., Staub, E.* (eds). Chicago: Nelson Hall, 1997, pp. 311–326.

[20] *Staub, E.* Blind versus constructive patriotism: Moving from embeddedness in the group to critical loyalty and action. In: Patriotism: In the lives of individuals and nations, *Bar Tal, D., Staub, E.* (eds). Chicago: Nelson Hall, 1997, pp. 213–228.

[21] *Schatz, R. T., Staub, E., Lavine, H.* On the Varieties of National Attachment: Blind Versus Constructive Patriotism. Political Psychology, No. 20, 1999, p. 151.

[22] *Kleingeld, P.* Kantian Patriotism. Philosophy and Public Affairs, No. 29, 2000, pp. 317–321.

Unfortunately, these components have hardly been studied in Latvia, however, in this article, respecting the education and specialization of its authors, the main attention is paid to the legal aspects of patriotism.

2. Latvian national legislation and policy planning documents

2.1. Regulation in the fields of education and sports

In the regulatory framework of Latvia, the term "patriotism" is used relatively rarely. It is basically related to issues of education of students. The Education Law, for example, imposes obligations of a teacher in the educational process shall be, as follows: to raise decent, honest, responsible human beings – patriots of Latvia, to strengthen the belonging to the Republic of Latvia.[23] This is also reflected in Youth Law: "The purpose of the Law is to improve the quality of life of young people – persons from 13 to 25 years of age – by promoting their initiatives, work ethic, patriotism, and participation in decision-making and social life, and also by supporting youth work"[24]. Meanwhile, the obligation set out in the Section 8(1) of this law imposes on the state and local governments the duty to promote patriotism.[25] Patriotism is also promoted within the framework of the Youth Guard and National Defence Training.[26]

The need to ensure patriotic upbringing is also stipulated in the Cabinet of Ministers regulations. Cabinet Regulation No. 480 of 15 July 2016 "Guidelines for the Upbringing of Educatees and the Procedures for the Evaluation of Information, Teaching Aids, Materials, and Study and Upbringing Methods" state: "The objectives of the upbringing for the development of attitudes include promoting the following of educatees awareness of the national identity and statehood, loyalty to the State of Latvia and the Constitution, patriotism" and "In the implementation of the goal and objectives of upbringing, an educational institution shall strengthen the national awareness of an educatee, promote civic participation and initiative, loyalty and patriotism, including by organizing celebrations of national holidays and Latvian traditional holidays, remembrance days, and festive days, and other events which deepen the understanding of the history of Latvia, the emergence of the State, restoration of statehood, the fate of the nation, the War of Independence, and the protection of the State which contribute to a sense of pride for the State of Latvia and its people, popularize the examples of the lives and activity of people which demonstrate selflessness and altruism for the benefit of the State of Latvia, contribute to affiliation with his or her educational institution, region, city, or town, and inform of the opportunities for civic participation".[27]

In addition, one of the studies concluded that the daily education process, which takes place during lessons and extracurricular activities – in the events of the educational institution, during daily communication between teachers and students, several components can be found, including the most important human values, for

[23] Izglītības likums [Education Law], Section 51(1)2.[1] (29.10.1998). Latvijas Vēstnesis, No. 343/344, 17.11.1998.

[24] Jaunatnes likums [Youth Law], Section 1. (08.05.2008). Latvijas Vēstnesis, No. 82, 28.05.2008.

[25] Ibid., Section 8(1).

[26] Valsts aizsardzības mācības un Jaunsardzes likums [Law on the National Defence Training and the Youth Guard], Section 2(3)2. (03.12.2020). Latvijas Vēstnesis, No. 247A, 22.12.2020.

[27] Izglītojamo audzināšanas vadlīnijas un informācijas, mācību līdzekļu, materiālu un mācību un audzināšanas metožu izvērtēšanas kārtība [Guidelines for the Upbringing of Educatees and the Procedures for the Evaluation of Information, Teaching Aids, Materials, and Study and Upbringing Methods], Section 6.9. and 10.5. Cabinet of Ministers Regulation No. 480 of 15.07.2016. Latvijas Vēstnesis, No. 141, 25.07.2016.

example, patriotism, civic participation, traditions, culture, respectful, responsible and tolerant interpersonal relationships and the learning of various social or life skills.[28]

Cabinet Regulation No. 747 of 27 November 2018 "Regulations Regarding the State Basic Education Standard and Model Basic Education Programmes" notice: "The objective of the implementation of the basic education content is a comprehensively developed and competent pupil who is interested in his or her intellectual, socio-emotional, and physical development, is living healthily and safely, studies with pleasure and interest, participates in public events in a socially responsible manner and undertakes initiative, is a patriot of Latvia".[29] The results to be achieved in the field of social and civic learning, at the end of the 3rd, 6th and 9th grades are, as follows: at the end of the 3rd grade – the pupil explains what patriotism is and how it can be expressed, in the 6th grade – the pupil explains the importance of patriotism, whereas in the 9th grade – explains what expressions of loyalty and patriotism can be present in modern (Latvian) society.

Representatives of the "School 2030" project, who have participated in the development of the current curriculum, admit: "Patriotism is when I don't ask why I have to fulfil one or another duty of a citizen. It's an opportunity to show that I care about my country by working honestly, voting, paying taxes and driving at the speed limit. You can call it an everyday patriotism".[30]

The National Development Plan for 2021–2027 states: "A modern education system creates future citizens who are patriotic, rooted in the national culture and the way of life of their country, with significant creative potential and high demands on art. Latvia is a country where every resident can learn and improve according to their life situation and future goals".[31]

The term "patriotism" is relatively rarely mentioned in education, culture, and national defence policy planning documents, for example, the Guidelines for the Development of a United and Civically Active Society 2021–2027 assert: "The foundation of civil society is patriotic families that feel belonging to their country. The principles of civil society and basic values must be incorporated into the educational content of the education system, which form a loyal young generation with common value orientation from preschool age. The projects implemented in schools and within the framework of youth policy should also be oriented towards promoting the social activity of young people, researching the historical events of the parish, county and national level, involving them in decision-making, thus developing both local patriotism and belonging to the country".[32]

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[28] *Kenkle, A., Mihailovs, I. J.* Upbringing Process in Institutions of General Education in Latgale. Regional review. Research papers, No. 10. Daugavpils: Daugavpils University Academic Press „Saule", 2014, pp. 62–70.

[29] Noteikumi par valsts pamatizglītības standartu un pamatizglītības programmu paraugiem [Regulations Regarding the State Basic Education Standard and Model Basic Education Programmes], Section 2. Cabinet of Ministers Regulation No. 747 of 27.11.2018. Latvijas Vēstnesis, No. 249, 19.12.2018.

[30] *Tamsone, I.* Patriotisms mācību saturā – līdzdalība un rīcība ikdienā, ne vien simboliski [Patriotism in the curriculum involves participation and action in everyday life, not just symbolically] (21.11.2019). Available: https://www.skola2030.lv/lv/jaunumi/6/patriotisms-macibu-satura-lidzdaliba-un-riciba-ikdiena-ne-vien-simboliski [last viewed 04.02.2024].

[31] Latvijas Nacionālais attīstības plāns 2021.–2027. gadam [National Development Plan of Latvia for 2021–2027] (NAP2027). Available: https://likumi.lv/ta/id/315879-par-latvijas-nacionalo-attistibas-planu-20212027-gadam-nap2027 [last viewed 04.02.2024].

[32] Par Saliedētas un pilsoniski aktīvas sabiedrības attīstības pamatnostādnēm 2021.–2027. gadam [The Guidelines for the Development of a Cohesive and Civically Active Society for 2021–2027]. Cabinet of Ministers Order No. 72 of 05.02.2021. Latvijas Vēstnesis, No. 28, 10.02.2021.

Meanwhile, the Sports Policy Guidelines for 2022–2027 provide: "Successful sports policy promotes achievements in sport, promotes healthy lifestyle, provides economic contributions to national economy, and also strengthens patriotism of citizens, improves the image and recognizability of Latvia in the world and increases international competitiveness".[33] The National Development Plan for 2021–2027 reiterates: "Smart sport policy results in sporting achievements and healthy lifestyles, strengthens pride in Latvia and increases Latvia's visibility abroad."[34]

In general, the education system of Latvia dedicates sufficient attention to patriotism and patriotic education, however, family, as well as various state institutions and NGOs, play no less important role in fostering patriotism. The role of state institutions in this process can certainly be improved.

2.2. Requirement of loyalty in solemn promises and oaths

Commitment to be loyal to the Republic of Latvia is contained in solemn promises and oaths included in several laws. According to the Republic of Latvia Citizenship Law,

> *A person who is admitted to Latvian citizenship shall give and sign the following pledge of loyalty to the Republic of Latvia in a solemn ceremony:*
>
> *"I, (given name, surname), born on (date of birth), becoming a Latvian citizen, pledge that I will be loyal to the Republic of Latvia.*
>
> *I undertake to be devoted to Latvia and fulfil the Constitution and laws of the Republic of Latvia in good faith.*
>
> *I undertake to defend the independence of the State of Latvia, to strengthen the Latvian language as the only official language, to live and work in good faith, in order to increase the prosperity of the State and people of Latvia.*
>
> *I certify that my action will never be directed against Latvia as independent and democratic country.*[35]

Members of the *Saeima*,[36] judges,[37] prosecutors,[38] sworn lawyers,[39] state civil service officials,[40] State Police officers,[41] State Border guards,[42] soldiers and national guardsmen,[43] as well as several other officials, give an oath, which includes loyalty

[33] Par Sporta politikas pamatnostādnēm 2022.–2027. gadam [Sports Policy Guidelines 2022–2027]. Cabinet of Ministers Order No. 397 of 31.05.2022. Latvijas Vēstnesis, No. 107, 03.06.2022.

[34] National Development Plan of Latvia for 2021–2027. Available: https://www.mk.gov.lv/lv/media/15165/download?attachment [last viewed 04.02.2024].

[35] Pilsonības likums [Citizenship Law], Section 18(1) (22.07.1994). Latvijas Vēstnesis, No. 93, 11.08.1994.

[36] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia], Section 18 (15.02.1922). Latvijas Vēstnesis, No. 43, 01.07.1993.

[37] Par tiesu varu [On Judicial Power], Section 68 (15.12.1992). Ziņotājs, No. 1/2, 14.01.1993.

[38] Prokuratūras likums [Office of the Prosecutor Law], Section 60 (19.05.1994). Latvijas Vēstnesis, No. 65, 02.06.1994.

[39] Latvijas Republikas Advokatūras likums [Advocacy Law of the Republic of Latvia], Section 46 (27.04.1993). Ziņotājs, No. 28, 19.08.1993.

[40] Valsts civildienesta likums [State Civil Service Law], Section 13 (07.09.2000). Latvijas Vēstnesis, No. 331/333, 22.09.2000.

[41] Iekšlietu ministrijas sistēmas iestāžu un Ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm dienesta gaitas likums [Law on the Course of Service of Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Prison Administration], Section 11 (15.06.2006). Latvijas Vēstnesis, No. 101, 30.06.2006.

[42] Valsts robežsardzes likums [State Border Guard Law], Section 11 (05.11.2020). Latvijas Vēstnesis, No. 223, 17.11.2020.

[43] Latvijas Republikas Zemessardzes likums [National Guard of the Republic of Latvia Law], Section 5 (06.05.2010). Latvijas Vēstnesis, No 82, 26.05.2010.

to the Republic of Latvia. Loyalty to Latvia, as the foundations of a cohesive Latvian society, is also enshrined in the Preamble of the Constitution (*Satversme*) of the Republic of Latvia.[44]

In addition, loyalty, trust and affiliation are included in several professional codes of ethics. In the Code of Ethics of the State Police, for example, the principle of loyalty is included in Section 11.7 and contains four subsections, stipulating that a State Police officer with a special rank, an employee with whom an employment contract has been concluded, and a civil servant of the state undertakes the following: (1) while performing official (position, work) duties, always considers the state interests as primary in relation to personal interests; (2) in public statements, is loyal to the state and the State Police and respects the goals and core values of the State Police; (3) explains or expresses the opinion of the State Police in public statements related to professional activity, being aware that they shape the public's opinion about the image of the State Police; (4) does not participate in activities that could objectively raise doubts about actions in the interests of the state or society, interfere with the professional performance of service (position, job) duties, compromise or embarrass the State Police. The State Police respects the privacy of employees and does not restrict their private activities outside working hours, as long as it is not associated with the State Police.[45] The regulatory framework, which determines the professional ethical norms of the State Police employee, including the basic principles of values and professional ethics, has improved in the course of historical development.[46]

The principle of loyalty and patriotism, unfortunately, are not included in the Cabinet of Ministers Recommendation of 21 November 2018 "Values of State Administration and Fundamental Principles of Ethics"[47].

When evaluating the regulatory framework as a whole, it should be noted that, when using the term "patriotism", it does not provide an explanation for this concept and does not use a systemic approach to the use of this concept. In this regard, the authors express their belief that it would be useful for the legislator to clearly define the term "patriotism" (for example,. in State Administration Structure Law), which, in turn, would avoid the declarative use and different interpretation of this concept. A clear definition of the concept of "patriotism" will also make it possible to precisely determine the tasks to achieve an important goal of the country – increasing the level of patriotism.

Considering that ensuring the rights set forth in Chapter VIII "Fundamental Human Rights", the Constitution (*Satversme*) of the Republic of Latvia is the state's duty. In the opinion of the authors, it would be useful to introduce the amendments directly into this normative act with the highest legal force, and to supplement the Preamble, strengthening the requirement to promote patriotism in Latvian society: "Patriotism and loyalty to Latvia, the Latvian language as the only official

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[44] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Latvijas Vēstnesis, No. 43, 01.07.1993; Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (19.06.2014). Latvijas Vēstnesis, No. 131, 08.07.2014.

[45] Valsts policijas ētikas kodekss [Code of Ethics of the State Police], Section 11.7 (05.02.2020). Available: https://www.vp.gov.lv/lv/media/715/download [last viewed 04.02.2024].

[46] *Treļs, Ē.* Valsts policijas darbinieka profesionālās ētikas pamatprincipi [Basic Principles of the Professional Ethics of State Police Officers]. Socrates: Riga Stradiņš University Faculty of Law Electronic Scientific Journal of Law, 3(18), 2020, p. 110. Available: https://doi.org/10.25143/socr.18.2020.3.097-113 [last viewed 04.02.2024].

[47] Valsts pārvaldes vērtības un ētikas pamatprincipi [Values of State Administration and Fundamental Principles of Ethics]. Cabinet of Ministers Recommendation No. 1 of 21.11.2018. Latvijas Vēstnesis, No. 235, 29.11.2018.

language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society".

3. The State, homeland and humans

Analysing the aforementioned opinions of scientists, regulatory framework and other available information, it can be concluded that, although several authors highlight the features characterizing patriotism, they do not provide clear boundaries for this term. The main aspect that the authors of the article would like to emphasize in this regard is that when studying the concept and content of patriotism, one should delineate the love of the homeland (fatherland), i.e. patriotism as such, from loyalty to the state (state administration). At the same time, it must be recognized that these concepts are closely related: independence, sovereignty, democracy and territorial indivisibility allow Latvian patriots to freely express their feelings towards their homeland, their fatherland. For professor Robert Jensen, patriotism is an "expression of commitment to a set of basic democratic ideals, which typically include liberty, justice, and (sometimes) equality".[48] For Associate Professor M. Victoria Costa, in turn, "philosophical accounts of patriotism describe it as either (a) a type of love for country or (b) a type of loyalty to country. [...] there are two different approaches, one focused on feelings and the other on actions and dispositions to act. [...] the two views, which might initially seem quite distinct, overlap very considerably and differ perhaps only in emphasis."[49]

Patriotism is the love for one's homeland. It is a personal feeling, a personal experience of an individual. The homeland is not the state or the authority. The homeland is the territory within which the roots of one's life are entrenched.

The Ombudsman of the Republic of Latvia notes that patriotism cannot be facilitated by coercive means, imposing an obligation to engage in active behaviour to commemorate events of historical importance.[50] Such obligation could in no way consolidate the democratic structure of the state by functioning as a coercive or repressive mechanism.

In addition to the above, the authors emphasize the role of the State in ensuring the voluntary acquisition of patriotic education. For an individual, it is an opportunity rather than an obligation. The State, in turn, should serve the people. Patriotism grows out of freedom, out of the human rights and fundamental freedoms of individuals or groups, out of prosperity and well-being, out of love for one's neighbour, and it is the duty of the State to make every effort to achieve the highest possible standard of living for every person who inhabits the given state.

Patriotism is not only an emotional element of connection, but also a particular way of life that influences an individual's beliefs, actions and choices. Patriotism takes many forms, from individual to collective ones, manifesting itself in civic activities, such as voting in *Saeima* and local government elections, involvement in public work, participation in local community events and several other activities. In this way, patriotism promotes unity and solidarity in society. Patriotism mobilizes people to defend their country's interests by participating in economic development, security

[48] *Jensen, R.* Patriotism Is a Bad Idea at a Dangerous Time. In: *Westheimer, J.* (ed.). Pledging Allegiance: The Politics of Patriotism in America's Schools. New York: Teachers College Press, 2007, p. 75.

[49] *Costa, M. V.* Patriotism and Civic Virtue. In: *Sardoc, M.* (ed.). Handbook of Patriotism. Berlin: Springer Nature, 2020, pp. 214–215.

[50] Judgement of the Constitutional Court of the Republic of Latvia of 2 July 2015 in case No. 2015-01-01. Latvijas Vēstnesis, No. 129, 06.07.2015.

and environmental protection. At the same time, patriotism can be deeply personal, involving love for one's homeland, its history and culture, as well as one's fellow men. Patriots as a group are united and simultaneously divided by several criteria. It is belonging to a certain culture, faith, language, following certain traditions, and other criteria resulting from persons belonging to a certain social group. Although the aforementioned criteria are important, they are by no means decisive in order to prevent a person from considering himself a patriot of a particular country. For example, belonging to a certain nationality will not necessarily be a characteristic of a patriot. A frequently heard question in the context of military action is: Are the Russians living in Latvia patriots of Latvia?

The authors express their belief that the concept of "patriotism" is not delineated by belonging to a certain nationality. In this regard, it would be useful to remember important historical events for Latvia. In the context of restoring Latvia's national independence, the issue of patriotism is especially relevant. Remembering the events of August 1991 in Riga, Ziedonis Čevers, a witness and active participant of the events of that time, described the connection of patriotism with nationality, as follows: "You cannot say that love for the country of Latvia at that time was determined by the nationality of a person. There were also Latvians who continued to disbelieve in Latvia's independence and were not patriots at all, but there were enough foreigners who were Latvian patriots."[51]

In this context, one should remember the words of professor Emile Durkheim: "Great social disturbances and great popular wars rouse collective sentiments, stimulate partisan spirit and patriotism, political and national faith, alike, and concentrating activity toward a single end, at least temporarily cause a stronger integration of society... As they force men to close ranks and confront the common danger, the individual thinks less of himself and more of the common cause".[52]

As times have changed, so has the situation in our country. Adverse historical events have influenced such phenomena as hatred, intolerance, prejudice and stereotypes.[53] In this context, the authors have to agree with Archbishop Jānis Vanags of the Evangelical Lutheran Church of Latvia, who said in one of the services: "Sometimes it seems that the only patriotism we are still capable of is not seeing foreigners".[54]

Thus, in the opinion of the authors of the article, it would not be correct to associate "patriotism" solely with belonging to a certain nation, linguistic group (for example, Latvian speakers), citizenship, home country, faith, to link it only with a certain origin, language, culture, or otherwise limit the expressions of patriotism of individuals.

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[51] *Vahers, J., Bērziņa, I.* Lūzums. No milicijas līdz policijai [Breaking point. From militia to police]. Rīga: Nordik, 2006, p. 165.

[52] *Durkheim, E.* Suicide. In: Emile Durkheim: Sociologist of Modernity. *Emirbayer, M.* (ed.). Malden: Blackwell Publishing, 2003, p. 38.

[53] See: *Treļs, Ē.* Krimināllatbildība par reliģiskā naida vai nesaticības izraisīšanu [Criminalisation of incitement to religious hatred or hatred]. Socrates: Riga Stradiņš University Faculty of Law Electronic Scientific Journal of Law, 1(7), 2017, p. 9.

[54] Dieva valstība ir jūsos. Arhibīskapa uzruna 18. novembra ekumeniskajā dievkalpojumā [The Kingdom of God is within you. Archbishop's address at the ecumenical service on 18 November]. (18.11.2010). Available: http://lelb.lv/lv/?ct=lelb_zinjas&fu=read&id=1087 [last viewed 04.02.2024].

Summary

Finally, the authors put forward the following theses in the form of conclusions and proposals:

1. The term "patriotism" is not explained in Latvian regulatory acts. The substantive fulfilment of this term is possible using theoretical/doctrinal knowledge, as well as methods of interpretation of legal norms.
2. In the regulatory acts of Latvia, patriotism is corroborated in the legal regulation of education and youth, simultaneously presenting a series of loopholes in connection with patriotic education and patriotism in areas such as state administration, national security, etc.
3. Although the term "patriotism" is not directly mentioned in the laws governing citizenship, civil service, National Armed Forces, etc., certain signs of patriotism can be seen in these laws. For example, trust or loyalty to the Republic of Latvia. Often, this is related to the obligation to take an oath, to comply with the provisions of regulatory acts, as well as ethical codes.
4. It is not correct to associate the term "patriotism" solely with belonging to a certain nation, linguistic group, citizenship, etc., and also to limit the expressions of patriotism of various persons, observing some special characteristic of individuals that does not correspond to the majority's ideas about the expressions of patriotism.

In general, it should be noted that the Republic of Latvia has neither defined the term "patriotism" in its regulatory acts and policy planning documents, nor has it clearly formulated its approach to the systemic development of patriotism and patriotic education, thoroughly comprising the Latvian society. However, it is precisely patriotism that is a crucial element in shaping our national identity.

To address the identified issues, it would be appropriate to amend the Preamble of the Constitution (*Satversme*) of the Republic of Latvia and supplement the second sentence of the fifth paragraph with the word "patriotism": Patriotism and loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society.

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Aspazijas bulvāris 5, Riga, LV-1050
www.apgads.lu.lv
apgads@lu.lv