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In Memoriam

Professor Jānis Rozenfelds 1946–2022

Photo: Boriss Koļesņikovs

Professor Jānis Rozenfelds was taken from us last year on the eternally moving wings of time: he passed away in the 77th year of his life on 21 November 2022. His lifetime was firmly linked with the University of Latvia since the 1960s of the last century, when he started his legal studies, and continued with rich and fruitful academic, scientific, and organisational work spanning many decades – from 1972 till his last breath.

Professor Rozenfelds was a well-known and recognised civil law scholar raising new generations of lawyers by means of his active, experience-based, and enthusiastic teaching of different legal courses. Amongst the most important courses taught by Professor, one may mention *Law of Things* (dedicated to Latvian civil law and its teaching following the Roman tradition), *Roman Civil Law*, and *Intellectual Property Law*. He mainly taught in Latvian, however, his teaching covered also courses in English, intended for visiting foreign students. He taught students at all study levels, i.e., bachelor's, master's, and doctoral programmes. The latter type of studies allowed Professor to raise seven legal scholars, whose doctoral theses were supervised by himself. The author of these lines was one of these seven scholars, and his first doctoral student who successfully defended a doctoral thesis twelve years ago, in 2011.

In this regard, it is worth mentioning that recently Professor's son approached me with an inquiry whether I thought that an AI generated voice of his father could

resemble his teaching. My answer was negative: perhaps, the words could describe Professor's ideas, however, he would never use such words by himself. I was rather sure of my answer, having known him for more than 20 years in different situations, such as being his student and working with him closely in a university and in legal practice. At the very moment of giving my answer, I realised that his teaching style cannot be repeated: his excellent sense of humour, profound knowledge of a subject, and vast experience enabled him to explain things as none other could. It would be true to say that his style of teaching resembled the posture of a classical Roman lawyer – this comparison is not a coincidence, as it reflects his dedicated teaching of Roman civil law and interest of Rome.

His teaching was successfully supplemented with research – mainly in legal areas of his teaching. He was an author of several monographs, including well known and widely cited textbooks in Latvian. His textbook on law of things is amongst the most cited publications in Latvian court rulings, as testified by the online database of anonymised Latvian court rulings. Another monograph, which was published online by *Kluwer* shortly before his passing away, dealt with property law in Latvia. He was also one of the most active contributors to this journal, and his articles were published in numerous issues. His last article was printed in the very last issue – No. 15 of the last year, and it explored liability for unlawful use of a trademark.

Professor enthusiastically carried out organisational duties in addition to his academic and scientific work in different internal institutions of the university. These duties included the position of the Head of the Civil Law Department for two consecutive terms and the Head of the Professors' Council for five years. His last official public duties included service as the Head of the Doctoral Council (since 2005) and the Head of the Council of the Faculty of Law (since 2011).

In addition to his life at the University of Latvia, Professor was resolute and successful in his legal practice as an attorney, which spanned almost 30 years. His assistance was sought by different clients in a vast variety of complicated disputes, mainly – in civil law. The disputes led him to litigation before different courts of Latvia since the 1990s, including the Constitutional Court and the Supreme Court. Legal practice also allowed Professor to raise the future attorneys, who today successfully work in the field of law, – some of them lead law firms, or act as partners therein.

For his distinguished academic, scientific, and practical work, he was decorated with several significant awards of the State and the University of Latvia. These merits include the Cross of Recognition awarded to him in 2012 for an outstanding contribution to the restoration of the legal system of the Latvian State, strengthening of democracy and the rule of law, development of legal science and education in Latvia.

Just like a human lifetime, the lines written to honour the memory of the Professor end in due course. At the conclusion, the author of these lines repeats the words said on a previous occasion in remembrance of Professor Jānis Rozenfelds: "Professor leaves behind thankful students, admiring colleagues, supporting family members, continuing to live in his publications, recordings of his speeches, class materials, scientific ideas, academic approaches, memories".

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The Multi-Stage Adoption of the 1992 Lithuanian Constitution in Comparative Perspective and Some Constitutional Paradoxes

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This article is the first attempt to analyse the Constitution of the Republic of Lithuania of 1992 from the perspective of the comparative concept of multi-stage constitution-making. The article consists of three parts: the first two explain, why the 1992 Lithuanian Constitution is not only a result of the 1989–1992 political and legal events in the country, but also bears some conceptual similarities in the latter legal steps with those of 1918–1922. From a comparative perspective, we can see that the multi-stage constitution-making in Lithuania (as well as other Baltic states) in the late 1980s and beginning of 1990s differs from some countries in the region of Central Eastern Europe (e.g., Poland and Hungary), because it includes the concept of continuity with the inter-war republics and does not include the phenomenon of "round tables" between the Communist party and so-called new People's Front movements. The third difference is that the new constitutions were adopted in Lithuania and Estonia (and re-adopted in Latvia) at the beginning of 1990s, i.e., during the so-called "constitutional moment", while in Poland and Hungary this happened a bit later. The last chapter of the article shows some constitutional paradoxes of constitution-making, namely: the paradox concerning the legitimacy of the authority having the power to adopt a constituent act; the paradox of mutual inter-dependence between the constituent authority and the constituent act, adopted by this authority; the so-called paradox of "illegality of law" of the constituent act (including the constitution adoption process) and the paradox of retrospectivity of the constituent act.

Keywords: multi-stage adoption procedure, Constitution, constitution-making, restoration of independence, elections, paradox.

Contents

Introduction

The idea of this article is to reconsider the process of adoption of the 1992 Lithuanian Constitution in the light of its thirty-year anniversary, and to show the complex and multi-stage character of this process. It is also important that this anniversary of the 1992 Lithuanian Constitution coincides with the centennial anniversary of the 1922 Constitution as the first modern Lithuanian democratic constitution. It has to be said, that Lithuanian legal scholars have not analysed the legal and political stages of the adoption of the 1992 Lithuanian Constitution, – neither by linking them with the 1990 Act of Restoration of Independence (or with previous political events in the country), nor with the constitutional acts of interwar Lithuania (the First Lithuanian Republic). This article shows that disregarding the complexity of this constitution-making process may result in losing the proper understanding of the 1992 Lithuanian Constitution and the way of its adoption.

Thus, the current article states that the multi-stage process was used for the adoption of the 1992 Lithuanian Constitution, which was partly influenced by the events of the end of the 1980-ies, but furthermore, indirectly – by interwar political events in the country. Incidentally, the so-called "multi-stage" form of constitutional adoption is a rather widely discussed phenomenon in the comparative constitutional literature: for example, Andrew Arato in his book "Post Sovereign Constitution-Making. Learning and Legitimacy" (Oxford University Press, 2016)[1] analyses the recent constitutional amendment process in Hungary, comparing it with the earlier constitutional process in Poland. Thus, Andrew Arato distinguishes five stages of the 1989–1990 multi-stage constitution-making process in these two countries: (i) formation of the so-called roundtables and their compromises with the then communist government, (ii) adoption of an interim constitution, (iii) election of the first democratic parliament, (iv) adoption of a new constitution by this parliament; and v) ratification of this constitution by a nationwide referendum.

Considering the Baltic region, it is important to emphasize that multi-stage adoption of constitutions (as constitutional continuation of interwar republics) is reflected in the preambles to these constitutions. For example, the preamble of the 8 June 1992 Lithuanian constitutional act, which is an integral part of the Lithuanian Constitution, states that the former act is adopted on the basis of the 1918 (and of the 1990) Independence Act. The preamble to the 1992 Estonian Constitution also contains a reference to the 1918 Declaration of Estonian Independence[2]. Similarly, the 2014 amendment to the 1922 Latvian Constitution states that the Latvian state was created in 1918 and that "The people of Latvia did not recognise the occupation regimes, resisted them and regained their freedom by restoring national independence on 4 May 1990 on the basis of continuity of the State"[3]. Thus, it should be noted here

[1] See also articles by the same author: Conventions, Constituent Assemblies, and Round Tables: Models, Principles, and Elements of Democratic Constitution-Making. Global Constitutionalism, Vol. 1, issue 1, 2012; Multi-Track Constitutionalism Beyond Carl Schmitt. Constellations, Vol. 18, issue 3, 2011; Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What. South African Journal of Human Rights, Vol. 26, Part I, 2010. See also *Ginsburg, T., Elkins, Z., Blount, J.* Does the Process of Constitution-making Matter? Annual Review of Law and Social Science, 2009.

[2] The Constitution of the Republic of Estonia. RT 1992 26, 349. The 1992 Estonian Constitution was supplemented by a preamble following the adoption of the 2007 Amendment to the Constitution. RT 2007, 33, 210. Available: https://www.riigiteataja.ee/en/eli/521052015001/consolide [last viewed 17.08.2023].

[3] The 1922 Latvian Constitution (Latvijas Republikas Satversme (15.02.1922). Valdības Vēstnesis, No. 141, 1922) was supplemented by a preamble following the adoption of the 19 June 2014 Constitutional

that the constitutions of Lithuania and other two Baltic states enshrine the provisions that the current Constitution is not only the result of political events of 1989–1992, but also of those after the First World War.

Notably, almost all the stages of the adoption of new constitutions after the fall of communism mentioned by Arato are more or less suitable for Lithuania and other two Baltic states (although Latvian case is a particular one, as it did not adopt a new document, but instead readopted the interwar 1922 Constitution). Thus, one of the main features of the multi-stage adoption of constitutions of the Baltic states is that in these countries (due to the loss of statehood during the Second World War) it was very important to show the illegality of the Soviet occupation and to demonstrate a continuity with the interwar constitutional tradition. Therefore, this article partly incorporates the practice of interwar Lithuanian constitutionalism into the contemporary constitution adoption process. In other words, it is stated here that the adoption procedure of the 1992 Lithuanian Constitution would have been different without the experience of adoption of the 1922 Lithuanian Constitution[4].

1. The multi-stage adoption of the 1922 Lithuanian Constitution

(1) The Lithuanian national revival at the end of the 19th century and the early 20th century led to the election of the Council of Lithuania (*Lietuvos Taryba*) in September 1917 and its Independence Act on 16 February 1918[5]. However, this Council was not a body formed on the basis of democratic elections (in the modern sense), therefore, it was necessary that the restoration of independence of 1918 be approved by the democratically elected representation of the nation. This is exactly what happened when democratically elected Constituent *Seimas* (Assembly) adopted the resolution of the 15 May, 1920 at its first sitting, not only reaffirming Lithuania's independence, but also providing Lithuania's form of government as a democratic republic[6], which was already determined in the aforementioned Independence Act of 16 February 1918.

Hence, the Council of Lithuania, which functioned during 1917–1920, considered itself a transitional institution, having the power not only to declare independence, but also to hold democratic elections of the Constituent *Seimas*, which had to adopt the Constitution. Therefore, before the adoption of the Constitution, the Council had

Amendment. See the consolidated text of the Constitution at: https://likumi.lv/ta/en/en/id/57980 [last viewed 17.08.2023].

[4] During the interwar period (besides the 1922 Constitution), the 1928 and the 1938 Lithuanian constitutions have also been adopted in Lithuania, but these constitutions are not included in this analysis of democratic processes, because the last two have been adopted after the *coup* in the end of 1926.

[5] Lietuvos Aidas, m. vasario 19 d. No. 22(70), 1918. Available: https://web.archive.org/web/20071113213946/http://viduramziu.istorija.net/etno/vasario16-en.htm [last viewed 17.08.2023]. It is widely accepted that this independence act is not only a political, but also a constitutional act, which was re-affirmed by the 11 March 1990 Independence Act "On the Restoration of the Independence of the State of Lithuania" adopted more than 70 years later. More thereof: *Paužaitė-Kulvinskienė, J., Vaičaitis, V*. 1918 m. vasario 16-osios akto konstitucinė samprata. Teisė, 2015, T. 94, pp. 176–188; *Sinkevičius, V*. 1990, m. kovo 11-osios aktas "Dėl Lietuvos valstybės nepriklausomybės atstatymo. In Lietuvos konstitucionalizmas. Ištakos, raida, dabartis. LR Konstitucinis Teismas, 2018, pp. 140–146.

[6] "The Constituent *Seimas* (Assembly) of Lithuania, expressing the will of the people of Lithuania, proclaims the existence of a restored Independent State of Lithuania as a democratic republic, with ethnological borders and free from all state relations that have existed with other states". Available: https://www.lrs.lt/sip/portal.show?p_r=38020&p_k=1 [last viewed 17.08.2023].

to adopt not only the provisional Constitution[7], but also the Law on Elections to the Constituent *Seimas* (Assembly)[8]. Thus, prior to the election of the Constituent *Seimas* in 1920, the Council adopted the following constitutional decisions (including the act of independence itself):

1) Act of Independence of 16 February 1918 → 2) 2 November 1918 Fundamental Laws of the Provisional Constitution (amended on 4 April 1919) → 3) 30 October 1919 Law on Elections to the Constituent *Seimas*.

(2) Thus, the Constituent *Seimas* elected in 1920 was unable to adopt the Constitution in a short time, first of all, because the Constituent *Seimas* as a "sovereign power" could not base its decisions on the legislation adopted by the transitional body – the Council of Lithuania (*Lietuvos Taryba*). Besides, before drafting the permanent Constitution it was necessary to adopt the Rules of Procedure of the Constituent *Seimas* and, finally, to adopt the Provisional Constitution (1920). Thus, the Constituent *Seimas*, continuing the constitutional processes of the Council of Lithuania, used the following four steps for the adoption of the 1922 Constitution by adopting 1) the Resolution of the Constituent *Seimas* of 15 May, 1920, re-affirming the independence and determining the republican form of government → 2) Rules of Procedure of the Constituent *Seimas* of 18 May 1920 → 3) Provisional Constitution of 10 June 1920 → 4) the 1922 Lithuanian Constitution.

The adoption of the 1922 Constitution was clearly a multi-stage process, as for its proclamation an adoption of previous seven constitutional acts were needed: 1) 1918 independence act; 2) 1918–1919 Fundamental Laws of the Provisional Constitution; 3) Law on Elections to the Constituent *Seimas* (30 October 1919); → 4) Resolution of the Constituent *Seimas* of 15 May 1920; → 5) Rules of Procedure of the Constituent *Seimas* (18 May 1920); → 6) Provisional Constitution (10 June 1920); → 7) 1922 Lithuanian Constitution.

2. The multi-stage adoption of the 1992 Lithuanian Constitution

Before commencing the analysis of the multi-stage 1992 Constitution-making, it has to be said that the 1992 Lithuanian Constitution is a compromise between two main draft Constitutions: the parliamentary one and the presidential one. Therefore, the form of government defined in the 1992 Constitution, according to the 10 January 1998 decision of the Lithuanian Constitutional Court, is parliamentary republic with certain peculiarities of semi-presidential form of government[9].

After the occupation and annexation of Lithuania by the Soviet Union in June 1940, the latter introduced the 1936 Stalin Constitution, and during the second soviet occupation (1944–1990), after "reaching the historical stage of mature socialism", the so-called 1977 Brezhnev Constitution was introduced in the territory of Lithuania (together with the 1978 Constitution of the Lithuanian Soviet Socialist Republic[10]). Thus, in 1990, when Lithuania's independence was restored, it was necessary to distance the state from these pseudo-constitutional acts of the occupying power, showing their illegality and emphasizing the continuity of the restored Lithuanian state with the interwar Lithuanian Republic.

[7] 2 November 1918 Fundamental Laws of the Provisional Constitution of the State of Lithuania. Lietuvos aidas, No. 130, 13.11.1918.

[8] Laikinosios Vyriausybės žinios, No. 16, 02.12.1919.

[9] Valstybės žinios, No. 5-99, 1998.

[10] Vyriausybės žinios, No. 11-130, 1978.

There is a general consensus that the creation or restoration of a democratic order can only be achieved through democratic means, in accordance with the principle that democracy can be born of democracy. In other words, only a democratically elected parliament or a constituent assembly could restore an independent and democratic state. However, the paradox here lies in the fact that, in general, the peaceful transition from an undemocratic regime to democracy sometimes requires a reference to previous undemocratic legal acts.

As noted above, the most important legal acts that were in force in occupied Lithuania until the restoration of independence were the 1978 Constitution of the Lithuanian Soviet Socialist Republic (Lithuanian SSR) together with 1989 Law on Elections to the Supreme Council of the Lithuanian SSR, and Rules of Procedure of the Supreme Council of Lithuanian SSR. Therefore, the Supreme Council of the Lithuanian SSR elected in the February 1990 elections convened its first meeting and adopted the first legal acts relying on the soviet legal acts, while these elections were organised and approved by the Electoral Commission of the Lithuanian Soviet Socialistic Republic. Admittedly, the electoral laws of the Lithuanian SSR were already partially democratized in 1989–1990[11]. Thus, for the first time since the first soviet occupation in 1940, the elections provided not one, but two candidates for one seat[12].

The first meeting of the newly elected Supreme Council took place on March 10, 1990. In the elections held on 23 February–10 March 1990, 133 deputies out of 141 were elected to the Supreme Council. Therefore, the quorum of 3/5 members of parliament to start the parliamentary session was pronounced by the then Chairman of Electoral Commission according to the (amended) 1978 Constitution of the Lithuanian SSR[13] and the Rules of Procedure of the Supreme Council of the Lithuanian SSR. In the same way, on 11 March 1990, the Speaker of the Supreme Council of the Lithuanian SSR and his deputies were elected on the basis of the soviet legal acts[14]. Therefore, paradoxically, not only the organization of the 1990 parliamentary elections, but also the democratically elected parliament had to start and organize its activities with the reference to the laws of the undemocratic regime. Only after that, on the same day – 11 March 1990 – the Supreme Council adopted the Act "On

[11] In the Soviet Union (and thus, in the occupied territory of Lithuania) the "elections" to the so-called Soviets (and thus to the Supreme Council – the pseudo-parliament) were conducted according to the list of candidates prepared in advance by the Communist Party in which there were only as many candidates as needed to fill the seats. According to official soviet data, in 1985 – 99.99% of voters participated in the elections to the Supreme Council of the Lithuanian SSR and 99.99%, in turn, voted for the candidates of the "inseparable communist bloc". Of 350 deputies: 67.1% were members of the Communist Party, 15.1% – members of communist youth organisation Komsomol and 17% did not belong to the Communist party. See: *Truska, L.* Paskutinioji (1985–1990 m.) Lietuvos TSR Aukščiausioji Taryba: evoliucija iš valdžios fikcijos į parlamentą. Vilniaus Pedagoginis Universitetas, Mokslo darbai „Istorija", 75 tomas, 2009/3.

[12] On 24 February 1990, the elections to the Supreme Council of the Lithuanian SSR were held in 141 single-member constituencies, where 133 deputies were elected from 472 candidates, 96 of whom were supported by the *Sąjūdis*. The remaining deputies were elected up to 10 March 1990. See the transcript of the first meeting of the Supreme Council on 10 March 1990. Available: https://www.lrs.lt/datos/kovo11/st_01.htm [last viewed 17.08.2023].

[13] The last (29 September 1989) Amendments to this Constitution, see: Žinios, No. 29-378, 1989.

[14] See the 11 March 1990 Resolution of the Supreme Council of the Soviet Socialist Republic of Lithuania "On the Election of the Speaker of the Supreme Council of the Soviet Socialist Republic of Lithuania" (Valstybės žinios, No. 9-215, 1990) and the March 11 1990 Resolution of the Supreme Council of the Soviet Socialist Republic of Lithuania "On the Election of the Deputy Speaker of the Supreme Council of the Soviet Socialist Republic of Lithuania" (Valstybės žinios, No. 9-216, 1990).

the Restoration of the Independent State of Lithuania"[15], and two accompanying acts: the Law on the Restoration of the 1938 Lithuanian Constitution (the last one in force before the Soviet occupation in 1940)[16] and the 1990 Provisional Fundamental Law of the Republic of Lithuania[17].

It should be recalled here that a year later, i. e., on 9 February 1991, it was decided to organize a plebiscite (consultative referendum), during which more than three quarters of Lithuanian voters supported the statement that the Lithuanian state is an independent democratic republic. On 11 February 1991, the Constitutional Act of the Republic of Lithuania "On the State of Lithuania" was adopted[18], which later became an integral part of the 1992 Constitution.

Thus, here emerge some historical legal parallels (or at least – similarities) with the restoration of interwar independence by the Constituent *Seimas*, which passed the 15 May 1920 resolution constitutionalizing the 1918 Independence Act, and later adopted the 1922 Constitution. In similar way, the Supreme Council, by adopting the 1991 Constitutional Act, re-affirmed the 1990 Act of Independence, and subsequently approved the draft of the 1992 Constitution. Therefore, it can be noted that the Supreme Council in 1990–1992 did not consider itself as being an ordinary parliament, but compared itself to the status of the 1920–1922 Constituent *Seimas*.

Thus, based on the above, in the process of adopting the 1992 Constitution of the Republic of Lithuania, the following main legal steps can be singled out:

1) In 1989, the Supreme Council of the Lithuanian SSR made some democratic changes in the text of the 1978 Lithuanian SSR Constitution[19] and in the Law on Elections to the Supreme Council of the Lithuanian SSR →
2) Organization of the 1990 elections to the Supreme Council of the Lithuanian SSR, which due to the wide participation of voters and the possibility for the Lithuanian Reform Movement (*Sąjūdis*) to nominate alternative candidates (to the Communist Party) can be considered at least partly as democratic elections →
3) On 11 March 1990 the Supreme Council adopted the Act on the Restoration of the Independent State of Lithuania, and on the same day approved the provisional constitution – the Provisional Fundamental Law →
4) In 1991–1992, the preparation of various drafts of the Constitution took place →
5) Approval of the draft Constitution on 13 October 1992 by the Supreme Council →
6) Adoption of the new Constitution by popular referendum on 25 October 1992.

3. Four constitutional paradoxes

First of all, the constitutional law is not an ordinary law, but a fundamental or basic law, and this fundamental nature of Constitution also includes certain paradoxes: on the one hand, the Constitution is a part of national legal system, but on the other hand, it is a foundation of this legal system. Therefore, not only the nature of the 1992 Lithuanian Constitution, but also its multi-stage adoption procedure can be seen as a set of certain paradoxical events.

[15] Lietuvos aidas, No. 11-0, 16.03.1990.
[16] Valstybės žinios, No. 9-223. 1990.
[17] Valstybės žinios, No. 9-224, 1990.
[18] Valstybės žinios, No. 6-166, 1991.
[19] E.g., the provision on the ruling role of the Communist Party was repealed.

(1) First of all, the paradox of a subject (body) having the power to declare independence, which is, as a rule, a necessary step for later adoption of the Constitution. According to modern democratic tradition, such a decision on independence could normally be proclaimed only by an institution with the nationwide mandate[20], but the legal problem here is that until the declaration of independence is adopted, public institutions, functioning in the state to be seceded from, usually oppose any separatist movements. Meanwhile, neither societal organizations (such as the People's Front), nor semi-social and semi-political formations such as "roundtables" are suitable for the adoption of constitutional acts, including declarations of independence. Therefore, there is some universal practice of changing the status and title of a particular institution by its own decision in order to adopt independence or constituent acts. For example, the Third Estate Assembly in Paris in 1789, as part of the *Assemblée des notables*, changed its name to the National Constituent Assembly (*Assemblée Nationale Constituante*), asserting its power to represent the whole nation and claiming authority to adopt a nationwide constitution. An analogy can also be observed in the Council of Lithuania (*Lietuvos Taryba*), elected in German-occupied Vilnius during the First World War (1917), which by German occupying authority was called *Litauische Landesrat* and was understood as body under the system of German rule in occupied territories. On the other hand, members of this Council, unlike the German occupation authorities, considered itself as representatives of the entire Lithuanian nation, therefore, it called itself a Council of Lithuania (*Lietuvos Taryba*)[21] having a mandate to adopt the 1918 Independence Act. Similarly, in February 1990, according to the reformed and partially democratized Soviet Constitution and electoral laws, the elected deputies of the Supreme Council of the Lithuanian Soviet Socialist Republic considered themselves democratically elected representatives of the entire Lithuanian nation and not members of the puppet soviet quasi-parliament. Therefore, by adoption of the 11 March 1990 Act of the Restoration of Independence, the Supreme Council of the Lithuanian SSR renamed itself as the "Supreme Council of the Republic of Lithuania". It is important to mention this paradox in the context of this article, because the 1992 Lithuanian Constitution was drafted and put to the popular referendum by the same Supreme Council.

(2) The second paradox lies in the dialectic between the constituent body (entity) and the constituent act adopted by this body (entity). For example, the 1918 Independence Act was adopted by the Council of Lithuania, while on the other hand, this Independence Act itself legitimized the Council of Lithuania, because this Council, without the adoption of the Act of Independence (i.e., without restoration of Lithuania's independence), would have remained *de jure* a *Litauische Landesrat*. Thus, the so-called chicken and egg paradox appears here, and it can be schematized, as follows: Council of Lithuania → Act of Independence → Council of Lithuania (or Act of Independence → Council of Lithuania → Act of Independence). A similar paradox can be noted between the Supreme Council and the 1990 Independence Act: the latter act was adopted by the said Supreme Council, but at the same time, the Independence Act (legally) created the Supreme Council of the Republic of

[20] As the 2014 Scottish example shows, an independence decision could also be proclaimed by the popular referendum, but the 2014 Scottish independence referendum is more an exception than the rule. See, e.g., *Hassan, G*. Scotland the Bold: How our nation has changed and why there is no going back. Freight Publishing, 2016.

[21] And from 11 July 1918 it changed its name to the Council of State of Lithuania (Lith. *Lietuvos Valstybės Taryba*).

Lithuania, instead of the "Supreme Council of the Lithuanian SSR". Therefore, the latter paradox can be illustrated, as follows: the Supreme Council of the Republic of Lithuania → the 1990 Act of Restoration of Independence → the Supreme Council of the Republic of Lithuania (or the 1990 Act of Restoration of Independence → the Supreme Council of the Republic of Lithuania → the 1990 Act of Restoration of Independence). This paradox is important in the context of adoption of the 1992 Lithuanian Constitution not only because this Constitution was drafted by the same Council (actually, by its special Commission), but also because the 1990 Act on the Restoration of Independence is considered by Lithuanian constitutional scholars as being a constitutional act itself.[22]

(3) The third paradox (the so-called paradox of "illegality of the law") lies, first of all, in the fact that, since the Independence Act is not only constitutional, but also a primary constituent act, therefore, there can be no pre-existing rules governing the procedure for adopting the Independence Act. A very similar consideration can be expressed regarding the adoption of Constitution: on the one hand, the adoption procedure of Constitution might be regulated by previous (sometimes provisional) Constitution, on the other hand, the principle of supremacy of Constitution does not tolerate any subordination of the latter to other previous legal documents. For example, the 1992 Lithuanian Constitution was adopted in popular referendum on 25 October 1992 and entered into force on the day after the official announcement of the results of the referendum (2 November 1992). However, the paradox is that this rule of adoption of the Constitution by referendum and the procedure of its entry into force were provided by the 1992 Constitution itself, or more precisely – by the draft of this Constitution, which had not yet been adopted by the electorate during the voting process[23]. Clearly, the latter paradox is not a Lithuanian invention, for example, the 1787 US Constitution was adopted on the basis of its Article 7, which had not yet entered into force during the ratification process, and it was also formally in breach of the 1777 Articles of Confederation, which provided for any alteration of this document only by unanimous vote of the Thirteen states (Art. 13). Therefore, this case recalls the idea, mentioned in hermeneutic philosophy of Derrida and Vattimo[24], stating that in certain exceptional cases the law must be violated in order to exercise the law.

(4) The fourth paradox manifests itself in the adoption of constitutional acts (including independence acts), as "the paradox of retrospectivity",[25] which is revealed in two aspects: first, the Constitution or other constituent act is always adopted retrospectively, i.e., as if looking back from a future perspective, when the moment of its entry into force cannot be clearly grasped; and, secondly, the Constitution is usually adopted and enters into force according to those rules which are not yet in force, i.e., in accordance with those provided for in the draft Constitution, which is still being voted on. Again, here an apt example is that of the preamble of the 1992

[22] E. g., see *Vaičaitis, V. A*. (ed.). Lietuvos konstitucionalizmo istorija. Vilniaus Universiteto Leidykla, 2016, p. 224.

[23] The fact that this Constitution must be adopted by referendum is provided for in Articles 151–154 of the Constitution itself, and Article 151 of the Constitution states that "this Constitution of the Republic of Lithuania comes into force on the day following the official publication of the results of the referendum, provided that more than half of all citizens of the Republic of Lithuania with voting rights approve this Constitution in the referendum". Lietuvos Respublikos Konstitucija. Valstybės žinios, No. 33-1014, 1992.

[24] See, e.g., *Vaičaitis, V. A*. Hermeneutinė teisės samprata ir konstitucija. Justitia, Vilnius, 2009, p. 30.

[25] Ibid.

Lithuanian Constitution, which states that "the Lithuanian nation […] adopts and promulgates this Constitution by the will of the citizens of the State of Lithuania". Thus, by casting the bulletin in 25 October 1992, Lithuanian voters understood the words of present tense ("Lithuanian nation […] adopts and proclaims") from a future perspective ("if adopted"). Meanwhile, upon learning the results of the constitutional referendum, the citizens read the same words of the Constitution ("adopts and proclaims") in the past sense – as an act that has been already adopted, i.e., retrospectively. Secondly, it has already been mentioned that the retrospective nature of the adoption of the Constitution is also manifested in the fact that the rules according to which the Constitution is adopted and enters into force are provided in the text of the Constitution itself (e.g., Article 151 of the Lithuanian Constitution states: "This Constitution of the Republic of Lithuania comes into force if more than half of all citizens of the Republic of Lithuania with the right to vote will approve it in a referendum"). In other words, citizens voted for the Constitution in a referendum, as if this Article of the Constitution was already in force. Incidentally, after adoption of the Constitution there was a political debate in Lithuania to determine the exact date of entry into force of the Constitution, which was resolved by the 1994 ruling of the Constitutional Court.[26]

Summary

The adoption of the 1992 Lithuanian Constitution was a complex and multi-stage process: it was primarily necessary to restore independence in 1990 and then to adopt an interim provisional constitution. The 1990 Independence Act simultaneously constitutionalized the body of its adoption and legalized the change of its title – the Supreme Council of the Republic of Lithuania (from the Supreme Council of Lithuanian SSR). The process of adopting the Lithuanian Constitution in 1990–1992 after the collapse of the Soviet Union was largely similar to the constitutional procedures in the region, but it had its own peculiarities. Firstly, in Lithuania (the same as in other two Baltic states) the so-called "roundtable" format between the People's Front and the Communist authorities was practically non-existent, while it played a certain role during the political transition in Hungary and Poland. Secondly, in Lithuania the new 1992 Constitution was adopted during the so-called "constitutional (founding) moment" between 1990 and 1992, while in Poland the new Constitution was adopted in 1997 and in Hungary – only in 2011. Thirdly, before adopting its Constitution, Lithuania (just like other Baltic states), first of all, had to restore their independence after half a century of the soviet occupation.

It is not possible to fully understand the process of multi-stage adoption of the 1992 Lithuanian Constitution without including into this process the adoption procedure of the 1922 Constitution. Therefore, a reconstruction of this constitution adoption process may include the following eight constitutional acts:

1) the 1918 Independence Act →
2) the 1918 Fundamental Laws of the Provisional Constitution →
3) the 15 May 1920 Resolution of the Constituent *Seimas* on independent republic →
4) the May 18, 1920 Provisional Constitution →
5) the 1922 Constitution →

[26] Judgement of the Constitutional Court of the Republic of Lithuania of 21 April 1994. Valstybės žinios, No. 31-562, 1994.

6) the 11 March 1990 Act on the Restoration of the Independent State of Lithuania (adopted by the Supreme Council of the Republic of Lithuania) →
7) the 11 March 1990 Provisional Fundamental Law (adopted by the Supreme Council of the Republic of Lithuania) →
8) the 1992 Lithuanian Constitution adopted on 25 October 1992 referendum.

In the process of multi-stage adoption of the 1992 Lithuanian Constitution, four constitutional paradoxes can be revealed: (1) the paradox of the constitutional moment and the constituent power, which manifests itself in the fact that democratically elected Supreme Council of the Lithuanian Soviet Socialist Republic on 11 March 1990 renamed itself into the Supreme Council of the Republic of Lithuania in order to restore Lithuania's independence and be able to draft the Constitution; (2) the paradox of the relationship between the constituent body and the constituent act, which manifested itself in the fact that, on the one hand, the Supreme Council of the Republic of Lithuania adopted the 1990 Act of Independence, but, on the other hand, it was the same Act of Independence that legitimised the Supreme Council; (3) the so-called paradox of "illegality of law", which is revealed in the fact that adoption procedure of the 1992 Lithuanian Constitution and the rules of its entry into force were provided for in the text of the 1992 Constitution itself, which was not yet in force during the voting process; (4) therefore, the Constitution is always adopted retrospectively, i.e., as if looking back at it from future perspective.

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25 Years of Fundamental Rights in the Constitution of the Republic of Latvia: Development, Significance and Content

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Only in 1998, the Constitution of the Republic of Latvia – *Satversme*, which was adopted more than a hundred years ago and is one of the oldest constitutions in Europe, was supplemented with new Chapter 8 – regulation on fundamental rights. Until the adoption of Chapter 8 of the *Satversme*, only a few fundamental rights could be found in the Constitution.

The current article discusses the development of the regulation of fundamental rights in the *Satversme*, the importance of fundamental rights in a democratic state, as well as reflects the catalogue of fundamental rights. The authors, looking at the catalogue of fundamental rights included in the *Satversme*, analyse the fundamental rights by dividing them in groups, i.e., civil, political, social, economic, cultural and solidarity rights. The publication outlines the most characteristic features of each group of rights, reveals the content of those rights and also provides the recent case law of the Constitutional Court.

Keywords: fundamental rights, Constitution (*Satversme*), catalogue of fundamental rights, Constitutional Court, protection of fundamental rights.

Contents

Introduction

2023 is the year of the 25th anniversary of inclusion into the constitution of the Republic of Latvia – the *Satversme* – Chapter 8 "Fundamental Rights", which comprises broad and contemporary regulation of fundamental rights.

Although the *Satversme* of the Republic of Latvia (hereafter – the *Satversme*) is a constitution with a history spanning more than 100 years – it was adopted and entered into force in 1922, until the amendments of 15 October 1998 it did not contain extended regulation on fundamental rights. Until 1998, only few fundamental rights could be found in the *Satversme*, related to the electoral rights and Art. 82, in the wording of that time, defined the equality of citizens before the law and the court.[1]

The situation, where the *Satversme* existed so long without an expanded catalogue of fundamental rights was a coincidence, based on the political events of the time. The fathers of the *Satversme* had intended to include the regulation on fundamental rights in a separate part of the *Satversme* – Part II, however, because of disputes among the political forces represented at the Constitutional Assembly, a few votes were missing for its adoption, thus, Part II, which had been drafted, was not adopted in 1922[2]. Publications of the inter-war period show that in the circle of politicians and lawyers of the time the dismissal of Part II of the *Satversme* in general was not perceived as a significant failure or a deficiency of the *Satversme* – this drawback is mentioned only in a couple of articles.[3]

Over time, also after Latvia's independent statehood was restored, fragmented regulation on some fundamental rights could be found in some special laws, e.g., the law of 1990 "On the Press and Other Mass Media"[4], the law of 1990 "On

[1] Note that, until the amendments of 1998, the historical wording of Art. 82 of the *Satversme* provided: "All citizens shall be equal before the law and the court". 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 23.04.2023].
It must be added that the significance of fundamental rights was understood in Latvia since the establishment of the state because some fundamental rights were found in the so-called provisional constitutions, e.g., the Political Platform of the People's Council, as well as in the Transitional Rules on the Order of the Latvian State, adopted by the Constitutional Assembly on 1 June 1920.

[2] Note, when the decision was made on the second part of the *Satversme* in the third reading by the Constitutional Assembly, it did not receive the necessary support of the people's representatives – 62 Members of the Constitutional Assembly voted "for", 6 were "against", and 62 abstained from voting.

[3] More extensively about the fundamental rights defined in provisional constitutions and draft Part II of the *Satversme*, see: *Pleps, J.* Pamattiesību konstitucionālā regulējuma ģenēzes ietekme uz Satversmes 8. nodaļas normu interpretāciju [The impact of the genesis of the constitutional regulation of fundamental rights on the interpretation of the norms of Chapter 8 of the Constitution]. In: Aktuālās cilvēktiesību aizsardzības problēmas. Konstitucionālā sūdzība. Satversmes tiesas 2008. un 2009. gada konferenču materiālu krājums. Rīga: TNA, 2010, 14.–23. lpp.

[4] Likums Par presi un citiem masu informācijas līdzekļiem [Law On the press and Other Mass Media] (20.12.1990). Available: https://likumi.lv/ta/en/en/id/64879-on-the-press-and-other-mass-media [last viewed 30.04.2023].

the Religious Organisations"[5], etc. After restoration of independence, more expanded regulation on fundamental rights was set out in a special law – the constitutional law of 10 December 1991 "Human and Citizen Rights and Obligations" – this law had 44 sections, divided into three chapters: general provisions, the rights and obligations of a citizen, and the rights and obligations of all human beings.[6] The law was criticised because of its unclear legal status[7], moreover, also the *Satversme*, which had been fully reinstated on 6 July 1993, did not envisage such type of regulatory enactments as "a constitutional law". Because of this, the experts had noted that this constitutional law fulfilled its objective poorly because it had a formal rather than real constitutional status.[8] Anyway, this law played the role of the main regulation on fundamental rights until 1998 when Chapter 8 was added to the *Satversme*. In addition, it should be noted that before Chapter 8 of the *Satversme* was adopted, i.e., on 27 June 1997, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention) and several Protocols to it entered into force in Latvia.[9] Likewise, Latvia's aspiration to join the European Union facilitated development of fundamental rights, because approximation of Latvia's legal acts to the European standards had been set as one of the main objectives.

In 1998, the adoption of Chapter 8 of the *Satversme* eliminated its deficiency; i.e., due to the lack of fundamental rights it was said to be uncompleted, or, using professor M. Lazerson's figurative simile, a "headless torso"[10].

This publication aims to provide an insight into the development of regulation on fundamental rights, included in the *Satversme*, outlining the course of drafting Chapter 8 of the *Satversme*, as well as examining the practical significance of fundamental rights, included in the *Satversme*. Due to the limited scope of the article, the authors are not claiming to provide comprehensive analysis of each fundamental right, included in the *Satversme*, but will examine groups of fundamental rights, found in the *Satversme*, and will characterize fundamental rights belonging to these groups, as well as outline the most relevant and recent findings of the Constitutional Court regarding the catalogue of fundamental rights and significance of protection for fundamental rights.

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[5] Likums Par reliģiskajām organizācijām [Law On the Religious Organisations] (12.10.1990.). Ziņotājs, No. 40, 1990 [expired].

[6] Latvijas Republikas konstitucionālais likums "Cilvēka un pilsoņa tiesības un pienākumi" [Constitutional Law of Republic of Latvia "Human and Citizen Rights and Obligations"] (10.12.1991). Available: https://likumi.lv/ta/id/72346-konstitucionalais-likums-cilveka-un-pilsona-tiesibas-un-pienakumi- [last viewed 30.04.2023] [expired].

[7] Latvijas Republikas Augstākās Padomes pirmās sesijas 1990. gada 3. maijs – 1993. gada 5. jūlijs 45. sēdes (1991. gada 10. decembrī) stenogramma [Transcript of the 45th session (10 December 1991) of the first session of the Supreme Council of the Republic of Latvia, 3 May 1990–5 July 1993], 198. burtnīca. Latvijas Vēstnesis, 20.04.2006.

[8] Satversme un cilvēktiesības. Gadagrāmata 1999. [The Constitution and Human Rights. Yearbook 1999]. Cilvēktiesību žurnāls 9–12, 1999, LU Cilvēktiesību institūts, 2000, p. 7.

[9] Likums Par 1950.gada 4. novembra Eiropas Cilvēka tiesību un pamatbrīvību aizsardzības konvenciju un tās 1., 2., 4., 7. un 11. protokolu [Law on the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 and its Protocols 1, 2, 4, 7 and 11] (04.06.1997.). Latvijas Vēstnesis, No. 143, 1997.

[10] *Cielava, V*. Pamattiesības – Satversmē vēl tukša vieta. Aktuāli cilvēktiesību jautājumi Latvijā. [Fundamental rights – still an empty space in the Constitution. Current human rights issues in Latvia]. Cilvēktiesību žurnāls, LU Cilvēktiesību institūts, No. 3, 1996, p. 33; *Lazersons, M.* "Konstitucionālā" likumdošana un Saeimas publisko tiesību komisija ["Constitutional" legislation and the Public Rights Commission of the Saeima]. Jurists, No. 6, 1928, sl. 165.–166. Cited after: *Pleps, J.* Pamattiesību konstitucionālā regulējuma, p. 24.

1. Fundamental rights – necessity in a democratic state governed by the rule of law

The understanding of a constitution and its contents has evolved by taking into consideration important historical events (e.g., revolutions), as well as the development of legal and philosophical thought. It is noted in the doctrine that modern constitutions, which comprise, *inter alia*, also fundamental rights, have been adopted from the end of the 18th century.[11] Since this moment, fundamental rights as natural rights are being materialized also in regulatory act with the supreme legal force or they are constitutionalised. As noted by professor A. Sajo, at present, a typical constitution comprises or includes a catalogue of human rights, the content of which is left at the discretion of each state.[12]

The fundamental importance, both formal and substantial, has been recognised in theory, thus, they constitute the central part of all legal systems.[13] In formal meaning, the fundamental nature of these rights can be substantiated by the fact that they are included in a regulatory enactment with supreme legal force that is binding upon all, without exceptions. Substantially, these rights are fundamental because they determine the content of other decisions, which can be justified by the natural or inherent character of these rights.

It is sometimes said that contemporary constitutionalism is characterised by the human being as the main subject, on whose rights the State should focus. Similarly, the Latvian Constitutional Court has concluded that the fundamental value of the Latvian legal system is ensuring human rights.[14] Namely, a human being and their fundamental rights is a value that characterizes the Latvian State.

Adding Chapter 8 "Fundamental Rights" to the *Satversme* was a logical step, characterising the understanding of the rule of law in Latvia and the Latvian State. It turned fundamental rights into an objective part of the constitution. At the same time, fundamental rights, included in the *Satversme*, are subjective rights. This means that real and direct possibilities of protection are thereby granted to a person. One could also say that subjective fundamental rights mean the legislator's decision on granting a right to the subject of rights.[15] For a person, this creates not an illusionary but real possibility in the form of a right and freedom.

Fundamental rights have a direct effect.[16] It has been explained in case law that fundamental rights should be applied "directly and immediately"[17]. This means that exercise of fundamental rights does not mandatorily require any additional

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[11] *Loughlin, M.* What is Constitutionalisation? In: The Twilight of Constitutionalism? *Dobner, P., Loughlin, M.* (eds). Oxford: Oxford University Press, 2010, p. 48.

[12] *Sajo, A.* Limiting Government. An Introduction to Constitutionalism. Budapest: CEU Press, 1999, p. 253.

[13] *Alexy, R.* A Theory of Constitutional Rights. Oxford: Oxford University Press, 2004, p. 351.

[14] Judgement of the Constitutional Court of the Republic of Latvia of 29 April 2016 in case No. 2015-19-01, para. 10.6. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2015/08/2015-19-01_Spriedums_ENG.pdf#search= [last viewed 16.03.2023].

[15] *Alexy, R. A* Theory, p. 119.

[16] *Sweet, A. S.* Governing with Judges. Constitutional Politics in Europe. Oxford: Oxford University Press, 2000, p. 94.

[17] Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2007 in case No. 2007-12-03, para. 20. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/06/2007-12-03_Spriedums_ENG.pdf#search= [last viewed 16.03.2023]; Judgement of the Constitutional Court of the Republic of Latvia of 29 October 2003 in case No. 2003-05-01, para. 32. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/02/2003-05-01_Spriedums_ENG.pdf#search= [last viewed 16.03.2023].

legal regulation, whilst the lack of it does not preclude exercising of the particular fundamental right. This principle is significant both in substantive and procedural sense, because a person, by referring directly to a subjective fundamental right, can use the available legal remedies to protect their (subjective) fundamental rights.[18]

In this regard, it is essential to point out also a person's responsibility for exercising one's subjective fundamental rights because it has been indicated in case law, that the pre-condition for the functioning of a democratic state governed by the rule of law is each individual person's ability to self-restrain one's egoistic freedom and act responsibly.[19] Undoubtedly, fundamental rights can be exercised only if the state is truly democratic and governed by the rule of law. On the other hand, exercise of fundamental rights cannot be aimed against democracy as such.[20] It is for a good reason that the concept of militant democracy is known in law, it allows and, in some cases, even demands special self-defensive measures for ensuring the stability and effectiveness of its democratic system.[21] *Inter alia*, envisaging restrictions on fundamental rights. However, fundamental rights may be restricted only within the framework of the constitution itself, which means that restrictions must be justified and necessary: established by law, having a legitimate aim and necessary in a democratic society. In other words, as aptly put by A. Barak, fundamental rights may be restricted but there are some restrictions on these restrictions.[22]

One of the essential features of a constitution is its ability to be a living instrument. Human rights will never be constant – unchangeable. They develop and grow together with society's understanding of these rights. This means that fundamental rights in the constitution are mere words that have to be filled with content, given by a human being, by interpreting these rights, moreover, taking into consideration the development of the legal system at the particular moment.

Everybody who applies law, in establishing the content of fundamental rights, must know the methods for interpreting these fundamental rights, *inter alia*, the principle of harmony between the national and international human rights, derived from Art. 89 of the *Satversme*. Here, one can see internationalisation of constitutional law when, through interpretation, international law "enters" national law.[23] This nature of constitutional law is particularly vividly reflected in fundamental rights.

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[18] Judgement of the Constitutional Court of the Republic of Latvia of 5 December 2001 in case No. 2001-07-0103, para. 1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2001/07/2001-07-0103_Spriedums_ENG.pdf#search= [last viewed 16.03.2023].

[19] Judgement of the Constitutional Court of the Republic of Latvia of 11 December 2020 in case No. 2020-26-0106, para. 19.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/05/2020-26-0106_Judgement.pdf#search= [last viewed 16.03.2023].

[20] Judgement of the Constitutional Court of the Republic of Latvia of 30 August 2000 in case No. 2000-03-01, para. 6. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf#search= [last viewed 16.03.2023].

[21] See: *Müller, J.-W.* Militant Democracy. In: Comparative Constitutional Law, *Rosenfeld, M., Sajo, A.* (eds). Oxford: Oxford University Press, 2012, p. 1254; Judgement of the Constitutional Court of the Republic of Latvia of 29 June 2018 in case No. 2017-25-01, para. 20.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2017/10/2017-25-01_Judgment_ENG.pdf#search= [last viewed 20.03.2023].

[22] *Barak, A.* The Judge in Democracy. [b.v.]: Princeton University Press, 2006, p. 84.

[23] *Chang, W.-C., Yeh, J.-R.* Internationalization of Constitutional Law. In: Comparative Constitutional Law, *Rosenfeld, M., Sajo, A.* (eds). Oxford: Oxford University Press, 2012, p. 1168.

The principle of the *Satversme's* unity has become enshrined both in the theory of the *Satversme* and its application.[24] This means that provisions of the *Satversme* cannot be examined in isolation. This, first of all, structurally outlines the fact that, within the *Satversme*, fundamental rights are not found solely in Chapter 8 of the *Satversme.* Secondly, fundamental rights, defined in the *Satversme*, constitute a balanced system,[25] therefore, content-wise, several articles of the *Satversme* may protect one and the same right. For example: the right to inviolability of family life is guaranteed in both Art. 110 and Art. 96 of the *Satversme*.[26]

The theory of human rights speaks, validly, about diverse systematisation (division) of human rights, e.g., into negative, positive, active fundamental rights[27] or, also, into absolute and relative fundamental rights. Undoubtedly, the *Satversme* comprises both civil and political rights, as well as economic, social and cultural fundamental rights, and also solidarity rights. However, it is not that important to find the affiliation of a particular fundamental right with one group or another; it is more important to respect them.[28] Likewise, the same fundamental right might take on different natures. For example, the right to education has the nature of both civil and political rights, as well as the nature of economic, social and cultural rights, which demands positive actions by the State, and even an element of solidarity.[29] At the same time, there are differences, e.g., in the assessment of the State's role and its engagement, discretion, in ensuring fundamental civil or social rights. Thus, due attention is still paid, both in science and practice, to the groups of fundamental rights.

The premise that fundamental rights should be respected in Latvia, even if they have not been included in the *Satversme*, is undeniable. That would follow both from the fact that Latvia is a state governed by the rule of law, and the fact that several international legal acts, which include the respective standard of human rights, are binding upon Latvia. However, the presence of fundamental rights in the *Satversme* is a value that characterizes the Latvian State and society and must be respected by all.

2. Drafting and adoption of Chapter 8 of the *Satversme*

Following the restoration of independence, inclusion of fundamental rights in Latvian constitutional legal acts was one of the most relevant constitutional law issues. When the Declaration of the Supreme Council of the Latvian SSR of 4 May 1990 "On the Restoration of Independence of the Republic of Latvia" was adopted, its

[24] Judgement of the Constitutional Court of the Republic of Latvia of 8 November 2006 in case No. 2006-04-01, para. 15.3. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf#search= [last viewed 16.03.2023].

[25] Judgement of the Constitutional Court of the Republic of Latvia of 13 May 2005 in case No. 2004-18-0106, para. 10. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2004/08/2004-18-0106_Spriedums_ENG.pdf#search= [last viewed 16.03.2023].

[26] Satversmes tiesas 2009. gada 23. aprīļa spriedums lietā Nr. 2008-42-01 [Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2009 in case No. 2008-42-01] para. 8. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-42-01_Spriedums.pdf#search= [last viewed 16.03.2023].

[27] See more, for example, *Alexy, R.* A Theory, pp. 163–177.

[28] Judgement of the Constitutional Court of the Republic of Latvia of 11 December 2006 in case No. 2006-10-03, para. 14.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/07/2006-10-03_Spriedums_ENG.pdf#search= [last viewed 16.03.2023].

[29] Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2019 in case No. 2018-12-01, para. 20. 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#search= [last viewed 16.03.2023].

para. 8 set out the commitment to "guarantee to the citizens of the Republic of Latvia and the citizens of other states, residing permanently in the territory of Latvia, social, economic and cultural rights, as well as political freedoms, which comply with the generally recognised international human rights provisions […]."[30] On the same day, the Supreme Council adopted the declaration "On the Accession of the Republic of Latvia to International Legal Documents on Human Rights Issues", acceding a number of international human rights documents.[31] Thus, a guarantee of a catalogue of human rights of general nature was made by this declaration, referring to the respective international human rights provisions.[32] However, at that time, in practice, state authorities and courts, following the outdated Soviet understanding of law, perceived human rights provisions as declarative documents and almost did not apply them at all.[33]

After the restoration of independence, the Supreme Council's initial intention was to adopt for the transitional period the Basic Law, comprising also fundamental rights; however, due to various reasons, this idea was not implemented, and shortly afterwards the constitutional law, referred to above, of 10 December 1991 "Human and Citizen Rights and Obligations" was adopted.

The inclusion of Chapter 8 "Fundamental Rights" into the *Satversme* was the achievement of the 6th *Saeima*; the draft amendment to the *Satversme*, which envisaged adding a new chapter to the *Satversme*, Chapter 8, was submitted to the *Saeima* for review in 1996, it was adopted on 15 October 1998, and entered into force already on 6 November.[34] As provided for in the transitional provisions, with Chapter 8 of the *Satversme* entering into force, the constitutional law "Human and Citizen Rights and Obligations" became void.

International experts, who were critical of the fact that human rights in Latvia had not been defined on the constitutional level, exerted certain influence upon drafting and inclusion into the *Satversme* the catalogue of fundamental rights.[35] Latvian legal experts also were aware that the absence of the catalogue of fundamental rights

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[30] Latvijas PSR Augstākās Padomes deklarācija "Par Latvijas Republikas neatkarības atjaunošanu" [Declaration of the Supreme Council of the Latvian Soviet Socialist Republic On the Restoration of Independence of the Republic of Latvia] (04.05.1990). Available: https://likumi.lv/ta/id/75539-par-latvijas-republikas-neatkaribas-atjaunosanu [last viewed 30.04.2023].

[31] Par Latvijas Republikas pievienošanos starptautisko tiesību dokumentiem cilvēktiesību jautājumos. Augstākās padomes deklarācija [On the accession of the Republic of Latvia to international legal documents on human rights issues. Declaration of the Supreme Council]. Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, No. 20, 1990.

[32] *Ziemele, I.* Starptautiskās tiesības Latvijas tiesību sistēmā un tiesu un administratīvajā praksē [International law in Latvian legal system and judicial and administrative practice]. In: Cilvēktiesību īstenošana Latvijā: tiesa un administratīvais process. Riga, Latvijas Cilvēktiesību institūts, 1998, pp. 27–30.

[33] *Levits, E.* 4. maija Deklarācija Latvijas tiesību sistēmā [Declaration of May 4th in the Latvian legal system]. In: 4. maijs. Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju. Rīga: LU žurnāla "Latvijas Vēstures" fonds, 2000, p. 64.

[34] Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (15.10.1998). Available: https://likumi.lv/ta/id/50292-grozijumi-latvijas-republikas-satversme [last viewed 30.04.2023].

[35] Atbildes uz ANO Cilvēktiesību komitejas locekļu jautājumiem [Answers to the questions of the members of the UN Human Rights Committee]. Cilvēktiesību Žurnāls, No. 2, 1996, pp. 78–79. Cited after *Pleps, J.* Pamattiesību katalogs starpkaru periodā [Catalogue of fundamental rights in the interwar period]. Jurista Vārds, No. 48 (553), 23.12.2008.

in the national basic law was a serious drawback.[36] The fact that, at that time, new constitutions, comprising extensive chapters on fundamental rights, were adopted in the other two Baltic states – Estonia and Lithuania, also was of certain importance in the drafting of the chapter of fundamental rights.[37] All this led to the idea of including broad regulation on fundamental rights in the *Satversme*. Experts predicted that the fact that, finally, fundamental rights would be put into the *Satversme* "in black and white", would disallow a civil servant or a judge to ignore them as easily, and, thus, this addition to the *Satversme* could contribute significantly to improving human rights in Latvia, possibly, decreasing tensions between inhabitants and the State's apparatus, thus, stabilising the independent and democratic State of Latvia.[38]

Adoption of Chapter 8 of the *Satversme* is the most considerable amendment to the *Satversme* and, in view of the special significance of fundamental rights, it can be described as the most fundamental amendments, ever introduced to the *Satversme*. These amendments changed the structure of the *Satversme*, it acquired a new chapter, Chapter 8, consisting of 28 articles. Moreover, the first article, included in Chapter 8, Art. 89, refers directly to the principle of harmony between the Latvian and international law, *inter alia*, Latvia's commitment to safeguard human rights, defined also in international legal acts, whereas Art. 116 sets out regulation on restricting human rights. The remaining articles of Chapter 8, however, comprise various fundamental rights, thus forming a quite extensive human rights catalogue, encompassing all generations of human rights.

When Chapter 8 was discussed from the perspective of legal technique, the idea of, possibly, changing the structure of the *Satversme* was touched upon, because it is typical for the constitutions of other states to include regulation of human rights as one of the first chapters, thus symbolically underscoring the special significance of a human being and their rights in the state; however, with respect to the *Satversme*, the conclusion was that, from the perspective of legal technique, such amendments would significantly affect the numbering of all other articles in it. Hence, it was decided to include fundamental rights, as the most recent chapter, in the final part of the *Satversme*, as Chapter 8, which, clearly, in no way diminishes its significance.

Chapter 8 of the *Satversme* was drafted in compliance with the specificity of the Latvian language of the last century and legal brevity, and the content of the provisions, included in the Chapter was created in conformity with the *Satversme's* internal style, therefore, fundamental rights have been written into the *Satversme* in general wordings.[39] This, definitely, has a certain impact on interpretation, although it is generally accepted that human rights are worded in a quite abstract manner, therefore their content must be established through reasonable interpretation,

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[36] *Kusiņš, G.* Kā pilnveidot mūsu valsts Satversmi [How to improve the Constitution of our state]. In: Satversmes reforma Latvijā: par un pret. Ekspertu seminārs Rīga 1995. gada 15. jūnijs. Rīga: Sociāli ekonomisku pētījumu institūts „Latvija", 1995, 39. lpp.

[37] *Balodis, R., Kārkliņa, A., Danovskis, E.* Latvijas konstitucionālo un administratīvo tiesību attīstība pēc neatkarības atjaunošanas [The development of Latvian constitutional and administrative law after the restoration of independence]. Latvijas Universitātes žurnāls „Juridiskā zinātne/Law", No. 3, 2012, 59. lpp.

[38] *Levits, E.* Piezīmes par Satversmes 8. nodaļu – Cilvēka pamattiesības [Notes on Chapter 8 of the Constitution – Fundamental Rights]. Satversme un cilvēktiesības. Gadagrāmata 1999. Cilvēktiesību Žurnāls, No. 9–12, 1999, p. 17.

[39] *Balodis, R.* Ievads Latvijas Republikas Satversmes VIII nodaļas komentāriem [Introduction to the comments on Chapter VIII of the Constitution of the Republic of Latvia]. Latvijas Republikas Satversmes komentāri. VIII nodaļa. Rīga: Latvijas Vēstnesis, 2011, p. 15.

taking as the basis the role of an individual in a Western democracy.[40] It has been noted in legal literature that, due to the laconic wordings in Chapter 8, it is lagging behind the extensive and concrete criteria, provided by the European Human Rights Convention.[41] This, in particular, applies to restrictions, which, in difference to the Convention, where restrictions are defined in each article, can be found in only one article of the *Satversme*, i.e., Art. 116. Of course, one can agree with scholars of the *Satversme* who have pointed out that the construction, similar to Art. 116, is not found in any other state,[42] and this article, with very complex structure, is misleading, as if it would provide exhaustive enumeration of all rights that *may* be restricted and would also refer to all criteria for restrictions. Similarly, also the regulation set out in Art. 91 of the *Satversme*, "all human beings in Latvia shall be equal before the law and the courts", might create a misleading perception that this article is applicable only to natural persons and not to private legal persons.

In difference to draft Part II of the *Satversme* of 1922, many ideas of which members of the Constitutional Assembly had drawn from Germany's Weimar Constitution of 1919, no particular national constitution was used as a prototype, content-wise it was based on regulation defined in international documents, and rights, included, in particular, in the Convention, as well as UN documents, constitutions of other states also served as a model.

It was envisaged to include several of the fundamental rights, found in Chapter 8, in Part II of the *Satversme*, which was not adopted in 1922, e.g., the rights of ethnic minorities to use their language and develop their ethnic and cultural identity, gender equality, inviolability of home and correspondence, freedom of movement, freedom of science and arts, *inter alia*, the right to education and minimum compulsory education.[43]

Over time, several amendments to articles of Chapter 8 have been adopted. They were introduced due to domestic political considerations, e.g., in 2002, Art. 101 was amended, providing that the working language of local government was Latvian, Art. 104, which defines the right to receive reply from State or local government institutions in the official language[44], Art. 110 was amended in 2005, providing that marriage was a union between a man and a woman[45]. Several articles have been amended because of international commitments, e.g., in 2004, the *Saeima* amended Art. 98 of the *Satversme*, allowing to extradite a Latvian citizen to a foreign country in cases provided for in international agreements ratified by the *Saeima*. Likewise, in

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[40] *Levits, E.* Cilvēktiesību normas un to juridiskais rangs Latvijas tiesību sistēmā [Human rights norms and their legal rank in the Latvian legal system]. Juristu Žurnāls, No. 5, Cilvēktiesību Žurnāls No. 6, 1997, 32.–53. lpp.

[41] *Vildbergs, H. J., Feldhūne, G.* Atsauces Satversmei [References to the Constitution]. Rīga: Latvijas Universitāte, 2003, 125. lpp.

[42] *Pleps, J., Pastars, E., Plakane, I.* Konstitucionālās tiesības [Constitutional law]. Rīga: Latvijas Vēstnesis, 2004, 719. lpp.

[43] Latvijas Republikas Satversmes II daļas redakcija [Draft law of Part II of the Constitution of the Republic of Latvia]. Latvijas valsts tiesību avoti. Valsts dibināšana-neatkarības atjaunošana. Dokumenti un komentāri. Rīga: TNA, 2015, 124–126. lpp., see also Latvijas Republikas Satversmes stenogrammu izvilkums (1920–1922) [digital publication]. Rīga: TNA, 2006.

[44] Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (30.04.2002). Available: https://likumi.lv/ta/id/62020-grozijumi-latvijas-republikas-satversme [last viewed 30.04.2023].

[45] Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (15.12.2005). Available: https://likumi.lv/ta/id/124957-grozijums-latvijas-republikas-satversme [last viewed 30.04.2023].

connection with Latvia's accession to the EU, in 2004, an amendment was introduced to Art. 101, providing that citizens of the EU who permanently resided in Latvia also had the right to vote in local elections and participate in the work of local governments, as provided by law.[46]

Clearly, supplementing the *Satversme* with Chapter 8 "Fundamental Rights" is one of the most significant amendments to the *Satversme*. It was a logical step, characterising Latvia's understanding of the rule of law and the State of Latvia. I.e., fundamental rights had become an objective part of the constitution and have been included in the hierarchically supreme legal act – the national constitution.

Immediately after the Chapter 8 of the *Satversme* was adopted, legal experts had noted: "The new chapter on fundamental rights cannot be perceived as a correction of a cosmetic defect. The worst that might happen would be if the *Satversme* were supplemented but the actual practice of authorities and courts would not change soon. In such a case, provisions of the *Satversme* would be degraded into declarative norms, which is typical of constitutions in ideological dictatorships".[47] Looking from the current perspective, it can be concluded that, luckily, experts' concerns have not materialised and, although problems can be identified in guaranteeing some fundamental rights or errors in the practical application thereof, at present there are no grounds to consider that state authorities would not be aware of the fundamental meaning of basic rights in Latvia as a democratic state governed by the rule of law, likewise, the courts, within the limits of their jurisdiction, engage in effective protection of fundamental rights.

3. Structure of fundamental rights in the *Satversme*

It is typical of constitutions of many countries to structure their catalogues of fundamental rights according to the so-called principle of human rights' generations, i.e., beginning with the regulation on the first generation of human rights – civil and political fundamental rights, followed by the second-generation human rights – social, economic and cultural rights, and, finally, the third-generation rights, designated as the solidarity rights. French lawyer K. Vasak is considered to be the author of the division of human rights into generations, and the division into generations, proposed by him, helps to understand the course of historical development taken by human rights, however, it does not form hierarchy among human rights.[48]

In view of the fact that the *Satversme's* part on fundamental rights has been created relatively late – close to the turn of the centuries, the *Satversme*, in difference to constitutions of many democratic states, includes fundamental rights of all generations, while even social and economic rights are not found in the constitutions of several states.[49]

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[46] Grozījumi Latvijas Republikas Satversmē [Amendments to the Constitution of the Republic of Latvia] (23.09.2004). Available: https://likumi.lv/ta/id/94651-grozijumi-latvijas-republikas-satversme [last viewed 30.04.2023].

[47] *Levits, E.* Piezīmes par Satversmes 8. nodaļu – Cilvēka pamattiesības [Notes on Chapter 8 of the Constitution – Fundamental Rights]. Satversme un cilvēktiesības. Gadagrāmata 1999. Cilvēktiesību Žurnāls, No.9-12, 1999, p. 17.

[48] *Mits, M.* Pilsoniskās un politiskās tiesības [Civil and political rights]. In: Cilvēktiesības Latvijā un pasaulē. I. Ziemeles zinātniskā redakcijā. Otrais papildinātais izdevums. Rīga, TNA, 2021, 100. lpp.

[49] *Kučs, A.* Satversme un Latvijas konstitucionālo institūciju izveidošana. Pamattiesības. Pilsonība [Constitution and creation of constitutional institutions of Latvia. Fundamental rights. Citizenship]. In: Latvijas valsts tiesību avoti. Valsts dibināšana-neatkarības atjaunošana. Dokumenti un komentāri. Rīga: TNA, 2015, 123. lpp.

The catalogue of fundamental rights, established in the *Satversme*, may not be narrower than the scope of natural rights, recognised in a state governed by the rule of law, and the rights defined in international documents binding upon Latvia, and it must meet the standard defined in the EU acts. Our *Satversme* can be proud of an extensive catalogue of human rights, *inter alia*, the right, defined in the *Satversme*, which is rather untypical of other national constitutions, the right to know one's rights, included in Art. 90, which introduces the catalogue of human rights, defined int the *Satversme*, and points to how significant it has been for the legislator to enshrine this fundamental right in the *Satversme*[50]. As underscored by the Constitutional Court – only a person who knows his or her rights is able to exercise them effectively and, in the case of unfounded infringement, protect them in a fair trial.[51]

Further in this article, providing insight into the fundamental rights, included in the *Satversme*, they will be examined in accordance with the so-called principle of groups of fundamental rights, characterising briefly the features of the particular group and the catalogue of fundamental rights, belonging to the group, in the *Satversme*. Since the content of fundamental civil rights has been extensively revealed and is aligned with international human rights, due to the limited scope of the article, the part on civil rights will be more concise, outlining the main features and classification of this group, whereas description of other groups of fundamental rights will offer also broader insight into the Constitutional Court's findings with respect to the particular fundamental rights.

3.1. Fundamental civil rights

The term "fundamental civil rights" is used to denote rights vested in every person and without which life in organised society would be impossible.[52] These are the oldest rights, the seeds of which germinated already at the time of the French and American revolutions in the 18th century[53], however, the particularity of this group is that it has the closed connection with natural rights and, even if these rights had not been included in legal acts, they should be ensured. Substantially, fundamental civil rights are included in all the national constitutions that regulate fundamental rights.

As regards the classification of fundamental rights, it is typical of this group that these rights are, predominantly, the so-called negative fundamental rights, i.e., they impose an obligation on the State to abstain from taking some actions and not to interfere in the individuals' space of freedom, i.e., they have been formulated as an individual's liberties. Historically, in accordance with the liberal constitutional theory, fundamental rights have been established to protect citizens against the State's interference into citizens' legal interests of particular significance.[54]

However, to ensure any fundamental right, including the negative fundamental rights, the State, of course, is expected to fulfil its duties to enable individuals to enjoy

[50] Apart from Latvia, this right is found only in two European countries and there are very few constitutions that would include this right in the world. See *Rudevskis, J.* Satversmes 90. panta komentārs [Commentary on Article 90 of the Constitution]. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2011, 61. lpp.

[51] Judgement of the Constitutional Court of the Republic of Latvia of 20 December 2006 in case No. 2006-12-01, p. 16. Latvijas Vēstnesis, No. 206, 2006.

[52] *Mits, M.* Pilsoniskās un politiskās tiesības [Civil and political rights]. In: Cilvēktiesības Latvijā un pasaulē. I. Ziemeles zinātniskā redakcijā. Otrais papildinātais izdevums. Rīga, TNA, 2021, 100. lpp.

[53] Ibid.

[54] *Münch, I. von*. Staatsrecht. Band 2. 5., Neubearbeitete Auflage [State Law. Vol. 2. 5th revised edition]. Stuttgart, Berlin, Köln, Verlag W. Kohlhammer, 2002, Rn.145.

these rights, or the State must create such a system of legal acts and state authorities that give a person the possibility to exercise one's rights.[55] For example, to ensure the right to a fair trial, the State, in accordance with Art. 92 of the *Satversme*, must act to create such a system of institutions belonging to the judicial power that understands the principles of a state governed by the rule of law and is able to protect persons' rights and lawful interests. It also follows from the provision made in Art. 93, that "the right of life of everyone shall be protected by law", that the State has the obligation to protect life and facilitate creation of favourable conditions for exercising the right to life, i.e., the State has the obligation "not only to issue provisions aimed at protecting human life, but also to create an effective system for monitoring implementation of these provisions"[56]. At the same time, as conclude by the Constitutional Court, the State's obligation to ensure the necessary medication to everyone free of charge does not follow from this right.[57]

The standard of fundamental civil rights is most directly determined by the standard included in documents of international organisations – both the global (UN) system of human rights and international documents of regional human rights systems. Thus, in Latvia's context, the main document of the European regional human rights system, i.e., the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols to it, plays a particularly important role, its standard is taken into account also in interpreting the content of the *Satversme's* legal provisions.

The majority of subjects of civil rights are natural persons, because many fundamental civil rights are linked to particularities (features) of a human being as a physical being, e.g., right to life (Art. 93), prohibition of torture (Art. 95), freedom of movement (Art. 97), freedom of thought and conscience (Art. 99), prohibition to subject a person to cruel or degrading punishment (Art. 95), inviolability of private life (Art. 96), right to family and marriage (Art. 110). However, several rights of this group may be enjoyed also by a legal person governed by private law, e.g., right to a fair trial (Art. 92), inviolability of correspondence (Art. 96), freedom of expression and prohibition of censorship (Art. 100), right to property (Art. 105) should be ensured also to legal persons. The provision made in Art. 91 that "all human beings in Latvia shall be equal before the law and the courts", despite its *expressis verbis* wording, applies also to legal persons governed by private law. Likewise, the provision of Art. 92 that "everyone, where his or her rights are violated without basis, has a right to commensurate compensation" is applicable also to legal persons.

Depending on whether fundamental rights may be restricted, legal science classifies them into relative or absolute rights. The prevailing majority of fundamental civil rights (similarly to the overwhelming majority of rights belonging to other groups) are relative rights, i.e., rights that may be restricted in certain cases and in certain procedure. However, several rights, which belong exactly to the group of fundamental civil rights, are absolute rights, i.e., rights that may not be restricted. Prohibition of torture (Art. 95) is an absolute right, the Constitutional Court also has noted that prohibition of torture, as well as cruel or degrading treatment or punishment provides

[55] *Mits, M.* Pilsoniskās un politiskās tiesības [Civil and political rights]. In: Cilvēktiesības Latvijā un pasaulē. I. Ziemeles zinātniskā redakcijā. Otrais papildinātais izdevums. Rīga, TNA, 2021, 100. lpp.

[56] Judgement of the Constitutional Court of the Republic of Latvia of 28 March 2013 in case No. 2012-15-01, p. 18.2. Latvijas Vēstnesis, No. 63, 2013.

[57] Judgement of the Constitutional Court of the Republic of Latvia of 7 January 2010 in case No. 2009-12-03, p. 15.2. Latvijas Vēstnesis, No. 5, 2010.

for an absolute guarantee for the protection of human rights, from which the State has no right to derogate.[58] The presumption of innocence, which is an absolute right in criminal law, follows from the provision made in Art. 92 of the *Satversme* that "Everyone shall be presumed innocent until his or her guilt has been established in accordance with law.[59] Over time, the understanding of how the right to life should be classified has changed, i.e., taking into account the provisions made in Art. 2 of the Convention, the right to life, due to the exemptions made in this article[60] cannot be classified as an absolute right.[61] As the Constitutional Court has concluded, also the right, set out in the second sentence of Art. 98 of the *Satversme*, which protects the right of Latvian citizens to return freely to Latvia, cannot be restricted.[62] Likewise, the rights defined in Art. 99 – the right to freedom of thought, conscience and religion (internal expression) are to be regarded as absolute rights, however, external manifestations of these freedoms may be restricted.[63]

3.2. Fundamental political rights

Although, following the principle of generations of human rights, civil and political human rights are frequently examined together, presently, fundamental political rights are often treated as a separate autonomous concept,[64] understanding them as those rights that are linked to an individual's involvement in State and local government institutions (service), an individual's right to vote and participate in the decision-making process. From articles of Chapter 8 of the *Satversme*, the rights referred to in Art. 101–104 could be classified as fundamental political rights. In legal literature, the freedom of speech is often included in this group, depending on the content and aim of the particular type of expression the freedom of speech takes (speech, writing, artwork or other kind of expression).[65]

The particularity of fundamental political rights is that several of these rights are attributable directly to the citizens of State as persons who have a direct link with the State (citizenship). For example, only citizens can enjoy active and passive electoral rights at the *Saeima* elections. Likewise, Art. 101 of the *Satversme* is applicable only to citizens – "every citizen of Latvia has the right, as provided for by law, to

[58] Judgement of the Constitutional Court of the Republic of Latvia of 20 December 2010 in case No. 2010-44-01, p. 81, Latvijas Vēstnesis, No. 202, 2010.

[59] Judgement of the Constitutional Court of the Republic of Latvia of 15 November 2016 in case No. 2015-25-01, p. 18, Latvijas Vēstnesis, No. 224, 2016.

[60] Note – 1st part of Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection." Available: https://www.echr.coe.int/documents/convention_lav.pdf [last viewed 12.03.2023].

[61] *Mits, M.* Pilsoniskās un politiskās tiesības [Civil and political rights]. In: Cilvēktiesības Latvijā un pasaulē. I. Ziemeles zinātniskā redakcijā. Otrais papildinātais izdevums. Rīga, TNA, 2021, p. 103.

[62] Decision of the Constitutional Court of the Republic of Latvia of 18 February 2022 in case No. 2021-10-03, p. 14, Latvijas Vēstnesis, No. 37, 2022.

[63] Judgement of the Constitutional Court of the Republic of Latvia of 26 April 2018 in case No. 2017-18-01, p. 18, Latvijas Vēstnesis, No. 85, 2018.

[64] *Schabas, W. A.* The Customary International Law of Human Rights. Oxford University Press, 2021. https://doi.org/10.1093/oso/9780192845696.003.0008

[65] Judgement of the Constitutional Court of the Republic of Latvia of 23 November 2006 in case No. 2006-03-0106, p. 7. Latvijas Vēstnesis, No. 192, 2006.

participate in the work of the State and of local government, and to hold a position in the civil service." As mentioned above, with respect to local governments, since Latvia's accession to the European Union, alongside citizens of Latvia with full rights, the right to elect local governments has been granted also to those citizens of the European Union who reside permanently in Latvia. Likewise, a citizen of the EU, residing permanently in Latvia, has the right to participate in the work of local governments. The Constitutional Court has noted that determination of persons who, in the context of this article, are to be regarded as a citizen with full rights, falls within the legislator's competence,[66] however, if there are concerns regarding validity of restrictions established by the legislator, the Constitutional Court has the jurisdiction to review them.[67] It should be explained that civil service, in the context of Art. 101 of the *Satversme*, comprises all positions created in institutions of legislative, executive and judicial power.[68]

Freedom of association is one of the political rights. Art. 102 of the *Satversme* provides that everyone has the right to form joint associations, political parties and other public organisations. The Constitutional Court has underscored that the freedom of association is one of the most essential political rights of a person[69] and one of the pre-conditions of a democratic state order. This freedom ensures to persons the possibility to fight for their legal interests by uniting to achieve common aims and, thus, persons gain the opportunity to participate in democratic processes.[70] However, this right also can be restricted, e.g., the prohibition for judges to become members of political parties has been recognised as being justifiable.[71] In the context of this freedom, the second sentence of Art. 108 of the *Satversme* should be mentioned, since it regulates the freedom of association particularly in the area of labour law; i.e., the freedom of trade unions, defining the State's obligation to refrain from interfering into the activities of trade unions.[72]

The freedom of assembly is also important in all democratic states, it is one of the values of a democratic state and an essential pre-condition for the functioning of a state governed by the rule of law.[73] It is found in Art. 103 of the *Satversme*, which provides that "the State shall protect the freedom of previously announced peaceful meetings, street processions, and pickets." In several of its judgements, the Constitutional Court has underscored that the freedom of assembly ensures the possibility for society to influence political processes, *inter alia*, by criticising the state power and protesting against the State's actions. While exercising the right envisaged in Art. 103, persons can discuss significant problems, express their

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66 Judgement of the Constitutional Court of the Republic of Latvia of 15 June 2006 in case No. 2005-13-0106, p. 13.2. Latvijas Vēstnesis, No. 95, 2006.

67 Judgement of the Constitutional Court of the Republic of Latvia of 30 March 2022 in case No. 2021-23-01, p. 18, 19. Latvijas Vēstnesis, No. 66, 2022.

68 Judgement of the Constitutional Court of the Republic of Latvia of 10 May 2013 in case No. 2012-16-01, p. 31.1. Latvijas Vēstnesis, No. 90, 2013; Judgement of the Constitutional Court of the Republic of Latvia of 15 December 2022 in case No. 2021-41-01, p. 11. Latvijas Vēstnesis, No. 244, 2022.

69 Judgement of the Constitutional Court of the Republic of Latvia of 23 November 2006 in case No. 2006-03-0106, p. 7. Latvijas Vēstnesis, No. 192, 2006.

70 Judgement of the Constitutional Court of the Republic of Latvia of 10 May 2013 in case No. 2012-16-01, p. 17. Latvijas Vēstnesis, No. 90, 2013.

71 Ibid.

72 Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2014 in case No. 2013-15-01, p. 9. Latvijas Vēstnesis, No. 82, 2014.

73 Judgement of the Constitutional Court of the Republic of Latvia of 23 November 2006 in case No. 2006-03-0106, p. 6. Latvijas Vēstnesis, No. 192, 2006.

support for or condemn the politics implemented by the State. The freedom of assembly ensures the possibility to persons to make known their opinion or views to wider public.[74]

The right of petitions or submissions, envisaged in Art. 104 of the *Satversme*, also belongs to the group of political rights. It needs to be added that, in applying this right, it is important to reach a fair balance between public interests and protection of each individual's rights. Often, an overly active exercising of the rights, set out in Art. 104, by some individuals have created challenges for public authorities and, as noted in case law, an individual should exercise the right to submissions in good faith, i.e., if a person unfoundedly, through their requests of information or submissions requiring a substantive response, demands excessive resources from the State, this causes unfounded restrictions on other persons' rights to receive substantive responses, because the State is unable to examine them properly.[75]

In summing up the above, one can conclude that relativism if a typical feature of the group of political rights, i.e., they may be restricted, and often the very content of the particular legal provision points to the admissibility of these restrictions – they may be linked to certain criteria, e.g., having citizenship or full rights, the criterion of peacefulness in the context of assembly, etc.

Political rights, just like civil rights, have the features of both positive and negative rights – several of them envisage freedoms to individuals (i.e., unhindered exercise of them), at the same time, it would be impossible to exercise these rights without a system of institutions and mechanisms created by the State, which ensures practical implementation of these rights.

To sum up, one must uphold the conclusions made in legal literature that clarity of content is typical of both political and civil rights, because the states, which are the main guarantors of human rights, have been able to agree on detailed definitions of rights in both national and international human rights treaties.[76] This can be explained by the fact that the economic situation in the state does not influence exercise of these rights, and the content of civil-political rights is constantly improved by international institutions, and effective mechanisms for protecting human rights have been developed to allow exercising these rights.[77] Specification of these rights in the legal acts of each state is more typical of fundamental political rights, which is linked to the politics, historical experience of the state, etc., and these factors may influence the circle of subjects who, within the state, enjoy the particular fundamental political human rights.

3.3. Fundamental social rights

Fundamental social rights are very important but at the same time – they are special and differ from other groups. The particular feature of this group is that exercise of social rights, as the rights of second generation, require considerable state financial resources, therefore, ensuring of these rights depends upon the economic

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[74] Judgement of the Constitutional Court of the Republic of Latvia of 23 November 2006 in case No. 2006-03-0106, p. 6. Latvijas Vēstnesis, No. 192, 2006., p. 7.

[75] Judgement of the Supreme Court of the Republic of Latvia of 8 June 2007 in case No. SKA-194/2007, Available: https://www.at.gov.lv/lv/judikaturas-nolemumu-arhivs-old/senata-administrativo-lietu-departaments/hronologiska-seciba/2007 [last viewed 30.04.2023].

[76] *Mits, M.* Pilsoniskās un politiskās tiesības [Civil and political rights]. In: Cilvēktiesības Latvijā un pasaulē. I. Ziemeles zinātniskā redakcijā. Otrais papildinātais izdevums. Rīga, TNA, 2021, p. 100.

[77] Ibid., p. 101.

situation and the available resources of each state.[78] The conclusion that, globally, the development of social and economic rights is rather uneven, is very valid.[79] Due to these reasons, social rights have been worded as general obligations of the State also in international documents, leaving a wide margin of appreciation to the States in the implementation of these rights.

The perspective of comparative law leads to the conclusion that Member States of the European Union have chosen different approaches to regulating fundamental social rights in their constitutions. For example, in Austria, fundamental social rights have not been enshrined on the constitutional level. Neither does the Basic Law of the German Federal Republic contain regulation on fundamental social rights[80]. The choice made by states to not include fundamental social rights in the constitution is explained by the lack of the State's possibilities to ensure these benefits in unlimited scope, and, thus, such rights, if they had been included in the catalogue of fundamental rights, could be interpreted only as the objectives of the State, or items on agenda.[81]

Fundamental social rights are included in the *Satversme's* catalogue of human rights, i.e., individuals can use the mechanisms envisaged in regulatory enactments to demand that these subjective rights are ensured. The conclusions, made by the Constitutional Court, are valid and aligned with the findings of international law, i.e., that, without contesting the close link between implementation of social rights and the financial possibilities of each state, if any social rights are included in a State's basic law, then the State cannot derogate from them and, in such a case, these rights no longer have only a declarative nature.[82] At the same time, insofar general legal principles are complied with, the State enjoys discretion in choosing the methods and mechanisms for implementing and safeguarding social rights.[83]

Fundamental social rights are based on the idea that the State, with the purpose of ensuring social justice, assumes responsibility for those citizens, the basic needs of which should be provided for, taking into consideration the resources at its disposal.[84] Since the right to social security is based on the State's obligation to create a sustainable system of social security, the legislator must align the financial possibilities of the special budget not only with a person's rights in the social sphere but also with the need to ensure the welfare of entire society. The responsibility for aligning the special budget and reasonable use of budget resources lies upon

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[78] Judgement of the Constitutional Court of the Republic of Latvia of 13 March 2001 in case No. 2000-08-0109, Latvijas Vēstnesis, No. 41, 2001.

[79] *Tāre, I.* Ekonomiskās, sociālās un kultūras tiesības [Economic, social and cultural rights]. In: Cilvēktiesības Latvijā un pasaulē. I. Ziemeles zinātniskā redakcijā. Otrais papildinātais izdevums. Rīga, TNA, 2021, p. 132.

[80] Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany]. Available: https://www.gesetze-im-internet.de/gg/BJNR000010949.html [last viewed 11.03.2023]. However, the constitutions of several German Lands (e.g., the Constitution of Brandenburg) have taken a different path and sufficiently broad guarantees of fundamental social rights are included in them. Verfassung des Landes Brandenburg [Brandenburgas zemes konstitūcija]. Available: https://bravors.brandenburg.de/de/gesetze-212792#47 [last viewed 11.03.2023].

[81] *Coelln, C. von.* Vorbemerkung Grundrechte [Preliminary remarks for fundamental rights]. In: *Gröpl, C., Windthorst, K., Coelln, C. von.* Grundgesetz. Studienkommentar [Basic Law. Commentary]. 2. Auflage. München: Verlag C. H. Beck, 2015, Rn. 15.

[82] Judgement of the Constitutional Court of the Republic of Latvia of 13 March 2001 in case No. 2000-08-0109, p. 6. Latvijas Vēstnesis, No. 41, 2001.

[83] Judgement of the Constitutional Court of the Republic of Latvia of 15 June 2017 in case No. 2016-11-01, p. 14. Latvijas Vēstnesis, No. 121, 2017.

[84] Judgement of the Constitutional Court of the Republic of Latvia of 13 February 2013 in case No. 2012-12-01, p. 14.1. Latvijas Vēstnesis, No. 33, 2013.

the State.[85] Fundamental social rights have to suffer serious challenges when states experience financial crises, and, often, during these periods of economic crisis, individuals have turned to the Constitutional Court to protect their fundamental rights.[86]

Art. 109 of the *Satversme* is one of the main articles on fundamental social rights, containing extensive social security, provides: "Everyone has the right to social security in old age, for work disability, for unemployment and in other cases as provided by law." The State's positive duty to introduce measures that would allow a person to exercise the right to social security, when the risks referred to in the article set in, is enshrined in the article.[87] The legislator is obliged to specify the content of social rights, included in Art. 109, in laws, and these laws become part of the state social security.[88] The State's obligation both to establish such system of social security that ensures appropriate provisions in the case of social risk setting in, and functioning of this system follows from this article. However, the *Satversme* envisages neither specific amounts to be disbursed as social security, nor conditions for calculating specific amounts, nor specific producer for granting these amounts; however, the legislator's actions in making decisions pertaining to the area of social rights must comply with general legal principles and other provisions of the *Satversme*.[89] The *Satversme* guarantees to everyone the right to stable and foreseeable, as well as effective, fair and sustainable social security.[90]

Fundamental social rights are also closely linked to the concept of human dignity – the aim of the rights, falling within the scope of Art. 109, is, to the extent possible, ensure social justice and the possibility for everyone to lead a life that is compatible with human dignity.[91]

The content of fundamental social rights is found in Art. 110 of the *Satversme*, which provides that the State protects family, marriage, the rights of parents and the rights of a child, and provides special support to disabled children, children left without parental care, or those, who have suffered from violence. The State's positive obligation to ensure social and economic protection to the family follows from this article.[92]

The right to health care also belongs to the group of fundamental social rights and is included in Art. 111 of the *Satversme*. The Constitutional Court, in specifying

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[85] Judgement of the Constitutional Court of the Republic of Latvia of 19 October 2017 in case No. 2016-14-01, p. 9.3. Latvijas Vēstnesis, No. 209, 2017; Judgement of the Constitutional Court of the Republic of Latvia of 31 March 2021 in case No. 2020-35-01, p. 10. Latvijas Vēstnesis, No. 64, 2021.

[86] See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 10 June 2011 in case No. 2010-69-01, Latvijas Vēstnesis, No. 92, 2011; Judgement of the Constitutional Court of the Republic of Latvia of 30 March 2011 in case No. 2010-60-01, Latvijas Vēstnesis, No. 51, 2011; Judgement of the Constitutional Court of the Republic of Latvia of 15 March 2010 in case No. 2009-44-01, Latvijas Vēstnesis, No. 43, 2010, etc.

[87] Judgement of the Constitutional Court of the Republic of Latvia of 31 March 2021 in case No. 2020-35-01, p. 8. Latvijas Vēstnesis, No. 64, 2021.

[88] Ibid., p 9.

[89] Judgement of the Constitutional Court of the Republic of Latvia of 31 March 2021 in case No. 2020-35-01, p. 8. Latvijas Vēstnesis, No. 64, 2021.

[90] Judgement of the Constitutional Court of the Republic of Latvia of 10 July 2020 in case No. 2019-36-01, p. 8. Latvijas Vēstnesis, No. 133, 2020.

[91] Judgement of the Constitutional Court of the Republic of Latvia of 25 June 2020 in case No. 2019-24-03, p. 17. Latvijas Vēstnesis, No. 121, 2020; Judgement of the Constitutional Court of the Republic of Latvia of 10 December 2020 in case No. 2020-07-03, p. 15. Latvijas Vēstnesis, No. 240, 2020.

[92] Judgement of the Constitutional Court of the Republic of Latvia of 5 December 2019 in case No. 2019-01-01, p. 16. Latvijas Vēstnesis, No. 246, 2019.

the scope of Art. 111, has recognised three different obligations of the State, derived from it: to respect, protect and ensure (implement) a person's right to health. Firstly, the obligation to respect the right to health means that the State should abstain from interfering into a person's rights and freedoms. Thus, it should abstain from actions that restrict every person's own possibilities to provide one's own health care. Secondly, the obligation to protect the right to health means that the State must protect a person against interference by other private persons in exercising these fundamental rights. Thirdly, the obligation to ensure the right to health means that the State must introduce specific measures for implementation of fundamental rights.[93] Moreover, this article covers all the areas affecting a person's health, i.e., also the right to healthy environmental conditions.[94] The right to health comprises both a person's freedoms (e.g., the right to control one's health, body, by choosing methods of treatment) and also the rights ensured by the State, i.e., the right of access to a health care system.

The above allows concluding that fundamental social rights have the nature of positive rights, and the fundamental rights belonging to this group are enjoyed by individuals – natural persons.

3.4. Fundamental economic human rights

In legal literature, fundamental economic rights are often examined in conjunction with fundamental social rights; however, fundamental economic rights are characterised by their own, different features. They may be described as rights, with the help of which an individual attains financial independence and is able to provide for one's own wellbeing and that of one's family. Essentially, this group comprises fundamental rights linked to various aspects of employment.

The right to work or the right to employment can be identified as an economic right, regulation concerning it is included in Art. 106 of the *Satversme*, which provides that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications, as well prohibits forced labour. It should be underscored that the Constitutional Court has repeatedly recognised that the *Satversme* does not directly guarantee the right to work but the right to freely choose one's employment and workplace.[95] Thus, the content of this article is a negative fundamental right, which envisages the freedom of employment, i.e., protects a person against such State's actions that limit this freedom. At the same time, this article does not prohibit the State from setting such requirements that a person must meet in order to take certain employment. The legislator enjoys the discretion to impose requirements with respect to specific professional activities, insofar it is necessary for public interests.[96]

The rights, set out in Art. 107 of the *Satversme*, also can be included in the group of economic rights, i.e., the right to remuneration for work and the right to rest, the latter of these is linked to the right to private life and, indirectly, to the right to health. The Constitutional Court already has recognised that the scope of fundamental

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[93] See judgement of the Constitutional Court of the Republic of Latvia of 9 March 2010 in case No. 2009-69-03, p. 8.1. Latvijas Vēstnesis, No. 40, 2010; Judgement of the Constitutional Court of the Republic of Latvia of 19 December 2017 in case No. 2017-02-03, p. 16. Latvijas Vēstnesis, No. 254, 2017.

[94] Ibid.

[95] See for example, Judgement of the Constitutional Court of the Republic of Latvia of 25 March 2021 in case No. 2020-36-01, p. 12. Latvijas Vēstnesis, No. 62, 2021.

[96] Judgement of the Constitutional Court of the Republic of Latvia of 25 March 2021 in case No. 2020-36-01, p. 12. Latvijas Vēstnesis, No. 62, 2021.; Judgement of the Constitutional Court of the Republic of Latvia of 28 January 2021 in case No. 2020-29-01, p. 17. Latvijas Vēstnesis, No. 22, 2021.

rights in the area of employment has been defined in Art. 107, has been specified in regulatory enactments and is applicable to every person in paid employment – both to an employee, who is employed in accordance with the Labour Law, and various public officials, for example, civil servants and officials in service. The *Satversme*, of course, typically for constitutions, does not define the amount of minimum remuneration for work, but points out that the amount of minimum remuneration for work should be set within the state.[97]

Likewise, the right of employed persons to a collective labour agreement and the right to strike, defined in Art. 108 belong to the group of economic rights. Art. 108 also establishes the safeguards for the freedom of trade unions, which, essentially, constitute an expression of the right to association.

Looking at the content of the examined rights, one could conclude that economic rights, in difference to the groups of fundamental rights examined before, are characterised by the so-called horizontal effect. I.e., private persons are also the objects of these fundamental rights because, in employment relations, employers are legal persons governed by private law, or natural persons, and a number of obligations are imposed on them as employers, which they have to ensure to an individual (an employee) as the fundamental rights, guaranteed in the *Satversme*, i.e., the obligation derived from Art. 107 to disburse commensurate remuneration for work done and grant to the employee the right to rest, as well as the right, envisaged in Art. 108, to ensure conclusion of a collective agreement in the cases and procedure set out in the Labour Law, as well as the right to strike. A difference can be discerned also in terms of the burden this group of fundamental rights places on the state budget, i.e., guaranteeing the fundamental social rights requires considerable financial resources of the State and creates a burden for tax-payers, whereas ensuring the fundamental economic rights does not create a financial burden for the State, since, basically, ensuring these rights falls within employers' competence, moreover, the taxes paid by employers constitute a considerable part of the state budget revenue.

The rights belonging to the group of economic rights are characterised by the content of both positive and negative fundamental rights, because they both grant rights to individuals (e.g., the right to remuneration for work) and envisage that the particular fundamental rights should be enjoyed without interference (prohibition of forced labour, freedom to choose one's employment).

3.5. Fundamental cultural rights

In international law, the right to education, the right to participate in cultural life, the right to enjoy benefits of scientific progress, the author's right to moral and substantial protection of scientific, literary and artistic work, freedom of scientific activity and creative expression are considered to be cultural rights.[98]

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[97] Judgement of the Constitutional Court of the Republic of Latvia of 21 November 2005 in case No. 2005-03-0306, p. 6, Latvijas Vēstnesis, No. 189, 2005; Judgement of the Constitutional Court of the Republic of Latvia of 9 June 2011 in case No. 2010-67-01, p. 8.1. Latvijas Vēstnesis, No. 91, 2011.

[98] *Stamatopoulou, E.* Cultural rights in international law: Article 27 of the Universal Declaration of Human Rights and beyond. Leiden; Boston: Martinus Nijhoff, 2007, pp. 2–3. Compare with *Riedel, E., Giacca, G., Golay, Ch.* The Development of Economic, Social, and Cultural Rights in International Law. In: Economic, Social, and Cultural Rights in International Law, *Riedel, E., Giacca, G., Golay, Ch.* (eds). Oxford: Oxford University Press, 2014, p. 9.

Often, fundamental cultural rights receive less attention to than fundamental civil and political rights. And yet, undeniably, culture represents a person's soul, morals, human self-sufficiency and self-respect. Hence, these rights cannot be regarded solely as "luxury rights".[99] It has been noted, that respecting fundamental cultural rights is essential to retain human dignity and positive social interaction between individuals in society in the diverse and multicultural world.[100] The fundamental cultural rights, considering, in particular, their content, developed in case law, are and will be of great importance in society, facing various challenges, e.g., in the Internet environment, diversity of art and creativity, and development. The fundamental cultural rights can be "politically sensitive", because one the of the fundamental rights in this group is linked to the protection of ethnic minorities. Likewise, it should be taken into account that the exercise of fundamental cultural rights in each state will depend on the understanding and content of culture. Culture, in general, determines the essence and quality of a human being. Undeniably, these fundamental rights influence and are closely linked to the exercise of other fundamental rights.

The right to education is one of the most important fundamental cultural rights, it has been enshrined in Art. 112 of the *Satversme* and creates the possibilities for a person to develop as a free personality and to become integrated into civil society[101] and, substantially, is a pre-condition for consolidating democratic society.[102] Pursuant to the second sentence of Art. 112 of the *Satversme*, primary and secondary education, paid for by the State, is the minimum of rights that the State has committed itself to guarantee and the decrease of which is inadmissible.[103] The mandatory nature of primary education, defined in the third sentence of this article, follows from the principle of a democratic state governed by the rule of law, because the foundation of such a state is an educated person, able to acquire information independently, reason, think critically and make rational decisions.[104]

The Constitutional Court has made important conclusions with respect to higher education, noting that, firstly, the right to education is applicable to education programmes of all levels and types, *inter alia*, higher education[105], as well as post-graduate study programmes[106]; secondly, that Art. 112 of the *Satversme*, however, does not provide for a person's right to demand that higher education is provided

[99] *Stamatopoulou, E.* Cultural rights in international law: Article 27 of the Universal Declaration of Human Rights and beyond. Leiden; Boston: Martinus Nijhoff, 2007, p. 5.

[100] General comment No. 21. Right of everyone to take part in cultural life (Art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights). Committee on Economic, Social and Cultural Rights, Forty third session, 2–20 November 2009, p. 1. Available: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F21&Lang=en [last viewed 20.03.2023].

[101] Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2019 in case No. 2018-12-01, para. 20. 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#search= [last viewed 17.03.2023].

[102] Ibid.

[103] Ibid.

[104] Ibid.

[105] Judgement of the Constitutional Court of the Republic of Latvia of 6 May 2011 in case No. 2010-57-03, para. 11.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-57-03_Spriedums.pdf#search= [last viewed 17.03.2023].

[106] Judgement of the Constitutional Court of the Republic of Latvia of 24 October 2019 in case No. 2018-23-03, para. 11.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/11/2018-23-03_Judgment.pdf#search= [last viewed 17.03.2023].

free of charge[107]; thirdly, that the State must provide for persons' right to acquire higher education free of charge, within the limits of its financial means[108].

Art. 113 of the *Satversme*, in turn, includes two distinguishable legal aspects: freedom of creative activity and protection of the created work.[109] This article, alongside Art. 112 of the *Satversme*, protects, *inter alia*, academic freedom, which is one of the foundations of higher education.[110] Likewise, protection is granted to the freedom of scientific research, which, essentially, is a safeguard for a person engaged in scientific activities against the State's interference in exercising this freedom, as well as a safeguard for creating high-quality scientific works, because this freedom makes it possible for researchers (scientists) to form autonomous research units, define aims and objectives of research, as well as the methods used, cooperate with other researchers, share scientific data and analysis with policy makers and society.[111] This is the reason why the State should be interested in both respecting and protecting, as well as guaranteeing the rights of respective persons to the freedom of scientific research, artistic and other creativity.[112]

Both Art. 14 of the *Satversme* and the Preamble to it speak about ethnic minorities and reinforce their rights. Undoubtedly, representatives of other ethnicities have always lived in Latvia alongside Latvians. Ethnic minorities have a close link with Latvia and constitute an integral part of it.[113] The rights of ethnic minorities, guaranteed in Art. 114 of the *Satversme*, envisage recognition of minority values and rights and are aimed at ensuring balance in society, creating a benevolent environment for preserving the language, ethnic and cultural identity of ethnic minorities, simultaneously ensuring appropriate respect for the constitutional values.[114] In Latvia, these rights are enjoyed by a person, permanently residing in Latvia, who self-identifies as belonging to an ethnic minority, which historically has lived in the territory of Latvia.[115] At

[107] Judgement of the Constitutional Court of the Republic of Latvia of 6 May 2011 in case No. 2010-57-03, para. 11.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-57-03_Spriedums.pdf#search= [last viewed 17.03.2023].

[108] Ibid.

[109] Judgement of the Constitutional Court of the Republic of Latvia of 2 May 2012 in case No. 2011-17-03, para. 12. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/08/2011-17-03_Spriedums_ENG.pdf#search= [last viewed 17.03.2023].

[110] Judgement of the Constitutional Court of the Republic of Latvia of 11 June 2020 in case No. 2019-12-01, para. 25.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/07/2019-12-01_Judgement.pdf#search= [last viewed 17.03.2023].

[111] General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights); para 13. Available: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQdxONLLLJiul8wRmVtR5Kxx73i0Uz0k13FeZiqChAWHKFuBqp%2B4RaxfUzqSAfyZYAR%2Fq7sqC7AHRa48PPRRALHB [last viewed 21.03.2023].

[112] Judgement of the Constitutional Court of the Republic of Latvia of 11 June 2020 in case No. 2019-12-01, para. 25.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/07/2019-12-01_Judgement.pdf#search= [last viewed 17.03.2023].

[113] Judgement of the Constitutional Court of the Republic of Latvia of 13 November 2019 in case No. 2018-22-01, para. 21.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/11/Judgment-in-the-case-2018-22-01_EN-1.pdf#search= [last viewed 17.03.2023].

[114] Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2019 in case No. 2018-12-01, para. 23.2. 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#search= [last viewed 17.03.2023].

[115] Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2019 in case No. 2018-12-01, para. 23. 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#search= [last viewed 17.03.2023].

the same time, Art. 114 comprises also collective rights with an overall objective of ensuring preservation and development of the ethnic minority's identity, because a person, belonging to an ethnic minority, can preserve one's identity only together with other persons belonging to the respective ethnic minority.[116] This conclusion complies with the findings made in theory that cultural rights should rather be viewed as collective rights, which perform two important functions. Firstly, they are "the shield and the sword" for ethnic minorities, allowing to defend the provisions made in the *Satversme*.[117] Secondly, these rights reflect the constitutional system itself, where this group is a part of the State.

3.6. Solidarity rights

The *Satversme's* catalogue of human rights, Art. 115, includes the so-called third-generation[118] fundamental rights, which define everyone's right to live in a benevolent environment, by providing information about environmental conditions and by promoting its preservation and improvement. An opinion can be found in theory that this right could be viewed rather as an aim – an ideal, because it protects a universal value – environment. This is the reason why they can be considered as being solidarity rights.[119]

Definitely, the rights related to environment and its protection were identified only in the 1970s, when the link between environment and human rights became apparent.[120] Moreover, identification of this link became relevant alongside the understanding that the possibilities of human existence directly depend upon environment and its situation. Undoubtedly, facing various environment-related challenges (availability of resources, reducing pollution, global warming), these are exactly the rights that outline one of the central dimensions of the entire catalogue of fundamental rights. It has been emphasized, for a good reason, that environment is the pre-condition for human existence.[121] All of the above shows that the catalogue of human rights, included in the *Satversme*, which contains also the right to live in a benevolent environment as its integral part, can be recognised as being progressive and far-sighted.

The Constitutional Court in its case law has explained the content of this article quite extensively. It has been concluded that this provision, firstly, imposes the obligation upon public authorities to create and ensure an effective system of environmental protection; secondly, grants the right to a private person to obtain,

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[116] Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2019 in case No. 2018-12-01, para. 23. 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#search= [last viewed 17.03.2023].

[117] *Shoudhry, S.* Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power? In: Comparative Constitutional Law, *Rosenfeld, M., Sajo, A.* (eds). Oxford: Oxford University Press, 2012, p. 1100.

[118] *O'Byrne, D. J.* Human Rights: An Introduction. Harlow: Pearson Education Limited, 2003, p. 387.

[119] *Gentimir, A.* Environmental Protection as Fundamental Right Guaranteed to the European Level. Present Environment and Sustainable Development, Vol. 14, No. 2, 2020, p. 124.

[120] Satversmes 115. panta komentārs [Commentary of Article 15] In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā [Commentaries on the Constitution of the Republic of Latvia. Chapter VIII. Fundamental rights. Prepared by the of authors under the scientific supervision of prof. R. Balodis]. Rīga: Latvijas Vēstnesis, 2011, p. 719.

[121] *Bogojevic, S., Rayfuse, R.* Environmental Rights in Europe and Beyond: Setting the Scene. In: Environmental Rights in Europe and Beyond, *Bogojevic, S., Rayfuse, R.* (eds). Bloomsbury Publishing Plc, 2018, p. 12.

in the procedure set out in regulatory enactments, environmental information and participate in the process of making the decisions related to the use of environment; thirdly, places the right to live in a benevolent environment on the level of fundamental rights.[122] Moreover, the rights defined in this article envisage the State's obligation to protect a person from the activities that are actually taking place and might endanger human health or environment, as well as the activities planned for the future.[123]

The subject of Art. 15 of the *Satversme*, "everyone", comprises both natural persons and legal persons. Concurrently, the Constitutional Court has provided a very far-sighted explanation of the subject of this article, pointing out that this right comprises "the interests of living in a benevolent environment not only of the present but also of the future generations", which, thus, must always be respected when deciding on environment-related matters.[124]

The possibilities of the present generation and the future generations of living in a benevolent environment directly depend on the readiness of states to implement sustainable development. In other words, Art. 115 of the *Satversme* cannot be examined in isolation from the principle of environmental sustainability, included in the Preamble to the *Satversme*, which means responsible treatment of the future generations, prohibiting actions which might endanger or seriously encumber the life of future generations.[125] The concept of "environmental constitutionalism"[126] is known in science, which means that legal provisions of constitutional level deal with environmental issues, which might pertain to references to environmental protection, ecology, and nature.[127] The recent case law of the Constitutional Court reflects directly on this, noting that the principle of sustainability and the fundamental rights, included in Art. 115 of the *Satversme*, constitute a united system of environmental constitutionalism.[128] In Latvia, environmental constitutionalism is implemented (reflected) as a specific fundamental right – the right to live in a benevolent environment, as well as in the principle of sustainability, which should be viewed as one the basic principles of constitutionalism and the national development

[122] Judgement of the Constitutional Court of the Republic of Latvia of 14 February 2003 in case No. 2002-14-04, para. 1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/07/2002-14-04_Spriedums_ENG.pdf#search= [last viewed 17.03.2023]; Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2007 in case No. 2007-12-03, para. 13. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/06/2007-12-03_Spriedums_ENG.pdf#search= [last viewed 17.03.2023].

[123] Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para. 13.1. 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 17.03.2023].

[124] Judgement of the Constitutional Court of the Republic of Latvia of 24 September 2008 in case No. 2008-03-03, para. 17.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-03-03_Spriedums.pdf#search= [last viewed 17.03.2023].

[125] *Levits, E.* Izvērsts Satversmes preambulas iespējamā teksta piedāvājums un komentārs [Extended proposal and commentary on a possible text for the Preamble to the Constitution]. In: Levits, E. Valstsgriba. Idejas un domas Latvijai 1985-2018 [National will. Ideas and thoughts for Latvia 1985–2018]. Rīga: Latvijas Vēstnesis, 2019, p. 648.

[126] See for example, *Weis, L. K.* Environmental constitutionalism: Aspiration or transformation? International Journal of Constitutional Law, Vol. 16, issue 3, 2018, pp. 836–870.

[127] *O'Gorman, R.* Environmental Constitutionalism: A Comparative Study. Transnational Environmental Law, Vol. 6, issue 3, 2017, p. 438.

[128] 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= [last viewed 17.03.2023].

as such. It comprises, definitely, also environmental protection and environmental sustainability.

4. Significance of protecting fundamental rights

The principle of a state governed by the rule of law can be viewed in both narrower and broader understanding. In the narrow understanding of it, it comprises two basic elements – control over the power and rights,[129] whereas in the broader understanding it also embraces such principles as, for example, separation of powers, democracy, as well as protection of human rights.

To protect one's fundamental rights, persons need effective legal remedies at their disposal. The need for such remedies follows from the principle of a state governed by the rule of law, which, *inter alia*, comprises protection of fundamental rights against the abuse of power. The State is obliged to ensure effective protection to anyone whose rights have been violated.[130]

Usually, the constitutional court is deemed to be the guardian of the constitution. However, the opinion of the Lithuanian constitutional law expert E. Kuris should be upheld, – he has noted that, although judges of the constitutional court undeniably are the ones who, in view of the court's nature, are the guardians of the constitution and also of the fundamental rights, at the same time they are not the only ones performing this function.[131] Protection of the constitution is also the task of other institutions and persons.[132] Clearly, protection of fundamental rights at the constitutional court should be seen as one of its functions. The direct applicability and the subjective nature of the fundamental rights, included in the *Satversme*, has given to Latvia the opportunity to create the constitutional complaint, which is sometimes called the acme of fundamental rights. It should be emphasised here that persons do not have the right to turn directly to the constitutional court to defend their violated fundamental rights in all countries. For example, such possibility is non-existent in Estonia. In Lithuania, the constitutional complaint was introduced only on 1 September 2019 when amendments to the Lithuanian Constitution entered into force.[133]

The institutional existence and functioning of legal remedies constitute only one of the aspects. Access to these legal remedies and, in particular, to courts is of decisive importance. As noted by American scholar T. Ginsburg, access to court is one of the most essential and important aspects of the right to trial.[134] A. Barak also has underscored that the way in which a judge applies the provisions that define access

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[129] *Lautenbach, G.* The Concept of the Rule of Law and the European Court of Human Rights. Oxford: Oxford University Press, 2013, p. 19.

[130] Judgement of the Constitutional Court of the Republic of Latvia of 5 December 2001 in case No. 2001-07-0103, para. 1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2001/07/2001-07-0103_Spriedums_ENG.pdf#search= [last viewed 17.03.2023].

[131] *Kuris, E.* Judges as Guardians of the Constitution: "Strict" or "Liberal" Interpretation. In: The Constitution as an Instrument of Change, *Smith, E.* (ed.). [b.v.]: SNS Förlag, 2003, p. 191.

[132] See more about rights protection mechanisms in Latvia: *Ziemele, I.* Cilvēktiesību aizsardzības mehānismi Latvijā [Human rights protection mechanisms in Latvia]. In: Cilvēktiesības pasaulē un Latvijā, Ziemele, I. (ed.). Rīga: TNA, 2021, pp. 441–466.

[133] *Jočiene, D.* Challenges to the Implementation of Individual Constitutional Complaints: Lithuanian Experience. In: Reports from the XVI Bilateral Conference of the Justices of the Constitutional Court of the Republic of Lithuania and the Constitutional Court of the Republic of Latvia 30 September–1 October 2021, Vilnius. Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 2022, p. 166.

[134] *Ginsburg, T.* Judicial Review in New Democracies: Constitutional Courts in Asian Cases. New York: Cambridge University Press, 2003, p. 37.

to court is, in a way, a test of the understanding of the judge's role.[135] One might subscribe to the thesis that, frequently, access to court depends on the interpretation of a legal provision.[136] Namely, it depends exactly upon the justices; for example, how in the proceedings before the Latvian Constitutional Court, a person's obligation to exhaust legal remedies will be examined or how the term for submitting the application will be assessed.

However, the existence of legal remedies *per se* may be unable to reach the aim, if the Constitutional Court's judgements are not enforced. A legal remedy, including the Constitutional Court, may deemed to be effective only if the delivered judgements are enforced. This conclusion applies to enforcing the judgements of all courts. However, this principle is most substantially manifested with respect to the enforcement of the Constitutional Court's judgements, because these judgements have *erga omnes* legal nature.

Every country, which respects the rule of law, invariably enforces a judgement delivered by the Constitutional Court. In Latvia, enforcement of the Constitutional Court's judgement can be presumed because a state governed by the rule of law cannot accept a different solution but to enforce the constitutional court's judgement that has entered into force. There cannot be any doubt, whether the Constitutional Court's judgement that has entered into force is enforceable. This finding not only follows from the constitutionally legal status of the Constitutional Court and the legal nature of its judgements, but is also an element of the rule of law. Enforcement of the judgement is presumed by, *inter alia*, the fact that no control over enforcement of these judgements has been envisaged. As noted above – enforcement of judgements is the presumption of a state governed by the rule of law.

Enforcement of the Constitutional Court's judgement does not mean only enforcement of the substantive part of the ruling. If the Court has provided interpretation of a legal provision in its findings, which requires the legislator's actions, the legislator has to respect the Court's rulings. To specify, this finding does not apply directly to *obiter dicta*. Simultaneously, it is worth reminding that a reasonable legislator always listens to the constitutional court's *obiter dicta*.

Enforcement of the Constitutional Court's judgements that pertain directly to the issues of fundamental rights, reveals, especially, whether fundamental rights are respected within the state. Namely, enforcement of judgements demonstrates, in a way, whether that, which has been defined in the theory of fundamental rights, conforms with the truth and reality.

Summary

Fundamental rights are an objective part of the constitution. However, the subjective understanding thereof, the direct effect, the ability to be "alive" give them a special place within the national legal system.

The inclusion of fundamental rights in the *Satversme* is a value that characterises the State and society, and should be respected by all.

The *Satversme's* catalogue of human rights can be characterised as modern, – it comprises fundamental rights belonging to all groups, including the most

[135] *Barak, A.* The Judge, p. 192.

[136] *Langford, M.* Judicial Review in National Court. Recognition and Responsiveness. In: Economic, Social, and Cultural Rights in International Law. Contemporary Issues and Challenges, *Riedel, E., Giacca, G., Golay, Ch.* (eds). Oxford: Oxford University Press, 2014, p. 425.

recent one – the third-generation rights, solidarity rights, which are not found in the constitutions of many other countries.

The fundamental civil rights enshrined in the *Satversme* do not have particularly national characteristics, as these rights are firmly related to international human rights standards. Notably, several fundamental political rights can be exercised only by the citizens, and the catalogue of political rights have expanded after the accession of Latvia to the European Union.

In difference to many other countries, fundamental social rights have also been included in the *Satversme's* catalogue of fundamental rights, and the subjects of social rights, i.e., individuals, may use the mechanisms envisaged in the state to demand guarantees of these subjective rights.

Fundamental cultural rights create a person as a self-sufficient member of society. They simultaneously form the grounds for manifestations of human dignity and influence the diversity of interactions between a person and society.

In Latvia, environmental constitutionalism is manifested both as the specific fundamental right to live in a benevolent environment, and as the principle of sustainability.

The constitutional court is not the only instrument for protecting human rights. However, *erga omnes* nature of its judgement makes it special.

Enforcement of a judgement delivered by the Latvian Constitutional Court is presumable. The enforcement of its judgements follows from the principle of a state governed by the rule of law.

Enforcement of the Constitutional Court's judgement does not mean enforcing only its substantive part. The entire judgement is binding, including the interpretation of a legal provision provided within the findings.

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Risks to Employees' Intellectual Property Rights Posed by Artificial Intelligence

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Artificial intelligence (AI) is one of the disruptive technologies, causing new and unforeseen social problems and uncertainty about how these problems should be solved. One such problem area is granting the status of author or inventor to AI in the area of intellectual property protection. One of the risks of giving AI this status is damage to workers' interests. Currently, employees can benefit from statutory guarantees concerning their creative results. Such existing regulation contributes to ensuring fair remuneration for creative workers and allows them to participate in the commercial success of their creative activities. The development of AI and related regulatory changes may undermine employee guarantees. The article distinguishes and analyses four scenarios – not protecting objects created by AI, granting rights to AI, allocating rights to the employer, or granting them to the employee. The consequences of each choice are evaluated from the point of view of the interests of the employees.

Keywords: artificial intelligence, employees, intellectual property, copyright, patent.

Contents

Introduction

Artificial intelligence (hereinafter – AI) is one of the disruptive technologies that has already affected many areas of life and will undoubtedly continue to exert an even greater impact in the future. Although the phenomenon of AI itself and the attention of scientists devoted to it is not new,[1] it has recently acquired a second wind. Suffice it to mention the hype surrounding the success of AI ChatGPT just a few months ago.

One of the most relevant and worrisome impact areas of AI is how it affects workers' rights and income inequality. This article does not consider the problem of rising unemployment, which is one of the most sensitive issues when it comes to AI and the labour market[2]. This article focuses on a much narrower aspect – how the development of AI can affect the intellectual property rights (hereinafter – IPRs) of employees and, accordingly, their ability to receive financial benefits from these rights.

The protection of IPRs, such as copyright and patents, from the very beginning was deeply entrenched in social security discourse. One of the most important justifications for copyright and patent law is related to the need to ensure the well-being of authors and inventors. According to the current rules, employees participate to some extent in using intellectual property (hereinafter – IP) objects created by them, giving them additional opportunities. In almost all European countries, specific legal rules enable the employee to control his work and sometimes provide additional remuneration. The question is – how the current model will be affected by AI and whether the position of employees will be worsened.

Therefore, the research question of this article is – how will the development of AI affect the IPRs of employees and their opportunities to receive remuneration from these rights?

The article analyses the impact of AI from the perspective of two "classic" IP rights – copyright and patent rights. Both IP rights share the attribute that their objects are characterized by creativity. Accordingly, only natural persons, i.e., humans, are recognized as authors and inventors in many countries because, at least until now, only they have been recognized as possessing a creative activity. Another significant limitation of the study is that the article does not examine AI-assisted works and inventions when the creative contribution of the employee can be traced in them, but only the "real" AI-generated results, when it is no longer possible to ascertain the creative contribution of the employee.[3]

The boundaries of the study are mostly linked to the European region. However, the study also includes the US and some other non-European jurisdictions for illustration.

1. Rights of employees to their works and inventions

It is a well-established principle that the production created by the company and the benefits generated by it belongs to the owner of the company, not to the employees, who participate in the benefits of the production generated by the company only

[1] A convenient starting point is the year 1956, when a conference dedicated to AI was held, marking the beginning of the discipline of artificial intelligence.

[2] A recently published study states that AI could replace the equivalent of 300 million full-time jobs. See https://www.bbc.com/news/technology-65102150 [last viewed 17.08.2023].

[3] For the distinction between these two situations, see *Hristov, K.* Artificial Intelligence and the Copyright Dilemma. IDEA, Vol. 57, 2017, pp. 435–437.

indirectly, through wages and other possible (but by no means mandatory) financial incentives.

However, the legal regime of intellectual property objects in many jurisdictions differs from that of physical production, with workers acquiring additional rights upon the intellectual property objects they create. In this respect, regulation differs between common law and civil law systems.[4] While in the countries representing the first system (primarily the US and the UK), the employer becomes the holder of all rights to the intellectual property created by his employees, and the employees are not given any additional statutory rights in the civil law countries, it is usually possible to find imperative or dispositive provisions that give the employees additional opportunities to benefit from the IP they created. The following is an overview of several continental European jurisdictions illustrating this statement.

1.1. Employees' copyright

At the EU level, issues of authorship and copyright ownership of works created by employees are not regulated, leaving them to the competence of the member states. The only area in which the regulation of copyright in the creations of employees is harmonized in the case of computer programs provided for in Directive 2009/24/EC on the legal protection of computer programs[5]. Article 2.1 of this directive provides that "the author of a computer program shall be the natural person or group of natural persons who have created the program or, where the legislation of the Member State permits, the legal person designated as the rightsholder by that legislation." Thus, according to the directive, the authors of computer programs could be both natural and legal persons. However, according to Article 2.3, "where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract." This provision establishes a default rule, causing the transfer of all economic rights from employee to employer. Due to the said harmonization, analogous provisions are found in all the states discussed below.

French copyright law, characterized by a personalized approach to the author and creation, does not provide a general rule for transferring copyright to works created by employees to the employer. On the contrary, Article L.111-1 of the French Code of Intellectual Property provides that the author owns the moral and economic rights to the work from its creation, even though it was created during an employment contract or public service duties. The employer can acquire the rights to the employees' work through the copyright agreement.

There are no special provisions in the Danish Copyright Act to regulate the transfer of copyright from the employee to the employer, and these issues are left to the parties' agreement. The copyright for computer programs created in the performance of official functions belongs to the employer according to Article 59 of the Danish Copyright Act.

As indicated in the literature, based on court practice, the copyright to the works of employees is still assigned to the employer in some cases when such a job function

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4 *Wolk, S., Szkalej, K.* (eds). Employees' Intellectual Property Rights. Wolters Kluwer, 2015, pp. 3–4.

5 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version). OJ L 111, 05.05.2009, pp. 16–22. Available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024 [last viewed 14.04.2023].

is described in the description of the employee's duties, and the rights are transferred only to such use of the work, which is intended for the employer's normal activities.[6]

According to German law, the natural person who created the work is considered an author. In addition, in Germany, the transfer of copyright is not allowed in principle, and copyright contracts can only agree on the assignment of rights. However, Article 43 of the German Copyright Act provides for the presumption of copyright ownership to the employer when the author created the work to perform his duties in the employment or service relationship unless otherwise agreed. The specified provision applies when an employment or service relationship between the author and the work must be created during employment. The scope of permitted use is determined based on the so-called principle of specific purpose – if there is no agreement on specific methods of use, the scope of use is determined according to the goals pursued by the contracting parties.

Article 69 of the above law provides legal regulation for computer programs, according to which the rights to computer programs are transferred to the employer. In this case, the rights are fully transferred, and the so-called principle of specific purpose does not apply.

Lithuania also includes additional guarantees for employees. From the point of view of copyright, the Lithuanian Copyright Act establishes a unique rule that the rights to the works created by the employee are transferred to the employer for five years (the exception applies to computer programs, the rights to which are transferred to the employer for the entire duration of rights) unless otherwise agreed. After five years, the rights return to the employee. Thus, although Lithuania establishes a statutory presumption of transfer of rights, it is limited in time, so the employer, in order to acquire rights for a period longer than five years, must conclude an additional contract with the employee.

1.2. Employees' inventions

At the EU level, the rights of employees to their inventions are not harmonized, and the rights to service inventions are regulated at the discretion of each state. There is no harmonization of this issue in the European Patent Convention[7] as well, as Article 60 thereof indicates that the issue of the right to patent an invention made by an employee is decided according to national law.

Although Article L.611-6 of the French Intellectual Property Code stipulates that the right to a patent belongs to the inventor or his successor, Article L.611-7 provides for the so-called service inventions. This article distinguishes three cases: when inventions are created during a normal work function, when inventions are created beyond the employees' normal duties, and when inventions are created beyond employment duties. In the first case, the rights to the invention belong ab initio to the employer, and the employee is entitled to additional remuneration; in the second case, the right to the invention belongs to the employee, but the employer may require a mandatory transfer of rights or a license, in which case the employee must be paid fair wages; in the third case, an employer has no rights to such inventions.

In Denmark, the rights to employees' inventions are regulated by two legal acts – the 1955 Service Inventions Act and the 2000 Law on Inventions in Public Research Institutions.

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[6] *Wolk, S., Szkalej, K.* (eds). Employees' Intellectual Property Rights, p. 78.

[7] The European Patent Convention (5 October 1973). Available: https://www.epo.org/law-practice/legal-texts/epc.html [last viewed 13.04.2023].

The Service Inventions Act applies to inventions that are created by employees in the course of their work duties. The concept of employee is understood based on the provisions of labour law. In the case of employee-created inventions, both the right to the invention and the right to decide whether to patent it pass to the employer. The law provides for the employee's right to reasonable remuneration if the employer requires the transfer of the invention, as well as the right to additional remuneration if the value of the invention exceeds what the employee was required to create.

The Act on Inventions in Public Research Institutions applies to inventions patentable under the Danish Patent Act and the Utility Model Act when developed in public research institutions named in the Act. The law stipulates that although the right to the invention belongs to the inventor, he is obligated to transfer the right, if the invention is created while the researcher works at the institution. There is also a special provision for inventions created during funded research activities. In such cases, the research institution has the right to transfer the rights to the inventions created by the researchers to the funder of the research activity. If the institution uses the invention for commercial purposes, the employee has the right to appropriate remuneration, just as if the employee uses the invention for commercial purposes, the institution has the right to remuneration.

German Patent Law provides that the right to an invention belongs to the person who created the invention. In the case of service inventions governed by the German Employee Inventions Act, the employer has the right to demand the transfer of the right to the invention. Service inventions are inventions created during carrying out the work duties, as well as employee inventions made using experience or results arising from the employment relationship. The employee can register the invention in countries where the employer has not registered. Also, in cases where the employer claims the right to the invention, he has the right to fair remuneration for using the patent.

Likewise, in Lithuania, there is a rule that in the case of an official invention, the rights may pass to the employer (unless the employer is not interested in it), and the employee is provided with a remuneration.

In conclusion, although there is no international or regional regulation, and the national regulations are sufficiently different, one can observe a fairly universal tendency in European countries to establish the opportunity for employees to receive additional income from their inventions. Usually, the legal mechanism allows the employer to acquire the rights to the invention invented by the employee performing his normal working duties, while providing the employer with the obligation to pay the employee a remuneration. The situation in the field of copyright is slightly different, and, as a rule, the law does not expressly provide additional remuneration to the employee for created copyrightable subject matter. However, in many European countries, there is no automatic transfer of copyright to the employer, or such a transfer is provided only for a short period of time (the case in Lithuania). Even if the presumption of transferring the employee's property rights to the employer is established, when deciding on the scope of the transferred rights, the purpose rule applies, which limits the rights transferred to the employer only to the extent necessary to achieve the purpose of the contract. In this way, the legal regulation of authors leaves a sufficient number of possibilities where the employer and the employee have to conclude a separate contract for the work created during work, which implies the possibility for the employee to receive additional compensation for the transfer of such rights. Therefore, the status of authors and inventors working

under an employment contract is somewhat privileged – unlike employees who create physical products, the former have additional guarantees of participation in the benefit of IP.

2. AI and its impact on authorship and inventorship

AI is not a new phenomenon, but a unified definition can hardly be given. On the one hand, the term "AI" refers not to a single technology but describes a relatively distinct group. On the other hand, AI is constantly developing, so trying to provide a definition is risky because it may immediately become outdated. For this article, the definition given by R. Abbott is entirely sufficient: "an algorithm or machine capable of completing tasks that would otherwise require cognition."[8]

Thus, AI is a machine, computer, and/or computer program that can make decisions independently. Related to this feature of AI is, for this article, the most important attribute of AI, which is autonomy.[9] The autonomy of AI can also be seen in the definition presented by the European Commission in the draft AI Act[10]. Autonomy means that the results of AI are no longer just the execution of pre-formulated human instructions. Autonomy is a crucial element that distinguishes AI from other technical tools.

It should be noted here that authors and inventors rarely create without using technical means. From the very beginning, works of literature or art have required the use of at least means of writing or painting (which have been successfully replaced by the computer). Similarly, the inventor uses various, sometimes extremely complex, devices. However, using technical means does not affect the decision on the authorship of a work or invention – it belongs to the individual making creative decisions.

However, AI differs from other technologies because humans no longer make creative decisions. The participation of AI in creating traditional IP objects is a well-established fact. AI creates music, movies, works of art, other computer programs, fiction and non-fiction books, and various inventions. The human contribution can be limited to an abstract command to the computer to create a work of some kind. Therefore, previous judgments that technology is just a tool to implement the will of the human actor are no longer applicable. Consequently, the following chapter will consider the status of AI in the context of IPRs.

3. The status of AI in copyright and patent law

Copyright has been and remains anthropocentric. In the laws of many countries, it is stated *expressis verbis* that only a human being can be an author. In other countries,

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[8] *Abbott, R.* The Reasonable Robot: Artificial Intelligence and the Law. Cambridge: Cambridge University Press, 2020, p. 22.

[9] *Ramalho, A.* Intellectual Property Protection for AI-generated Creations Europe, United States, Australia and Japan. eBook. London, Routledge, 2021, p. 69.

[10] "'Artificial intelligence system' (AI system) means a system that is designed to operate with elements of autonomy and that, based on machine and/or human-provided data and inputs, infers how to achieve a given set of objectives using machine learning and/or logic- and knowledge-based approaches, and produces system-generated outputs such as content (generative AI systems), predictions, recommendations or decisions, influencing the environments with which the AI system interacts". See the updated Proposal for a Regulation laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts. Available: https://www.artificial-intelligence-act.com/Artificial_Intelligence_Act_Articles_(Proposal_25.11.2022).html [last viewed 13.04.2023].

even if there is no such imperative in the law, this approach is followed by judicial case law and doctrine. Accordingly, animals, plants, or – most importantly – machines – cannot be qualified as authors. As the author, the human creator is also the first rights owner. The mentioned anthropocentrism is reflected in the requirements for protecting the work. In the EU, the essential condition for a work to receive copyright protection is originality, which is defined as the author's own intellectual creation[11]. It is generally accepted that only human creativity can meet the criteria formulated this way.

The indicated anthropocentric approach is reflected in the refusal to recognize copyright protection for AI-generated works. Most recently, the US Copyright Office adopted guidelines[12] reiterating its longstanding practice that AI-generated results will not be registered as copyrightable works. Due to the originality requirement mentioned above, the same decision regarding AI-generated works would likely be made in European countries. The resolution of the European Parliament[13] states that works created by machines should not receive copyright protection.

Although anthropocentrism is not so pronounced in patent law, the inventor in many countries can be only a human being. This aspect of the human inventor was especially evident in the recent DABUS cases, which deserve to be presented in greater detail.

DABUS is an AI created by US scientist S. Thaler, which is said to produce creative results entirely autonomously. DABUS has brought into existence many objects that, if created by a human, would be considered copyrighted objects (pictures, movies) and – most likely – would be considered patentable inventions. Seeking patent protection for such inventions, S. Thaler filed patent applications in a number of jurisdictions. The applications listed AI as the inventor. In most jurisdictions, patent offices and courts have rejected the application, because only a human can be named as the inventor. This was the situation in the European Patent Office,[14] the United States,[15] and the United Kingdom. The only country where DABUS has managed to obtain a patent is the Republic of South Africa. However, such a decision is explained by the Republic of South Africa applying the formal examination patent system. As a result, this single success does not seem very persuasive.

However, there is no clear answer to patenting AI inventions. The EU Parliament resolution states that AI inventions should be patentable.[16] At the end of 2022, UK Intellectual Property Office published the guidelines where the possibility of patenting

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[11] Judgment of the Court (Fourth Chamber) of 16 July 2009. Infopaq International A/S v. Danske Dagblades Forening. Available: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62008CJ0005 [last viewed 13.04.2023].

[12] US Copyright Office. Copyright Registration Guidance for Works Containing AI-Generated Material. Available: https://www.copyright.gov/ai/ai_policy_guidance.pdf [last viewed 13.04.2023].

[13] European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.html [last viewed 13.04.2023].

[14] 20-12-2019 Decision of the European Patent Office, Available: https://www.epo.org/news-events/news/2019/20191220.html [last viewed 13.04.2023]; 21.12.2021 Decision of the Legal Board of Appeal of the European Patent Office, Available: https://www.epo.org/law-practice/case-law-appeals/recent/j200008eu1.html [last viewed 13.04.2023].

[15] Decision of the United States Court of Appeals for the Federal Circuit, Available: https://cafc.uscourts.gov/opinions-orders/21-2347.OPINION.8-5-2022_1988142.pdf [last viewed 13.04.2023].

[16] European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.html [last viewed 13.04.2023].

AI inventions is recognized[17]. For its part, in the USA, the US PTO is currently surveying how AI inventions should be treated, so the final answer has yet to be discovered. It should be noted that legal regulation and practice are still uncertain, and the search for solutions is still ongoing.

4. Possible scenarios of allocation of IPRs to AI-generated results

Based on the preceding analysis, the main alternatives for determining who should own IPR in an AI-created work or invention are discussed below.

4.1. Public domain

According to this view, intellectual property rights in results created by AI should not be recognized at all. In other words, the creative results produced by AI, no matter how creative or valuable, would fall into the public domain.[18]

This approach can be supported by arguments derived from the IPRs justification doctrine. If IPRs are traditionally perceived as incentivizing persons to create, this incentive is irrelevant to AI. The machine can create 24/7 all year round, without any extra incentives. A public domain solution would benefit society as a whole, as it would have unlimited access (at least in terms of copyright and patent rights) to the creative output of AI, the quantity of which is likely to increase exponentially.

On the other hand, this approach will face the obvious problem that companies interested in protecting AI works and inventions will pretend that the work or invention is created by natural persons. In addition, without copyright or patent protection, the perceived gap in legal protection will undoubtedly be filled with trade secrets, contracts, and other legal instruments.

Judging from the employees' perspective, the public domain option would not be helpful for them, as it, in principle, eliminates any IPRs and the possibility of any additional remuneration.

4.2. AI

The second option would be to consider AI as the author or inventor. This option directly relates to another fundamental choice – considering AI as a separate person.

The postulate that the AI should be considered a rightsholder and, accordingly, acquire property rights in the created IP object has its supporters. One of the most vocal of them is probably R. Abbott, who helps the above-mentioned S. Thaler in the DABUS patenting process. His main argument is that AI nowadays has become sufficiently independent to be considered as an entity making creative decisions. Since there is no creative contribution of natural persons in the final product, their authorship would be fictitious, while the actual author or inventor is AI.[19]

On the other hand, current regulation is not moving in this direction. On the contrary, both US and EU practice and regulatory proposals demonstrate a clear

[17] United Kingdom Intellectual Property Office. Examining patent applications relating to artificial intelligence (AI) inventions: The Guidance. Available: https://www.gov.uk/government/publications/examining-patent-applications-relating-to-artificial-intelligence-ai-inventions/examining-patent-applications-relating-to-artificial-intelligence-ai-inventions-the-guidance [last viewed 14.04.2023].

[18] *Huson, G.* I, Copyright. Santa Clara High Technology Law Journal, Vol. 35, issue 2, 2018, p. 77.

[19] *Abbott, R.* The Reasonable Robot, pp. 25–27, 34. Also see *Lawrence, B. S.* Comment, Legal Personhood for Artificial Intelligences, North Carolina Law Review, Vol. 70, 1992, pp. 1231, 1259; *Watanabe, Y.* I, Inventor: Patent Inventorship for Artificial Intelligence Systems. Idaho Law Review, Vol. 57, issue 2, 2021, pp. 473–496; *Comer, A.* AI: Artificial Inventor or the Real Deal? North Carolina Journal of Law & Technology, Vol. 22, issue 3, 447–486, 2021.

orientation to maintain the central position of the human being and refusal to grant AI the status of an independent person.[20]

No matter how the legal status of AI is resolved, the consequences of recognizing AI as the author or inventor would not be favourable for the employee. It is noteworthy that the authors who are in favour of granting the status of author and inventor to AI simultaneously advocate that IPRs should be immediately passed to the company[21]. In this case, the employee does not acquire IPRs or other guarantees.

4.3. Employer

There is already a lot of research intended to assess which entities are placed in the best position to receive the rights to the results created by AI, specifically whether it should be the company that created the AI[22] or the user-company[23]. For this article, it does not matter – in both cases, the rightsholder will be the employer, not the employee. In both cases, the assignment of rights to the company is motivated by the fact that, although AI does not need incentives, the companies that invest in the creation of AI and the development of new products with the help of AI do need such incentives.

The discussed option is attractive, because it maintains the existing regulatory structure of IPRs and does not require significant changes. Possibly, in many jurisdictions, adopting this option would not necessarily require changes in legal regulation at all, and minor adaptations of the doctrine, relevant practice of courts, and other institutions would be sufficient.

As in the previous case, this decision is unfavourable for employees, because they would not receive any additional benefit from IP objects. The existing exclusivity of creative workers would be abolished, and they would be subject to the same regime as "non-creative" workers, who, as mentioned before, typically have no rights to the result of their work.

4.4. Employees

Another option is to initially grant the IPRs to employees who have directly interacted with the AI, for example, formulated the task that resulted in the AI generating a new work or invention. Such an alternative would essentially be the preservation of the status quo. Employees would be considered authors and inventors, and the IPRs would pass to the employer, as it is now, preserving the guarantees established for the benefit of employees, discussed in Chapter 1 of this article. On the one hand, such a solution would be acceptable, because it would avoid the problem of AI personhood, and from the point of view of the legal economy, this option would require little change in legal regulation. Socially, this would also be the most suitable option for employees, as it would maintain the existing guarantees.

However, this alternative faces a fundamental flaw. Because AI creates a creative output autonomously, workers cannot be considered authors and inventors in the context of current copyright and patent law. The existing practice of legal institutions, especially in the USA, demonstrates just such an approach, and does not

[20] European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.html [last viewed 13.04.2023].

[21] Ibid.

[22] *Abbott, R*. The Reasonable Robot, pp. 87–88. Similarly, see *Hristov, K*. Artificial Intelligence.

[23] *Schuster, W*. Artificial Intelligence and Patent Ownership. Washington and Lee Law Review, Vol. 75, issue 4, 1945–2004, 2018, p. 1988.

recognize rights to objects created in this way.[24] Employees could only be considered authors or inventors by applying legal fiction. It is possible – an existing model could be the category of computer-generated works that is recognized in the UK and some other common law states. The rights to computer-generated works are attributed to the person by whom the arrangements necessary for the creation of the work are undertaken. It is noteworthy that the actions of such a person do not have to be creative[25]. However, such a decision requires additional legal regulation, which would change the fundamental provisions of copyright and patent law. In addition, common law has always been more flexible regarding protected subject matter and requirements of protection, while such an instrument is conceptually alien to continental legal tradition. Therefore, the possibility of the discussed alternative remains unclear at the moment.

Summary

Although there is currently no universal solution as to who should own the rights to the works and inventions created by the employee, in most continental European countries, there are provisions in favour of the employees, which determine that they can receive additional benefits from the IP subject matter created by them. In the case of copyrightable work, these rules usually mean the requirement for the employer to enter into a separate agreement with the employee, thereby enabling additional remuneration or at least certain leverage for the employee. In the case of rights to service inventions, the employer, upon acquiring these rights, has a legal obligation to pay the employee remuneration for the invention.

The question of ownership of rights to AI-created objects, which would generally be copyrighted works or patentable inventions, remains unresolved at the global or regional level. National regulation is also in its nascent stages. However, four emerging scenarios can be distinguished: considering such objects to be in the public domain; allocating rights to the AI itself; granting rights to the employer, granting rights to the employee.

According to the first three scenarios, employees would lose the opportunity to rely on the current system of guarantees associated with service inventions and copyrightable works created in the course of employment duties. Therefore, the most likely consequence is that employees will not participate in the benefits created by AI and will be worse off due to the development of AI.

The fourth alternative is to preserve the status quo and consider employees as the authors and inventors of the AI-created result. Although it would be the most beneficial option to employees, this solution would face conceptual obstacles and require revision of fundamental postulates of copyright and patent law.

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[24] See Chapter 4.1.

[25] *Lee, J.* Computer-Generated Works under the CDPA 1988. In: Artificial Intelligence and Intellectual Property. *Lee, J. Hilty, R. M.,* and *Liu, K.-Ch.* (eds). Oxford University Press, 2021.

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Victim of Crime and the State's Liability for the Result of Criminal Proceedings

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This paper examines the issues related to the state's liability for such a result of criminal proceedings that impairs the victim's right to a fair trial. The views presented in this paper follow the notion of the victim's constitutional rights in Latvia and the principles established in the jurisprudence of the European Court of Human Rights, particularly with respect to the victim's right to an effective and thorough investigation of a crime. Consequently, this paper provides an analysis of Latvia's regulative framework on reparation of harm caused by state's unlawful actions in criminal proceedings and the implementation thereof in the case law.

Keywords: victim of crime, fair trial, effective remedy, state's liability.

Contents

Introduction

The right to effective remedy as an element of a fair trial prescribes that a victim of crime must be endowed with the opportunity to receive restitution of rights violated in the result of a crime. At the same time, the state has a corresponding responsibility to provide procedural rules that enable the victim to exercise this right.

A question may arise if the state is accountable for such a result of criminal proceedings which fails to satisfy the victim's right to effective remedy. Although the answer to this question may go beyond the area of criminal-legal relations and may not be fully regarded as a matter of criminal proceedings, it is crucial to understand whether the law has an adequate solution for a situation when the criminal justice system has not been functional for the victim.

The aim of this paper is to define the ground and scope of the state's liability for such criminal proceedings that have resulted in the victim's inability to achieve a redress of harm caused by an act of crime. Considering the complexity of this issue, an insight to the concept of a fair trial for the victim is provided in the beginning. The attention further is directed at the issue of the effectiveness of criminal proceedings as a part of the victim's right to effective remedy. The third part of the paper is dedicated to the development and problematic of Latvia's regulation on the state's liability.

1. Criminal proceedings from the victim's perspective

The purpose of criminal proceedings according to Article 1 of the Criminal Procedure Law[1] of Latvia (hereinafter – the "CPL") is to ensure effective application of the Criminal Law and to fairly regulate criminal-legal relations. A link between the concept of fair regulation of criminal-legal relations and the right to a fair trial established in the first sentence of Article 92 of the Constitution of the Republic of Latvia[2] (hereinafter – the "Constitution") can be clearly seen.

The legislator intentionally allowed for a broad interpretation of what constitutes criminal-legal relations and what fair regulation thereof entails. As a social phenomenon, crime affects various actors in society. In most cases, there is a victim whose violated rights need to be restored. Society usually empathises with the victim and desires the offender to receive a just punishment. The state seeks to convict and punish the offender. Finally, the offender has a right to be presumed innocent until proven otherwise, as well as to have lawful and impartial professional proceedings with the opportunity to defend oneself. In an ordinary situation, these interests are the criminal-legal relations that must be balanced equitably in the result.

Still, the right to a fair trial is generally understood as a set of guarantees for the offender. Indeed, the presumption of innocence determines the rules of how the offender must be treated by state's authorities and what rights he must be endowed with. A disregard of these rules in certain situations can make the proceedings unfair *per se*.[3] Nevertheless, the purpose of the proceedings, as stipulated by the Constitutional Court of the Republic of Latvia, embraces the principle of protection of the victim, and determines the restoration of the victim's violated rights.[4] Hence, one may inquire what the elements of the victim's right to a fair trial there are.

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1 Kriminālprocesa likums [Criminal Procedure Law] (21.04.2005). Available: https://likumi.lv/ta/id/107820-kriminalprocesa-likums [last viewed 05.02.2023].

2 Latvijas Republikas Satversme [Constitution of the Republic of Latvia] (15.02.1922). Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme [last viewed 05.02.2023].

3 Judgement of 7 March 2019 of the European Court of Human Rights in case Abdullayev v. Azerbaijan, No. 6005/08, paras 58–60. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-191357%22]} [last viewed 05.02.2023].

4 Judgement of 10 March 2017 of the Constitutional Court of the Republic of Latvia in case No. 2016-07-01, para. 21. Latvijas Vēstnesis, No. 52, 10.03.2017.

At the first glance, the answer to this question seems self-evident. The victim's purpose in participating in a criminal case appears to be obtaining compensation for harm inflicted by the offender. The term "compensation" is defined in Article 350(2) of the CPL as an element of the regulation of criminal-legal relations which an accused pays voluntarily, or on the basis of a court or prosecutor's ruling. Harm and its redress, whether provided voluntarily or imposed by the state, is therefore a criminal-legal relation between the victim and the offender.

Nonetheless, the analysis of the victim's rights supports the inference that limiting the victim's access to a fair trial to compensation for harm would be imprudent. Articles 95 and 96 of the CPL determine the victim as an active participant in criminal proceedings.[5] The victim's basic rights are outlined in Article 97 "prim" of the CPL, however, the catalogue of procedural rights which ensure the victim's active role includes the right to submit evidence and testimonies[6], the right to express opinion on any matter[7] during the trial, as well as the right to be acquainted with evidence after the conclusion of the pre-trial stage of the process.[8]

It is clear that the victim's participation in criminal proceedings is crucial not merely concerning the compensation for harm, but also for executing certain control mechanisms over the conduct and outcome of a criminal case. The victim's participatory rights help to ensure that the state does not overlook anything that is necessary for the result of criminal proceedings.[9] The idea of victim's participation in criminal proceedings as a tool for providing justice suggests that the participatory rights of the victim are intended to serve the pursuit of his or her individual interest in the conviction and punishment of the offender.[10] Consequently, the victim's role in criminal proceedings includes the opportunity to actively contribute to the achievement of a fair regulation of criminal-legal relations, particularly by presenting evidence and challenging decisions of competent authorities. At the same time, while the offender uses the right to speak and submit evidence for defence, the victim's right to be heard pursuits three-fold objectives: first, to contribute to the fact-finding process; second, to instil confidence about the final verdict and how it is reached; and third, to come to terms with the plight of the crime.[11]

In this regard, the right to punishment imposed on the offender is another possible aspect of the right to a fair trial that has been discussed in legal literature. Behind this suggestion, there is a narrative that punishment should work as a reaffirmation (rather than restoration) of the victim's violated rights.[12] However, the implementation of this right can be complex, as it raises questions about the appropriate degree of victim involvement in sentencing decisions. Latvia's legal doctrine and case law lack a comprehensive analysis of the victim's right to punishment of the offender and therefore, further research and discussion are necessary to determine how this right

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[5] *Strada-Rozenberga, K.* Victims and their Criminal Procedure Status in Law Enforcement Practices in Latvia. Journal of the University of Latvia "Law", No. 6, 2014, p. 52.

[6] Article 189(1) of the CPL.

[7] Article 99(1)(4) of the CPL.

[8] Article 98(1)(8) of the CPL.

[9] *Cassell, P. G., Mitchell, N. J., Edwards, J. B.* Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed. Journal of Criminal Law and Criminology, Vol. 104, issue 1, 2014, p. 70.

[10] *Göhler, J.* Victim Rights in Civil Law Jurisdictions. In: *Brown, D. K., Turner, J. I., Weisser, B.* (eds). The Oxford Handbook of Criminal Process. New York: Oxford University Press, 2019, p. 274.

[11] Ibid., p. 275.

[12] *Brown, S. P.* Punishment and the restoration of rights. Punishment & Society, Vol. 3, issue 4, 2001, pp. 493–494.

could fit into the country's legal system. Despite these challenges, CPL addresses this issue by allowing the victim during the court debates to express opinion regarding compensation for harm and the sentence to be imposed on the accused.[13] The court, needless to say, is not obligated to follow the victim's views on the appropriate punishment. This leads to the question of effectiveness of criminal proceedings as a part of a fair trial for the victim.

2. Effective criminal proceedings as a necessary remedy

The right of a victim of crime to seek redress is an expression of the principle of effective remedy, which is guaranteed by the third sentence of Article 92 of the Constitution. This principle is a general guarantee that if rights or interests protected by law are infringed, an individual is entitled to adequate reimbursement of harm.[14] As admitted by the Court of Justice of the European Union, this principle underlines the constitutional traditions common to the member states of the European Union and grants judicial protection to everyone.[15] In the context of the purpose of criminal proceedings, even though a remedy provided for a victim of crime cannot be perceived as a punishment,[16] it undeniably may have a punitive effect and be as powerful as a criminal sanction.

However, the main task of criminal law is to protect the interests of society.[17] It means that a fair regulation of criminal-legal relations may not require investigation and conviction of the offender at any price.[18] In Latvia's criminal proceedings, the victim's right to effective remedy may be limited by the principle of public accusation laid down in Article 7(1) of the CPL which mandates that criminal proceedings shall be conducted in the interests of society regardless of the will of the person upon whom harm was inflicted (except for cases provided in Article 7(2)). Thus, Latvia's legislator has established that a crime, as an infringement of public order, must be investigated, and the offender must be punished for the benefit of society. Even though Article 22 of the CPL recognises the victim's right to compensation for harm, from the explicit provision of law it is not possible to draw a conclusion regarding whether the victim has a legitimate basis to anticipate that the result of a criminal case satisfies a victim's interests.

Paradoxically, the case law of the European Court of Human Rights (hereinafter – the "ECtHR") provides a basis for a reasoning that the effectiveness of criminal

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13 Article 506(2) of the CPL.

14 Judgement of 5 March 2021 of the Constitutional Court of the Republic of Latvia in case No. 2020-30-01, para. 11.1. Latvijas Vēstnesis, No. 46, 08.03.2021.

15 Judgement of 25 July 2002 the Court of Justice of the European Union in case C-50/00 P, para. 39. Available: https://curia.europa.eu/juris/document/document.jsf;jsessionid=D32B96C2112576097354 7A348043B426?text=&docid=47107&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part= 1&cid=1224949 [last viewed 05.02.2023].

16 Decision of 5 November 2010 of the Senate of the Supreme Court in case No. SKK-508/2010. Available: https://www.at.gov.lv/files/uploads/files/archive/department2/2010/skk%20508_2010.doc [last viewed 05.02.2023].

17 *Meikališa*, Ā., *Strada-Rozenberga*, *K*. Kriminālprocesa obligātums un lietderīguma elementu Latvijas krimināltiesisko un kriminālprocesuālo normu sistēmā [The Mandatory Nature of Criminal Proceedings and the Elements of Expediency in the System of Latvian Criminal and Criminal Procedural Norms]. In: Kriminālprocesa obligātuma principa ietekme uz kriminālprocesa efektivitāti [The Impact of the Mandatory Principle of Criminal Procedure on the Efficiency of Criminal Proceedings], p. 155. Available: https://juristavards.lv/wwwraksti/JV/BIBLIOTEKA/PRAKSES_MATERIALI/ KRIMINALPROCESA%20OBLIGATUMS.PDF [last viewed 05.03.2023].

18 Ibid., pp. 157–159.

proceedings may be an essential part of what constitutes an effective remedy for a victim of crime. The ECtHR has drawn a conclusion that, in a situation when an individual has been seriously harmed, the notion of an "effective remedy" in the light of Article 13 of the European Convention on Human Rights[19] (hereinafter – the "ECHR") entails, in addition to the payment of compensation, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.[20]

This inference is derived from the states' positive duty to effectively protect fundamental rights according to Article 1 of the ECHR, and therefore it entitles individuals who arguably claims to have been victimised to request the state to conduct an in-depth investigation capable of identifying and punishing those responsible.[21] The ECtHR, however, restrained itself from providing a general conclusion on the victim's right to effective criminal proceedings, restricting this deduction solely to the rights protected by Articles 2, 3, 5 and 8 of the ECHR.[22] Still, on the basis of the jurisprudence of the ECtHR, it can be said that a result of criminal proceedings cannot be regarded as fair in a situation when the state has not been able to ensure the victim's right to effective remedy. Such a situation was examined by the ECtHR in case Lapsa v. Latvia, which should be examined briefly.

In 2008, Ms. Lapsa's child died the next day after birth due to medical complications. Following an inquiry by the Health Inspectorate of the Republic of Latvia, criminal proceedings were initiated against the doctors who had overseen Ms. Lapsa's delivery. The case went to trial in 2010 but was terminated in 2012 due to the withdrawal of charges. The decision was later reversed, and the doctors were found guilty of medical negligence in 2015. The decision was upheld by the appellate court but quashed by the Supreme Court (hereinafter – the "SC") in 2018, leading to a third round of trial that ultimately ended in the termination of the case against the doctors in 2019.

Ms. Lapsa referred this matter to the ECtHR on account of Latvia's failure to protect the child's life under Article 2 of the ECHR.

In its judgement, the ECtHR stated that under Article 2 of the ECHR, legal remedies should constitute means for establishing the facts, holding the guilty accountable, and providing redress for the victim; criminal proceedings should be effective and concluded within a reasonable time to fulfil the state's procedural obligation. Hence, the ECtHR found that the applicant's criminal proceedings were excessively lengthy, preventing her from bringing a civil claim against the doctors and indicating the state's failure to conduct a thorough investigation. As the result, the applicant was awarded 10,000 euros for non-pecuniary damage.[23]

This case highlights the importance of effective criminal proceedings in ensuring that victims can receive redress for the harm they have suffered. As a participant in

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[19] Convention for the Protection of Human Rights and Fundamental Freedoms (04.11.1950). Available: https://www.echr.coe.int/documents/convention_eng.pdf [last viewed 05.02.2023].

[20] Judgement of 25 September 1997 of the European Court of Human Rights in case Aydın v. Turkey, No. 23178/94, para. 103. Available: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58371%22]} [last viewed 05.02.2023].

[21] For a greater deal see: *Mowbray*, *A*. Duties of Investigation under the European Convention on Human Rights. The International and Comparative Law Quarterly, Vol. 51, issue 2, 2002, pp. 437–448.

[22] *Göhler*, *J*. Victim Rights, p. 281.

[23] Judgement of 22 October 2022 of the European Court of Human Rights in case Lapsa v. Latvia, No. 57444/19, paras 1–6, 15–27. Available: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-219945%22]} [last viewed 27.02.2023].

the proceedings, however, the victim is often deprived of any procedural mechanism to ensure effectiveness of the proceedings[24], particularly in terms of thoroughness and timeliness. Therefore, it is crucial to examine the legal mechanisms available for holding the state accountable for ineffective criminal proceedings.

3. Legal framework of the state's liability in criminal proceedings

In Latvia, the Law on Compensation for Harm Caused in Criminal Proceedings and Administrative Offence Proceedings[25] (hereinafter – the "Law on Compensation") regulates an individual's right to claim restitution for harm caused by state authorities within criminal proceedings. To understand this right fully, especially with regard to a crime victim, it's necessary to have a brief overview of how the law was elaborated.

The Law on Compensation was prepared by the Ministry of Justice to reconcile the regulation on the state's liability and to substitute the outdated 1998 law.[26] The original intention of the Law on Compensation was limited to ensuring compensation for those who were unjustly or illegally arrested or detained, thereby excluding victims of crime and other individuals from its purview.[27]

While the draft law was being examined in *Saeima*, the Department of Administrative Cases of the SC submitted a proposal to include a provision which would concern all the "non-typical" cases when individuals are harmed in criminal proceedings.[28] Without any further discussion, this proposal was supported by the Commission of *Saeima*, and Article 2 of the draft law was complemented by para. 2, as follows: "The provisions of this Law shall also apply to cases not explicitly mentioned in this Law if a private individual has suffered harm in criminal or administrative offense proceedings due to the illegal actions of an institution, the Office of the Prosecutor, or a court."

Pursuant to Article 4 of the Law on Compensation, compensation for harm incurred during criminal proceedings can be awarded based on various circumstances, including a court ruling of acquittal or the termination of criminal proceedings due to exculpatory reasons. Additionally, Article 2(2) allows for the assessment of any harm suffered by an individual during criminal proceedings. This creates a broad interpretation of what may constitute "harm" under the Law on Compensation. Nonetheless, the mere occurrence of harm does not automatically render the state liable.

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[24] *Trechsel*, *S*. Human Rights in Criminal Proceedings. Oxford University Press: 2005, p. 37.

[25] Krimināprocesā un administratīvo pārkāpumu lietvedībā nodarītā kaitējuma atlīdzināšanas likums [Law on Compensation for Damage Caused in Criminal Proceedings and Administrative Offence Proceedings] (30.11.2017). Available: https://likumi.lv/ta/id/295926-kriminalprocesa-un-administrativo-parkapumu-lietvediba-nodarita-kaitejuma-atlidzinasanas-likums [last viewed 27.02.2023].

[26] Likumprojekta „Krimināprocesā un administratīvo pārkāpumu lietvedībā nodarītā kaitējuma atlīdzināšanas likums" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Initial Impact Assessment Report (Annotation) of the Law on Compensation for Damage Caused in Criminal Proceedings and Administrative Offence Proceedings]. Available: https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/D358C46EE64B01CFC2257FB5003F122B?OpenDocument [last viewed 27.02.2023].

[27] Decision of 14 November 2018 of the Supreme Court of the Republic of Latvia in case SKA-1081/2018, para. 12. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/368366.pdf [last viewed 05.02.2023].

[28] Letter of 13 April 2017 of the Department of Administrative Cases of the Supreme Court No. 10-1/1-691nos. Available: https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/6EC3C6645E1411D8C2258106002478DF?OpenDocument [last viewed 27.02.2023].

First, the harm must have occurred due to an illegal action of an authority in criminal proceedings. The Law on Compensation indicates that this action must be of criminal-procedural nature, however, as was stipulated by the SC, inaction of officials may also be considered as a part of criminal proceedings.[29] The illegality of such an action must be established by the ruling of an authorised official or court.[30] This provision infers from the rule that illegal action should be identified in the same process in which the harm has occurred.[31] Additionally, the process of establishing and compensating harm caused by a state's authority is separated from criminal proceedings, hence, the institution authorised to make decisions to compensate harm under the Law on Compensation[32] acts as an independent administrative body without the right to review actions made in criminal proceedings.[33]

In criminal proceedings, illegal actions of competent authorities can be reviewed and contested if an interested participant lodges a complaint to a higher authority or investigative judge. However, the authors consider that this requirement can impose an excessive burden on individuals, particularly in situations when criminal proceedings have been unreasonably delayed, leaving the victim of crime to wait for the conclusion of the proceedings, as demonstrated in the case of Lapsa v. Latvia. At the same time, there is a range of decisions and actions in the CPL that cannot be challenged and nullified, especially with regard to actions of investigative bodies in the pre-trial stage of proceedings.[34] Nonetheless, the case law of Latvia's courts demonstrates that some flexibility might be applied to this provision to ensure the constitutional right to redress of harm. The SC has acknowledged that when the legislator has not introduced an effective mechanism for the evaluation of the legality of a criminal-procedural action, as an exception, the administrative court is empowered to assess the existence of harm.[35] While this conclusion does not substitute the general rule on the determination of an illegal act in criminal proceedings, it shows that an individual is entitled to expect that the harm inflicted upon him or her will not remain "unnoticed". Accordingly, justice Dr. iur. Jautrīte Briede has encouraged judges who adjudicate criminal and administrative offence cases not to restrain themselves from evaluating procedural infringements that could potentially harm a person's rights, thus ensuring the opportunity to claim compensation for harm from the state.[36]

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[29] Krimināprocesā un administratīvo pārkāpumu lietvedībā nodarītā kaitējuma atlīdzināšanas likuma piemērošanas prakse. Senāta judikatūras atziņas (2018.–2022. gada februāris) [Practice of Applying the Law on Compensation for Harm Caused in Criminal Proceedings and Administrative Offence Proceedings in the Senate's Case Law (February 2018-2022], p. 9. Available: shorturl.at/gjpq6 [last viewed 04.04.2023].

[30] Article 6 of the Law on Compensation.

[31] See note 29, p. 8.

[32] See Article 17 of the Law on Compensation.

[33] Judgement of 9 June 2022 of the Regional Administrative Court in case No. A420181021, para. 11. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/480536.pdf [last viewed 27.02.2023].

[34] *Meikališa*, Ā., *Strada-Rozenberga*, *K*. Grounds for Compensation in Administrative Procedure for the Damages Caused in Criminal Proceedings – Some Relevant Aspects Observed in Latvia's Law and Case Law. In: New Legal Reality: Challenges and Perspectives. II, 21–22 October 2021. Riga: University of Latvia Press, 2022, pp. 338–340.

[35] See note 29, p. 11.

[36] Vispārējās jurisdikcijas tiesās izskatīto krimināprocesu un administratīvo pārkāpumu lietu korelācija ar kompensāciju piedziņu Administratīvo tiesu lietās/vai administratīvajā procesā [The Correlation Between Criminal Proceedings and Administrative Offences Reviewed in Courts of General Jurisdiction and the Recovery of Compensation in Administrative Court Cases or in the Administrative Process]. Available: https://m.juristavards.lv/biblioteka/283054-visparejas-jurisdikcijas-tiesas-izskatito-kriminalprocesu-un-administrativo-parkapumu-lietu-korelaci/ [last viewed 04.04.2023].

Second, according to Article 7 of the Law on Compensation, a causal link between an illegal action of an institution and the harm caused to an individual must exist. In other words, in order to entail the state's liability, an illegal action of an authority in criminal proceedings must be the key reason which caused harm to an individual. An example from case law can illustrate the meaning of this provision.

The person "A" submitted a claim to the Office of the Prosecutor General for compensation for harm from the state in the amount of 5656 euro, considering that the criminal proceedings, in which A has participated as the victim, have been unreasonably delayed and therefore A has not been able to receive compensation from the offender for financial fraud. The Office of the Prosecutor General rejected A's claim on the ground of non-existence of the causal link between the illegal action of the investigator (failure to conduct investigation and consequent unreasonable delay of the proceedings which was established by the supervising prosecutor in the case) and the harm which was caused to A by the crime that allegedly had been committed.

The applicant challenged the decision of the Office of the Prosecutor General in the Administrative Court. By the decision of the District Administrative court, A's claim for compensation of harm was dismissed. The court, *inter alia*, established that the harm that had been caused to the applicant occurred as the result of the crime that had been investigated by the State Police, and therefore, no evidence that the investigator's omission was the "main factor", which caused damages to A, was presented to the court.[37]

It is worth noting that in this case the applicant requested compensation while the criminal proceedings were still ongoing, which means that the outcome of the proceedings was uncertain, and the applicant still had the opportunity to seek compensation under the CPL. However, the provision of Article 2(2) of the Law on Compensation has also been applied to benefit victims of crime, as demonstrated in the following example.

The person "D" was severely beaten by his neighbour, the person "H". Criminal proceedings were initiated against H for committing intentional bodily injury, and later the case was sent to trial. By court ruling, H was acquitted due the lack of proof. The court, however, took an ancillary decision, in which it established that the prosecutor had failed to conduct a thorough supervision of the investigation, and therefore the accusation against H had been ill-founded.

After an unsuccessful appeal, D submitted a claim to the Office of the Prosecutor General for compensation of moral harm in the amount of 3000 euro. The Office of the Prosecutor General partially satisfied D's claim and provided an apology. The claim regarding pecuniary compensation was rejected.

D then challenged this decision in the Administrative Court. In its judgement, the District Administrative Court, firstly, outlined a general conclusion on the victim's right to receive compensation under Article 2(2) of the Law on Compensation; secondly, the court admitted that the prosecutor's negligent performance of duties in criminal proceedings had breached D's right to a fair trial; thirdly, the court formulated the purpose of compensation as to provide satisfaction for the victim's violated rights and to deter authorities from repeating such actions; fourthly, the court recognised that, although it was not possible to fully restore D's rights that had been violated due to the crime as H had been acquitted, a compensation from the state

[37] Judgement of 6 February 2023 of the District Administrative Court in case No. A420221622, para. 9. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/497819.pdf [last viewed 28.02.2023].

for moral harm would be a reasonable remedy for D. As a consequence, the court awarded D a compensation of 1500 euro for moral damages.[38]

The authors wish to draw attention to the court's conclusion that the prosecutor's negligence, which led to the offender's acquittal, constituted a violation of the victim's right to a fair trial. The purpose of the Law on Compensation, declared in Article 1(1) therein, unequivocally provides that the state is responsible for harm caused to individuals by an illegal actions of state authorities in criminal proceedings. Conversely, the offender is responsible for harm caused by violating provisions of the Criminal Law. Therefore, compensation awarded to a victim under the Law on Compensation is not intended to provide complete redress for harm caused by the offender, but rather to compensate for the state's failure to ensure the victim's right to a fair trial.

The application of the Law on Compensation in practice shows that Article 2(2) provides a broad margin for victims of crime to receive compensation if the state has failed to ensure a fair regulation of criminal-legal relations. However, as stipulated by the SC, the legislator is ought to evaluate and refine the enforcement of this law to ensure that victims of crime are provided with the appropriate level of redress and that their rights are fully protected.[39] The authors concur with this observation.

Finally, in accordance with Article 14(4) of the Law on Compensation, the maximum compensation for non-material harm may be up to 30,000 euro if the harm is deemed "particularly severe". Paragraph 1 of this Article stipulates the general criteria for assessing such harm; however, these cannot be considered comprehensive. As there are two bodies authorised to compensate for the state's actions in criminal proceedings – the Ministry of Justice and the Office of the Prosecutor General – and taking into account the principle of equality (i.e. in comparable cases, compensation for moral harm should be similar, but in different cases, it may differ)[40], the authors hope that the implementation of the Law on Compensation will provide a more detailed and consistent benchmark for evaluating infringements of one's constitutional rights in criminal proceedings.

Summary

The victim's right to effective remedy in criminal proceedings goes beyond obtaining a compensation for harm caused by the offender, as the victim has control mechanisms over the conduct and result of the case, influencing the offender's conviction and punishment. The victim, however, cannot expect that the conviction and punishment of every offender is ensured in each criminal case.

The effectiveness of criminal proceedings leading to the identification and conviction of the offender, in addition to compensation for harm, may constitute an element of the victim's right to a fair trial. Therefore, the state is responsible for criminal proceedings that fail to fulfil the victim's expectation of effective proceedings.

The Law on Compensation provides a mechanism for victims to hold the state liable for ineffective criminal proceedings and to seek redress for a violation of their right to a fair trial. The case law shows that some derogations from the Law on

[38] Judgement of 15 June 2022 of the District Administrative Court in case No. A420255921, paras 5–13. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/480999.pdf [last viewed 05.03.2023].

[39] Decision of 14 November 2018 of the Supreme Court of the Republic of Latvia in case No. SKA-1081/2018, para. 13. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/368366.pdf [last viewed 05.02.2023].

[40] See note 29, p. 16.

Compensation's provisions on the establishing an illegal action of an authority in criminal proceedings are needed to ensure the fundamental right to redress of harm.

The legislator must ensure that the Law on Compensation is intended to compensate victims for the negligent performance of the state's authorities in criminal proceedings, and, if necessary, introduce more specific regulations to safeguard crime victims' rights. At the same time, the application of this law is ought to provide a more detailed criteria for the evaluation of the victim's violated right to a fair trial.

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Vispārējās jurisdikcijas tiesās izskatīto kriminālprocesu un administratīvo pārkāpumu lietu korelācija ar kompensāciju piedziņu Administratīvo tiesu lietās/vai administratīvajā procesā [The Correlation Between Criminal Proceedings and Administrative Offenses Reviewed in Courts of General Jurisdiction and the Recovery of Compensation in Administrative Court Cases or in the Administrative Process]. Available: https://m.juristavards.lv/biblioteka/283054-visparejas-jurisdikcijas-tiesas-izskatito-kriminalprocesu-un-administrativo-parkapumu-lietu-korelaci/ [last viewed 04.04.2023].

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Approaches to Promote Gender Parity in Parliamentary Representation in Germany and France

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Men and women are equal, but parliaments are dominated by men. In Europe, there has been a debate since the 1990s how to change this and promote gender parity in parliamentary representation. This contribution presents the approaches taken and discussed in Germany and France, and the considerable constitutional obstacles on the way to achieving this goal.

Keywords: Gender Parity in Parliamentary Representation in Germany and France, gender equality, freedom of political parties, equal opportunities of political parties, free and equal elections, democracy, mandatory gender quota for electoral lists, public funding of political parties, self-commitment of political parties to gender parity.

Contents

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Introduction

Men and women are equal, but in most countries the parliaments as the most powerful institutions of the state are strongly dominated by men; thus, in the law-making, the male perspective prevails. In Europe in the 1990s, this has triggered a debate about the ways, how to promote gender parity in democratic representation, which has led to different results in different countries, but remains vivid everywhere today. The following contribution presents the various approaches taken and discussed in Germany and France. It aims to sharpen the understanding of which approaches are effective and which are not, and what are the significant constitutional obstacles making it difficult to implement effective approaches.

1. Backgrounds

To understand the context of the gender parity politics and discussion, it is important to consider some backgrounds:

1.1. The European focus on gender equality instead of women's rights

The European view on gender issues differs from that in most other parts of the world. In most countries, in the twenties of the 21st century, "women's rights" are an important, much-discussed topic. Not so in Europe: Since women and men are

equal (an aspect of human dignity), there is no reason for specific "women's rights". With the exception of maternity protection, there are no such rights in the European human rights treaties, the Charter of Fundamental Rights of the European Union, the Basic Law for the Federal Republic of Germany (= BL) or the Constitution of the French Republic of 1958 (= Const. 1958), but instead these documents contain a firm commitment to non-discrimination and equal rights of men and women.[1]

While legal discrimination has been eliminated in the course of the 20th century, some countries, such as Germany, still have a lot of catching up to do to achieve effective (actual) gender equality in professional and political life.[2] The public discussion focuses on this aspect instead of "women's rights".

1.2. The active promotion of gender equality under European Union law and national constitutional law

The European Union and its member states are committed to an active promotion of gender equality. Under the international treaties, on which the Union is based,[3] the Union must in all its activities aim to eliminate inequalities between men and women, promote equality and combat discrimination. Far-reaching legislation serves this purpose.[4] Art. 23 ChFR, which anchors the fundamental right of equality between men and women at Union level, insists that "equality […] must be ensured in all areas" and explicitly allows "measures providing for specific advantages in favour of the under-represented sex".

In Germany, Art. 3(2) phrase 2 BL, added in 1994, follows a similar approach, requiring that "the state shall promote the actual implementation of equal rights for women and men and work towards eliminating existing disadvantages". Similar clauses can be found in the constitutions of some of the *Länder*. This goes beyond the prohibition of discrimination in Art. 3(3) BL: It establishes a positive obligation to equal rights and extends it to the social realities. It entitles the legislator to compensate for actually existing disadvantages, which typically affect women, by favouring regulations. Thus, in the civil service sector, federal and Land gender mainstreaming laws have introduced Equal Opportunities Officers (*Gleichstellungsbeauftragte*) in all public institutions, which must be consulted in all the matters related to gender equality, in particular before personnel decisions. To fill the positions, where women are underrepresented, it is a common practice to favour female applicants over equally-qualified male applicants. As to the private sector, in June 2021 the German *Bundestag* has passed a law requiring listed companies with more than three board

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1 See my lecture materials on gender equality under European law and the German Basic Law (p. 2 f.) from the course Human Rights Norms and Mechanisms II at Universitas Gadjah Mada, Semester 2, 2019/2020. Available: www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_HRNM-II_Children's-rights-gender-equality-Europe.pdf and /Schmitz_HRNM-II_Non-discrimination-gender-equality-Germany.pdf [last viewed 07.03.2023].

2 In the Gender Equality Index 2020 of 28.10.2020 of the European Institute for Gender Equality (https://eige.europa.eu/gender-equality-index/2020/country/DE), Germany ranks 12th in the EU, with a score slightly below the EU's score, while France ranks 3rd in the EU (https://eige.europa.eu/gender-equality-index/2020/country/FR).

3 See Art. 3(3) sub-sect. 2 of the Treaty on European Union and Art. 8, 10 of the Treaty on the Functioning of the European Union.

4 See, in particular, the Equal Treatment Directive (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).

members to appoint at least one woman to the board.[5] Measures promoting gender parity in the democratic representation in the parliaments and at the local level would be well in line with this development, although the Federal Constitutional Court (*Bundesverfassungsgericht*) excluded in a decision of 2020 any premature conclusion that Art. 3(2) phrase 2 BL obliges the legislator to take such measures.[6] The question is not if, but how to promote gender parity.

The French Constitution already stipulates in its first article that the law shall "promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility". On this basis, in 2012 mandatory gender quotas for decision-making positions in the civil service were introduced.[7] Unlike in Germany, the constitutional mandate explicitly extends to the political sphere and is flanked by a constitutional obligation of the political parties to "contribute to the implementation of the principle […] as provided for by statute" (cf. Art. 4(2) Const. 1958). This makes it easier to overcome obstacles that other constitutional norms may pose. Both provisions were introduced by constitutional amendment in 1999 and relocated and partially reformulated in 2008. France was one of the first countries to take this path.[8]

1.3. The still male-dominated parliaments in Germany and France

Despite this normative background, the parliaments are still male-dominated. In Germany, before the federal elections of 2021, the female quota in the *Deutsche Bundestag* (the federal parliament) was only ca. 31%. It was even lower in almost half of the parliaments of the *Länder*.[9] In the biggest faction in the *Bundestag*, the Christian Democrats (CDU/CSU) of Federal Chancellor Angela Merkel, it was only ca. 21%.[10] After the election of 2021, the situation in the *Bundestag* has only slightly improved, with a female quota of ca. 35% overall, ca. 23% in the Christian Democrat faction (which now forms the opposition) and ca. 42%, resp. 59% and 25% in the factions of the governing coalition, the Social Democrats (SPD), Greens and Liberals (FDP).[11] At the level of local government, there is also much room for

[5] See the Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst [Act for the equal participation of women and men in management positions in the private and public sectors], as amended 2021.

[6] Cf. BVerfGE 156, 224, 259 ff. [Decisions of the Federal Constitutional Court, Vol. 156, p. 224 ff., cited passage at p. 259 ff.], English press release. Available: www.bverfg.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-011.html [last viewed 07.03.2023].

[7] *Jacquemart, A., Revillard, A., Bereni, L.* Gender quotas in the French bureaucratic elite: the soft power of restricted coercion. French Politics, Vol. 18, issue 1, 2020, p. 50 ff.

[8] See for an overall assessment of the – existing but limited – effect of this new constitutional approach *Achin, C. Lévêque, S., Mazur, A.* Twenty Years of Parité under the Microscope in France: Parties Play with rather than by the Rule. In: *Lang, S., Meier, P., Sauer, B.* (eds). Party Politics and the Implementation of Gender Quotas, 2023, p. 211 ff.

[9] Cf. Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (ed.). Atlas zur Gleichstellung von Frauen und Männern in Deutschland [Atlas on Gender Equality in Germany], 2020. Available: www.bmfsfj.de/bmfsfj/service/publikationen/4-atlas-zur-gleichstellung-von-frauen-und-maennern-in-deutschland-160358, p. 8 [last viewed 07.03.2023].

[10] Cf. Statista (ed.). Anteil der Frauen im Bundestag nach Fraktionen in Deutschland im Jahr 2021 [Proportion of women in the Bundestag by factions in Germany in 2021], January 2021. Available: https://de.statista.com/statistik/daten/studie/1063172/umfrage/frauenanteil-im-bundestag-nach-fraktionen-in-deutschland [last viewed 07.03.2023].

[11] Cf. Statista (ed.). Anteil der Frauen im 20. Deutschen Bundestag nach Fraktionen im Jahr 2022 [Proportion of women in the 20th German Bundestag by factions in 2022], March 2022. Available: https://de.statista.com/statistik/daten/studie/1063172/umfrage/frauenanteil-im-bundestag-nach-fraktionen-in-deutschland [last viewed 07.03.2023].

improvement.[12] France had already achieved a female quota of ca. 40% in the National Assembly, but it decreased to 38% with the 2022 elections, mainly due to the lack of female deputies of the traditional conservative party *Les Républicains*; the female quota in the Senate is 35%.[13]

2. Constitutional standards limiting the measures to promote gender parity in parliamentary representation (explained by the example of Germany)

While the aim is legitimate and even encouraged by the constitution, it is difficult to achieve, because a couple of constitutional norms limit the range of means:

2.1. The principle of freedom of political parties (Art. 21(1) phrases 1, 2 BL)

The freedom to establish and to run political parties includes the freedom of election proposals, i.e., to nominate candidates and propose lists of candidates. Any interference with this freedom would be under high pressure of justification, since it could easily distort the free political process and, thus, jeopardize democracy; this also applies to any criteria for the admission to election.

2.2. The principle of free elections (Art. 38(1) phrase 1 BL)

This essential condition for any democratic election requires that the will of the people will be formed by the people with the help of elections which are free from any influence of the state or its institutions. This applies already in the run-up to the elections and includes the right of the political parties to freely nominate candidates and propose lists.

2.3. The principle of equal elections (Art. 38(1) phrase 1 BL)

This special, strictly formal manifestation of the general principle of equality (cf. Art. 3(1) BL) requires equal conditions not only for the right to vote (*aktive Wahlgleichheit*), but also for the right to stand as a candidate in an election (*passive Wahlgleichheit*). In particular, a man must have the same chance to become a candidate as a woman – even if traditionally there are more men than women among the members of parliament. In this context, it must also be taken into account that in all the political parties presented in the *Bundestag* there are more male than female party members.[14]

2.4. The principle of equal opportunities for political parties (Art. 21(1) read together with Art. 38(1) phrase 1 BL)

This principle is fundamental for any democratic order. It requires the state to treat the political parties equally, regardless of their policies or attitudes. This

[12] For more details, see the Atlas on Gender Equality in Germany (note 8), p. 10 ff.

[13] Cf. Institute for Democracy and Electoral Assistance (IDEA) (ed.). Gender Quota Database. Country Data France, as updated in February 2021 and January 2023. Available: www.idea.int/data-tools/data/gender-quotas/country-view/86/35 [last viewed 07.03.2023]; Le Monde, Rejuvenated French Assemblée sees increase in middle-class and young members, drop in women, 23.06.2022. Available: www.lemonde.fr/en/politics/article/2022/06/23/rejuvenated-french-assemblee-sees-increase-in-middle-class-and-young-members-drop-in-women_5987722_5.html [last viewed 07.03.2023].

[14] Cf. Statista (ed.). Anteil der Frauen an den Mitgliedern der politischen Parteien in Deutschland am 31. Dezember 2021 [Proportion of women among members of political parties in Germany as of 31 December 2021], 2023. Available: https://de.statista.com/statistik/daten/studie/192247/umfrage/frauenanteil-in-den-politischen-parteien [last viewed 07.03.2023].

excludes a "steering practice" in the providing of facilities, grants or other public benefits. Moreover, measures to promote gender equality must not affect the equal opportunities of the parties politically. This could happen if the specifications for the creation of the lists of candidates result in fact in the exclusion of important candidates, for example, if a requirement of equal gender representation compels a small feminist party to reserve important positions for men or an explicit "men's party" to reserve them for women.

2.5. Equal rights of men and women and the prohibition of differentiation by gender (Art. 3(2, 3) BL)

The German Basic Law guarantees equal rights of men and women (Art. 3(2) phrase 1), and strictly prohibits differentiations by gender ("sex", Art. 3(3) phrase 1). It allows them only exceptionally if they are imperative (absolutely necessary) for the solution of problems which, by their nature, may arise only for men, or only for women. This is usually only the case if there are biological reasons. Apart from this, an unequal treatment can only be legitimized by the way of thorough balancing in the case of a serious collision with other constitutional values. It is questionable if and to what extent a mere reference to the very general mission of "working towards eliminating existing disadvantages" (Art. 3(2) phrase 2 BL) can suffice.

2.6. Principle of democracy?

The principle of democracy does not generally bar measures to promote gender parity. True, all members of the parliament represent the entire people and, thus, also the male members represent the women. As the Bavarian Constitutional Court (*Bayerischer Verfassungsgerichtshof*) explained in 2018,[15] the parliament's composition does not need to reflect that of the population in its many diverse groups (men and women, old and young, heterosexuals and LGBT, ethnic groups, etc.). However, this only allows the conclusion that democracy does not require such measures but not that it excludes them.

3. Effective but unconstitutional without a specific constitutional basis: mandatory gender quotas for electoral lists

3.1. The most effective but controversial instrument to achieve gender parity

Mandatory gender quotas as admission requirements for electoral lists are the most effective and fastest instrument to achieve gender parity if they are designed properly. Almost complete gender parity is achieved by a mandatory alternate filling of positions (the so-called zipper system). Another, slightly less strict but still effective solution consists of a mandatory equal gender ratio for groups of candidates on the list. The instrument can also be used for a limited approach, which only excludes severe distortions, for example, by demanding a low minimum ratio for groups of candidates on the list. The instrument can even be used for a rather symbolic approach with little practical effect, for example, by demanding a minimum ratio for the whole list only, which would still allow to concentrate the male candidates on top.

[15] Cf. Bavarian Constitutional Court, judgement of 26/03/2018, Vf. 15-VII-16, No. 110 ff. (p. 49 ff.). Available: www.bayern.verfassungsgerichtshof.de/media/images/bayverfgh/15-vii-16.pdf [last viewed 07.03.2023].

In the political debate, mandatory gender quotas have been proposed again and again. All of them stand, however, for a state intervention into the free pre-electoral process, which limits the freedom of the political parties and, thus, the free competition of ideas in the democracy, and therefore have raised significant constitutional concerns among constitutional law scholars and the scientific services of the parliaments.[16]

3.2. The 1982 French approach to require a minimum of 25 % of women/men on the electoral lists for the local government elections

A law adopted in 1982 limited the allowed gender ratio on the electoral lists for municipal councils of communes of 3.500 and more citizens to 75/25 %.[17]

However, in the way of preventive constitutional review, the Constitutional Council (*Conseil constitutionnel*) declared these provisions unconstitutional pursuant to violation of Art. 3 Constit. 1958 (here: the principle of universal and equal elections) and of Art. 6 of the Declaration of the Rights of Man and of the Citizen of 1789 (equality of the citizens in the eyes of the law), so that they could not enter into force. The Constitutional Council reasoned that "these principles of constitutional value are opposed to any division of voters or eligible persons into categories; this is the case for all political suffrage, in particular, for the election of municipal councillors"[18].

3.3. The 2000 French approach to require gender-balanced electoral lists for all proportional representation elections on a special constitutional basis

In 1999, France introduced by constitutional amendment the clauses which now are Art. 1(2) and 4(2) Const. 1958. In 2000, it adopted on this basis the Parity Law[19], which amended the Electoral Code to the effect that it requires the political parties to present gender-balanced lists filled alternately with women and men in the zipping way for the regional, parts of the senatorial and the European Parliament elections and lists with equal gender ratio for each group of six candidates for the municipal elections in communes of 3.500 and more citizens.

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[16] See the references at Thuringian Constitutional Court, judgement of 15/07/2020, VerfGH 2/20 (note 20), p. 24 f.; see in particular the reports of the Scientific Services of the German Bundestag, Möglichkeiten einer paritätischen Besetzung des Bundestages mit beiden Geschlechtern [Possibilities for equal representation of both genders in the Bundestag], WD 3 – 008/08, 2008. Available: www.bundestag.de/resource/blob/407352/7b82e7f0b642586935a86275cfd500c9/wd-3-008-08-pdf-data.pdf [last viewed 07.03.2023], and of the Ministry of Justice and Equality of the Land of Saxony-Anhalt, Rechtsgutachten: Verfassungsrechtlicher Rahmen und verfassungsrechtliche Grenzen mit Bezug auf ein Paritätsgesetz für die Landes- und Kommunalebene [Legal opinion: Constitutional framework and constitutional limits with reference to a parity law for the Land and municipal level], 2020. Available: https://mj.sachsen-anhalt.de/fileadmin/Bibliothek/Politik_und_Verwaltung/MJ/MJ/gutachten/gutachten-paritaetsgesetz.pdf [last viewed 07.03.2023].

[17] See the Loi modifiant le code électoral et le code des communes et relative à l'élection des conseillers municipaux et aux conditions d'inscription des Français établis hors de France sur les listes électorales [Law amending the Electoral Code and the Municipalities Code and relating to the election of municipal councillors and the conditions of registration of French citizens established outside France on electoral lists], which had been adopted on 27.07.1982.

[18] Constitutional Council, decision No. 82-146 DC of 18.11.1982, recital No. 7. Available: www.conseil-constitutionnel.fr/decision/1982/82146DC.htm [last viewed 07.03.2023], with English translation.

[19] Loi n° 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law No. 2000-493 of 6 June 2000 to promote equal access of women and men to electoral mandates and electoral offices].

3.4. The 2019 Brandenburg and Thuringian approach to require alternately filled gender-balanced lists

In 2019, after a controversial debate and despite the concerns of their Scientific Services, the parliaments of the *Länder* Brandenburg and later also Thuringia without a special constitutional basis amended the Land Electoral Laws to the effect that henceforth only gender-balanced electoral lists following the zipping system were admitted to the Land parliamentary elections.[20] In Thuringia, a partially correct list would be partially admitted (to the position from which the requirements were no longer met). The parties only remained free in the decision whether a woman or a man should hold the first place on the list. Moreover, in Thuringia, in exceptional cases the list positions reserved for women could also be filled by men if not enough female candidates stood for election, and vice versa.

In 2020, first the Thuringian Constitutional Court[21] and three months later also the Constitutional Court of the Land Brandenburg[22] declared these laws void.

a) The Thuringian Constitutional Court (*Thüringer Verfassungsgerichtshof*) considered the right to free and equal elections under Art. 46 of the Thuringian Constitution violated, as well as the right of political parties to freedom of activity and programme, and to equal opportunities (as federal constitutional law incorporated in the Land constitutional law). The court explained that the parity rules would restrict the voters' freedom to influence the gender distribution in the parliament by electing a list on which only or predominantly men or women were listed. Moreover, the party members would no longer have the freedom to choose the candidates regardless of their gender and to apply for each list position themselves. The parties would be restricted in their freedom to underpin their programme with a specifically gender-related composition of their electoral list. They could also suffer disadvantages by not being able to list the personnel they deem the most suitable. Furthermore, if a party whose list has been partially rejected, as a result were to achieve fewer mandates, than it would have been entitled to, with regard to the votes for it, the practical effect of the votes for this party would be reduced and thus, the equal practical effect of all votes no longer guaranteed.[23]

Such interferences are not absolutely excluded, but they must be constitutionally justified, those affecting electoral equality even by imperative reasons legitimised by the constitution that can hold the balance. The principle of democracy has not

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[20] See the Zweites Gesetz zur Änderung des Brandenburgischen Landeswahlgesetzes – Parité-Gesetz [Second Act to amend the Brandenburg Land Electoral Law – Parité Law] of 12.02.2019 and the Siebtes Gesetz zur Änderung des Thüringer Landeswahlgesetzes – Einführung der paritätischen Quotierung [Seventh Act to Amend the Thurinigan Land Electoral Law – Introduction of the Equal Quota System] of 30.07.2019.

[21] Thuringian Constitutional Court, judgement of 15.07.2020, VerfGH 2/20. Available: https://dejure.org/ext/60690371a8bf2c222f464ee528430339 [last viewed 07.03.2023]; see also the dissenting votes of the judges *Heßelmann*, p. 46 ff., and *Licht* and *Petermann*, p. 52 ff. A constitutional complaint against this decision before the Federal Constitutional Court has not been accepted for decision, cf. Federal Constitutional Court, decision of 06/12/2021, 2 BvR 1470/20. Available: http://www.bverfg.de/e/rk20211206_2bvr147020.html [last viewed 07.03.2023].

[22] Constitutional Court of the Land Brandenburg, judgement of 23.10.2020, VfGBbg 9/19. Available: https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-919_4041 [last viewed 07.03.2023]; Constitutional Court of the Land Brandenburg, judgement of 23.10.2020, VfGBbg 55/19. Available: https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-5519_4042 [last viewed 07.03.2023].

[23] Thuringian Constitutional Court (note 20), p. 26 ff.

served this purpose, since it does not require the parliament's composition to mirror the composition of the people (see above II.6.) but its party-political preferences. The Land's obligation under Art. 2(2) phrase 2 of the Thuringian Constitution to "promote and ensure the actual equality of women and men in all areas of public life through appropriate measures" did neither, although this norm goes further than the corresponding Art. 3(2) phrase 2 BL (see above, I. 2), and may principally serve to justify measures affecting the freedom and equality of elections: Neither the norm's open and unclear wording, nor its genesis allow the conclusion that it intends to justify such intense measures as rigid mandatory gender quotas.[24]

b) Concerning corresponding rights under the Brandenburg Constitution, **the Constitutional Court of the Land Brandenburg** (*Verfassungsgericht des Landes Brandenburg*) considered them affected and denied any constitutional justification for that, too. It emphasized that the parliament represented the people as a whole, and not specifically its diverse groups, and explained in detail that democracy and equal democratic participation of male and female citizens did not require an equal gender representation in the parliament, and that no mandate followed from the principle of democracy to ensure a mirroring of the proportion of men and women in parliament. It also explained that from the gender mainstreaming clause in the Brandenburg Constitution (Art. 12(3) phrase 2), which corresponded to those in Thuringia and the Basic Law, no authority derived to amend the fundamental constitutional democratic structural principles by ordinary law. It did not entirely exclude a modification of these principles, but, in any case, would require a clear specific regulation in the constitution itself.[25]

Following these two decisions, the option of a parity law is still being discussed, but a serious new attempt is currently not in sight, neither at the federal level, nor in the *Länder*.

4. A milder alternative: the approach of making public funding of political parties contingent on gender parity in elections

4.1. Graduated public party funding as an equality lever

Linking public funding of political parties to the level of gender parity in the participation in elections may be a soft alternative to mandatory gender quotas. This instrument respects the freedom of the parties to choose their candidates according to their own ideas and politics, but nonetheless creates an incentive for achieving a greater gender equality.

4.2. The French approach of 2000 to reduce public party funding in case of an unequal number of male and female candidates for the election to the National Assembly

On the basis of Art. 1(2), 4(2) Constit. 1958, the Parity Law of 2000 also introduced the requirement of gender parity for the majority election to the National Assembly. If in these elections the numbers of male and female candidates of a political party

[24] Thuringian Constitutional Court (note 20), p. 33 ff.; see for another interpretation of Art. 2(2) phrase 2 of the Thuringian Constitution the dissenting votes of *Heßelmann*, p. 46 ff. and *Licht* and *Petermann*, p. 55 ff.

[25] Constitutional Court of the Land Brandenburg (note 21), case VfGBbg 9/19, No. 130 ff., 165 ff.; case VfGB 55/19, No. 149 ff., 209 ff.

differed by more than 2%, a part of the public financial support for that party would be reduced.

The effect of these rules was initially low.[26] The parties preferred to accept financial losses but continued to rely on male candidates.[27] Some tended to nominate female candidates in constituencies where the party would not be successful anyway. Only after a reform in 2014, which doubled the reduction, did the female quota in the National Assembly increase.[28] This experience shows that financial sanctions to enforce gender parity must be sensible to be effective.

4.3. The discussion about linking party funding and gender parity in Germany

In Germany, the idea meets concerns with regard to the principle of equal opportunities for political parties, which requires a strictly equal treatment of all parties and excludes any "steering practice" of the state, in the providing of public benefits as well as in the regulation of party activities. While it allows for a graduated treatment according to the parties' political importance, measured by their electoral success, it is difficult to imagine general socio-political criteria as justifying reasons. A mere reference to the state's mission under Art. 3(2) phrase 2 BL will not suffice: This approach will require a special constitutional basis, just like in France. The question has not yet been decided by the constitutional courts, but the jurisprudence of the Thuringian and Brandenburg courts points into this direction.

5. Helpful but insufficient: voluntary self-commitment of the political parties to gender parity

Three parties represented in the *Bundestag* have anchored a binding self-commitment to gender parity in the electoral lists in their statutes. Two of them (*Bündnis 90/Die Grünen* and *Die Linke*) apply the zipping system, while the third (*Sozialdemokratische Partei*) requires a minimum female quota of 40%. The freedom of the political parties, understood in the light of the constitutional value to eliminate existing gender disparities, allows to do so. However, the biggest block (*Christlich Demokratische Union* and *Christlich-Soziale Union*) and two smaller parties (*Freie Demokratische Partei* and *Alternative für Deutschland*) have so far rejected this approach. This has eventually caused the low female quota in the *Bundestag* and hindered a considerable improvement with the 2021 elections.

The example shows that this approach is helpful but of a little effect, if it does not involve all the parties expected to be represented in the parliament. It may be more effective if it was flanked by an inter-party agreement on the common commitment to gender parity in political representation. The refusal of a party to join this agreement could be made a topic in the electoral campaign. Moreover, the legislator could encourage to work on the problem by requiring the political parties to publish an

[26] See for a quantitative review of its impact *Achin, C.* The French Parity Law: A Successful Gender Equality Measure or a "Conservative Revolution"? In: *Auth, D., Hergenhan, J., Holland-Cunz, B.* (eds). Gender and Family in European Economic Policy, 2017, p. 179 ff.

[27] Cf. *Lépinard, E.* The adoption and diffusion of gender quotas in France (1982–2014), EUI Working Paper Law 2015/2019, p. 13.

[28] The highest female quota was achieved in the elections of 2017, cf. Reuters, France elects record number of women to parliament, 19.06.2017. Available: www.reuters.com/article/us-france-election-women-idUSKBN19911E [last viewed 07.03.2023].

annual gender parity report where they need to provide exact data and explain how they want to address the problem of gender imparity in their ranks.

6. Flanking measures to encourage women's participation in politics

Flanking measures to encourage women are less discussed but also important for achieving gender parity in politics:

6.1. Campaigns to mobilise women

Public institutions and the civil society could run campaigns to invite women to become active and inform them about the possibilities and conditions at the various (local, regional, national and European) levels. Cross-party networks of female politicians could support the campaigns. Retired female politicians could offer advice and coaching for newcomers. Such measures may not be relevant for the national and regional politics but helpful to revive the often-abandoned local politics.

6.2. More consideration for the needs of members of parliament with children

A better social infrastructure (e.g. family lounges, as well as own day care centres and kindergartens of the parliaments), and a greater social consideration for the specific needs of the members of parliament with young children (e.g. a higher tolerance towards breastfeeding in plenary and committee meetings, family-friendly planning of meetings, or day care support in the hometown allowing the spouse to continue his own activities), could eliminate practical obstacles that often hinder women in Germany from embarking on a political career.[29]

6.3. Resolute fight against misogynous hate speech, cyberbullying, cyberintimidation and fake news in the social media and the internet

In the recent years, in Europe, as elsewhere, misogynous attacks against women in the digital media have become more and more frequent. Often, they amount to a concrete threat, are orchestrated by unknown forces in campaigns and specifically targeted against politically active women, in order to intimidate them.[30] The responses to this treat, both from the social media and the states, have so far been inadequate. Without a vigorous prevention and criminal prosecution of these offences, complemented by the introduction of strict liability of the social media under civil law for the offences of their users, professional support to the victims by specialised offices and civil society organisations and other specific measures, the idea of equal political participation of women will remain an illusion.[31]

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[29] At least family-friendly measures are now being discussed in the Bundestag, see the documentation of the Scientific Services of the German Bundestag, Familienfreundliche Regelungen für Abgeordnete. Beispiele aus ausländischen Parlamenten [Family-friendly regulations for members of parliament. Examples from foreign parliaments], WD 9-3000-012/22, 2022. Available: www.bundestag.de/resource/blob/893022/3402cae6f825fee117572826c06cdcbc/WD-9-012-22-pdf-data.pdf [last viewed 07.03.2023].

[30] See on this topic *Di Meco, L., Brechenmacher, S.* Tackling Online Abuse and Disinformation Targeting Women in Politics, 30.11.2020. Available: https://carnegieendowment.org/2020/11/30/tackling-online-abuse-and-disinformation-targeting-women-in-politics-pub-83331 [last viewed 07.03.2023].

[31] See for a catalogue of solutions to respond to the new threats in the digital age *Schmitz, T.* New Threats to Democracy in the Era of Digitalisation, conference materials 2022/2023, p. 2 f. Available: http://www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Democracy-in-Era-of-Digitalisation_Indonesia2022-23.pdf [last viewed 07.03.2023].

Summary

While a mandatory gender quota will stay controversial, because it seriously interferes with the free democratic process and may even practically exclude certain politics, the milder approach of linking public party funding and gender parity promises to create pressure towards a greater gender parity, meanwhile respecting the freedom of the political parties. However, this instrument will only be effective, if the financial difference is sensible. Moreover, with regard to the principle of equal opportunities for all political parties in a democracy, it requires a specific constitutional basis, which needs to be created by a constitutional amendment. This presupposes a broad consensus in the society. On the other hand, voluntary self-commitments of the political parties are not a suitable alternative, since not all relevant parties will follow this approach.

The role of flanking measures to encourage women's participation in politics should not be underestimated. The state must, in particular, fight misogynous cyberbullying, hate speech and fake news in the digital media – the phenomena, which are discouraging many women from becoming or staying politically active.

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Appendix

Excerpt from the Constitution of the French Republic of 1958

Art. 1(2)
Statutes shall promote equal access by women and men to elective offices and posts, as well as to positions of professional and social responsibility.

Art. 4(2)
[Political parties and groups] […] shall contribute to the implementation of the principle set out in the second paragraph of article 1 as provided for by statute.
Sect. 3 of the preamble of the Constitution of 1946 (to which the preamble of the Const. 1958 refers)

3.The law guarantees women equal rights to those of men in all spheres.

Excerpt from the Basic Law for the Federal Republic of Germany of 1949

Art. 3(2, 3)
(2)Men and women have equal rights. The state shall promote the actual implementation of equal rights for women and men and work towards eliminating existing disadvantages.
(3)No one may be disadvantaged or favoured because of his sex […].

Art. 21(1)
(1)Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles.

Art. 38(1)
(1)Members of the German *Bundestag* shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience.

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First Century of the *Satversme*: Constitutional Development and Perspectives

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The centenary of the *Satversme* – the Constitution of the Republic of Latvia – in 2022 was an important event for the State of Latvia. The *Satversme* is one of the oldest valid constitutions in Europe. Its fate is unique, making Latvia interesting in the context of comparative constitutional law.

The authors of this article have examined the creation and evolution of the *Satversme* in the course of the last century, as well as analysed the current changes to the system of the Latvian State. Re-examining the instruments of direct democracy (referendum and legislative initiative), by expanding participation of the totality of Latvia's citizens in public administration, has been outlined as a direction requiring improvements, likewise, "parliamentary weakness", leading to judicial activism, is examined and leads to reflections on the need to increase the role of the President in the area of separation of powers, as well as control over the parliament and the executive power.

Keywords: *Satversme* (the Constitution of Latvia), parliamentarism, separation of powers, constitutional relativism, judicial activism, weakness of the parliament, the President of the State.

Contents

Introduction

Last year, the centenary[1] of Latvia's valid constitution – the *Satversme*[2] of the Republic of Latvia, adopted on 15 February 1922 by the Constitutional Assembly of Latvia,[3] – was celebrated. The centenary of a constitution, frankly speaking, is a rather rare event in the context of comparative constitutional law. The average term of validity of a constitution globally does not exceed 20 years.[4] Among the European republics, Latvia's constitution is the third oldest. The Austrian Constitution of 1 October 1920[5] is a couple of years older, while the Statutes of 8 October 1600[6] are still in force in San Marino. The European monarchies is a different story, some of them still have even older constitutions or fragments thereof; however, even on the general background, the Latvian *Satversme* is among the ten oldest valid constitutions in Europe. The *Satversme* is the earliest valid constitution in Central and Eastern Europe.

The *Satversme* is also among the few rare constitutions in the world that has been suspended and yet, later, has been reinstated in full. In the context of comparative constitutional law, returning to the old constitution is a comparatively rare event, since the typical approach, almost always, is drafting a new basic law.[7] The fate of the Austrian Constitution of 1 October 1920 has been similar to that of the *Satversme*, since it was reinstated after World War II, with the restoration of the Austrian statehood and sovereignty.[8] However, the Austrian Constitution was reinstated following an interruption that slightly exceeded a decade, whereas the *Satversme* was reinstated in full more than fifty years after it had been suspended.

The history of the *Satversme* and, at the same time, that of Latvia's statehood, is unique, making it stand out against the backdrop of other national constitutions.

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1 See more: *Pleps, J.* Satversmes simtgade un Latvijas valsts [Centenary of the *Satversme* and the Latvian State]. Latvijas Zinātņu Akadēmijas Vēstis. A daļa: Humanitārās un sociālās zinātnes, 76. sējums, Nr. 4, 2022, 26.–33. lpp.

2 In Latvian legal terminology, the constitution is denoted with specially created word "*Satversme*". The term "Satversme" was created and proposed in 1869 by Kronvaldu Atis, one of the leaders of the Latvian National Awakening, to mean a constitution. In Latvian the use of the term "Satversme" refers to two main ideas of the constitutionalism – to guarantee to the people legal protection and security and to prescribe limitations of the state authority. See more: *Rodiņa, A*. Satversme. Jurista Vārds, No. 7(1221), 15.02.2022, 4.–5. lpp.

3 The Constitution of the Republic of Latvia. Available: https://likumi.lv/ta/en/en/id/57980 [last viewed 04.02.2023].

4 *Ginsburg, T.* Constitutional Endurance. In: Comparative Constitutional Law. *Ginsburg, T., Dixon, R.* (eds). Cheltenham and Northampton: Edward Elgar, 2012, p. 112.

5 Bundes-Verfassungsgesetz (B-VG) [Federal Constitutional Law]. Available: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=bundesnormen&Gesetzesnummer=10000138 [last viewed 04.02.2023].

6 Leges statutae reipublicae Sancti Marini [The statute laws of the republic of San Marino]. Available: https://archive.org/details/bub_gb_jVYhQNWm6vUC [last viewed 04.02.2023].

7 See more: *Pleps, J.* The continuity of the constitutions: the examples of the Baltic states and Georgia. Wroclaw Review of Law, Administration & Economics, Vol. 6, issue 2, 2016, pp. 29–44.

8 *Geistlinger, M.* The Republic of Austria before 1938 and after 1945 — Some Thoughts on Continuity. Journal of the University of Latvia Juridiskā zinātne/Law, Vol. 9, 2016, p. 16.

Hence, Latvia's constitutional experience is interesting in the context of comparative constitutional law.[9] The return of the *Satversme* to the legal and social reality and restoration of Latvia's independence, which took place after fifty years of occupation, on the basis of the state continuity principle, is almost an impossible event, analogous precedents of which cannot be found in the history of global constitutionalism. In this respect, the *Satversme* and Latvia's constitutional history are interesting in the context of the European and global constitutional law.[10]

The hundredth anniversary of the *Satversme* is a very appropriate moment not only for taking pride in this remarkable event but also for assessing the development of the Latvian constitutional law and discussing improvements to the constitutional regulation.[11] Over time, the *Satversme*, involuntarily, has become an important element of the national identity, alongside the official symbols of statehood (red-white-red flag, the Latvian anthem and coats of arms) and the non-official symbols (Latvia's outline, *auseklītis* – the eight-pointed star symbol, the Dome Cathedral and busts of the pre-war Presidents).[12] At the same time, it should be kept in mind that public opinion polls reveal that slightly below 35% of respondents see the *Satversme* as being modern.[13] In society in general and among lawyers and politicians in particular, discussions regarding possible improvements to the *Satversme* are never ending. Several concrete "weak points" of the *Satversme* even have been identified, requiring amendments.[14]

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[9] See also: *Taube, C.* Constitutionalism in Estonia, Latvia and Lithuania. A study in comparative constitutional law. Uppsala: Iustus Förlag AB, 2001, pp. 52–55.

[10] For example, during centenary of the *Satversme*, several articles on the *Satversme* and the Latvian constitutional system were prepared and published by Italian experts of constitutional and comparative law. See: *Panzeri, L.* The "national" dimension of the Latvian Constitution one hundred years after its entry into force. DPCE Online, Vol. 55, issue 4, 2023, pp. 2029–2041. Available: https://www.dpceonline.it/index.php/dpceonline/article/view/1738 [last viewed 04.02.2023]; *Mezzetti, L.* Satversme, Statehood, Constitutional Culture and Traditions in Latvia. DPCE Online, Vol. 55, issue 4, 2023, pp. 2043–2055. Available: https://www.dpceonline.it/index.php/dpceonline/article/view/1739 [last viewed 04.02.2023]; *Zinzi, M.* The Latvian parliamentary form of government and the significant powers vested in the President. DPCE Online, Vol. 55, issue 4, 2023, pp. 2057–2073. Available: https://www.dpceonline.it/index.php/dpceonline/article/view/1740 [last viewed 04.02.2023]; *Mazza, M.* The judiciary in the Latvian Constitution of 1922, with regard to the circulation of legal models. DPCE Online, Vol. 55, No. 4, 2023, pp. 2075–2102. Available: https://www.dpceonline.it/index.php/dpceonline/article/view/1741 [last viewed 04.02.2023]; *Duranti, F.* Constitutional justice in Latvia. A young Court, a strong institution. DPCE Online, Vol. 55, issue 4, 2023, pp. 2103–2112. Available: https://www.dpceonline.it/index.php/dpceonline/article/view/1751 [last viewed 04.02.2023]; *Ferrari, G. F.* Rights and freedoms in Latvian constitutional law. DPCE Online, Vol. 55, issue 4, 2023, pp. 2115–2123. Available: https://www.dpceonline.it/index.php/dpceonline/article/view/1742 [last viewed 04.02.2023].

[11] See more: *Balodis R., Pleps J.* Atskatoties uz Satversmes simts gadiem: Latvijas valsts pamatlikuma plusi un mīnusi [Looking Back on Hundred Years of the *Satversme*: Pluses and Minuses of the Basic Law of the Latvian State]. Jurista Vārds, No. 18(1232), 03.05.2022., 16.–30. lpp.

[12] *Balodis, R.* Priekšvārds [Foreword]. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VIII. Fundamental Human Rights]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2011, 3. lpp. See more: *Balodis, R.* Satversme pārkāpj 100 gadu slieksni, mokoties ar relatīvisma un tiesu aktīvisma kaitēm [The *Satversme* Steps over the Threshold of 100 Years, Plagued by Relativism and Judicial Activism]. Available: https://telos.lv/satversmes-100-gadu-slieksnis/ [last viewed 04.02.2023].

[13] SKDS aptauja: Vai Satversme ir mūsdienīga un nodrošina demokrātijas pamatprincipus [SKDS Survey: Is the *Satversme* modern and does it ensure the basic principles of democracy]? Available: https://www.lsm.lv/raksts/kas-notiek-latvija/video/skds-aptauja-vai-satversme-ir-musdieniga-un-nodrosina-demokratijas-pamatprincipus.a444267/ [last viewed 04.02.2023].

[14] For example: 12. Saeimas Juridiskās komisijas deputātu darba grupas Valsts prezidenta pilnvaru iespējamai paplašināšanai un ievēlēšanas kārtības izvērtēšanai atzinums [Opinion of the working group

This article aims to examine the *Satversme* not only from the vantage point of its centenary but also to describe its strong and weak points, outlining academically the potential future challenges to the constitutional development of Latvia's basic law. To reach this aim, a short overview of the origins and evolution of the *Satversme* during the previous century will be provided and current challenges, pertaining to the *Satversme's* architecture, algorithms, trends, will be examined. The *Satversme's* centenary still being under the shadow cast by COVID-19 pandemic and legal contradictions caused by it, the possibilities of making mechanisms for crisis management more effective will, likewise, be examined in the article.

1. First centenary of the *Satversme*

1.1. Adoption of the *Satversme* (1920–1922)

The *Satversme* was drafted and adopted by a parliament, elected specifically for this purpose – a constitutional assembly, which was named the Latvian Constitutional Assembly.[15] The election of the Latvian Constitutional Assembly was the very first parliamentary election in the State of Latvia, during which Latvian citizens had the possibility to elect their own representatives for defining the basic law of the State.[16] Great and, frankly speaking, even excessive and impossible hopes were set upon the Constitutional Assembly and the emerging *Satversme*, which later caused sense of disappointment in society. Actually, the work of the Constitutional Assembly on drafting the *Satversme* was not very smooth – incessant parliamentary discussions and constant search for compromises caused the first disappointment with the still unadopted constitutional document.

The Latvian Constitutional Assembly has been called the longest constitutional assembly in the global history because usually constitutions are drafted much faster.[17] The discussions on the *Satversme* outlined serious contradictions in the opinions of political groups as to what the system of the State should be like. Despite these potential difficulties and opposite views on a number of law policy issues, politicians of the newly established State had to reach complex compromises. The balance of powers in the parliament prevented from defining in the *Satversme* a President, elected by the people, to create a constitutional counterforce to the parliament. Quite on the contrary, a head of the State, elected by the parliament, was created, who depended upon the goodwill of the parliament or, more precisely, the majority of

of members of the 12th *Saeima*'s Legal Committee on possible expansion of the powers of the President and evaluation of the election procedure]. Available: https://www.saeima.lv/lv/par-saeimu/saeimas-darbs/deputatu-grupas/darba-grupa-valsts-prezidenta-pilnvaru-iespejamai-paplasinasanai-un-ievelesanas-kartibas-izvertesana [last viewed 04.02.2023]. See also: *Rozenbergs, R.* Intervija ar Ringoldu Balodi: Satversmes simtgadē nav jāvairās runāt par politiķiem netīkamām lietām [Interview with Ringolds Balodis. At the centenary of the *Satversme*, Discussions on Matters Unpleasant for Politicians should not be Avoided]. Available: https://neatkariga.nra.lv/intervijas/371878-satversmes-simtgade-nav-javairas-runat-par-politikiem-netikamam-lietam [last viewed 04.02.2023].

[15] See more: *Šilde, Ā.* Latvijas vēsture. 1914–1940 [History of Latvia. 1914–1940]. Stokholma: Daugava, 1976, 352.–364. lpp.

[16] See more: Latvijas Satversmes sapulces vēlēšanu rezultāti [Outcomes of Election of the Latvian Constitutional Assembly]. Rīga: Valsts statistikas pārvalde, 1920. Available: https://www.cvk.lv/lv/media/529/download?attachment [last viewed 04.02.2023].

[17] *Cielava, V.* Priekšvārds [Foreword]. In: Latvijas Satversmes sapulces stenogrammu izvilkums (1920–1922). Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana [Excerpt from the Transcripts of the Latvian Constitutional Assembly (1920–1922). Discussions and Adoption of the Draft *Satversme* of the Republic of Latvia]. Rīga: Tiesu Namu Aģentūra, 2006, 1. lpp.

the *Saeima* (ruling coalition).[18] The President must reckon with this, in particular, during the first term in office, otherwise his chances of being re-elected would be close to zero. Admittedly, similar alternative centres of power were not created for the centre of the national political life, i.e., the *Saeima*,[19] that would be able to "hold in check" the *Saeima*. As the result, both during the first period of independence and, in particular, at present, such constitutional disbalance "spoils" the parliament, making it insensitive to appeals to introduce reforms, so necessary for the national development.[20]

It must be added that, despite the initial promises, the Constitutional Assembly was unable to include in the constitution the issue of local governments, which, by the way, has still has not been fully settled in the *Satversme*. Likewise, the Constitutional Assembly did not adopt the second part of the *Satversme* that would have defined citizen's fundamental rights and obligations (lacking votes in the third reading). The draft second part of the *Satversme* included a provision on the Latvian language as the official language, as well as safeguards for minority rights. Similarly, special guarantees were not defined for Latgale, upon which the members elected from Latgale constituency insisted.[21] Due to the lack of regulation on human rights, at the time, the *Satversme* had been called, with certain irony, "*Rumpf-Verfassung*", since it lacked the most important regulation, which defines the legal and political nature of the State and which usually is allocated the most prominent place in constitutions.[22] Adoption of the *Satversme* did not cause great rapture in society and left quite many dissatisfied with the newly adopted basic law of the State.[23]

After the *Satversme* entered into force on 7 November 1922, functioning of the new state system was fragmented. Numerous small factions, elected to the *Saeima*, and groups of deputies could not ensure a stable parliamentary majority and approve lasting governments. Arveds Bergs, one of the most prominent authors of

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[18] See more: *Lazdiņš, J.* Clashes of Opinion at the Time of Drafting the *Satversme* of the Republic of Latvia. Journal of the University of Latvia "Law", Vol. 10, 2017, pp. 95–97.

[19] *Dišlers, K.* Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian Public Law]. Rīga: A. Gulbis, 1930, 72.–73. lpp.

[20] For example, the amendments to the *Satversme* proposed by Presidents Valdis Zatlers and Andris Bērziņš aimed at modernising the Latvian state system still have not been seriously discussed. See: Valsts prezidenta Valda Zatlera 2011. gada 16. marta raksts Nr. 86 [Note No. 86 by President Valdis Zatlers of 16 March 2011]. Available: https://www.president.lv/lv/media/86/download [last viewed 04.02.2023]; Valsts prezidenta Andra Bērziņa 2013. gada 16. septembra raksts Nr. 354 [Note No. 354 by President Andris Bērziņš of 16 September 2013]. Available: https://www.president.lv/lv/media/4954/download [last viewed 04.02.2023].

[21] See more: *Kučs, A.* Protection of Fundamental Rights in the Constitution of the Republic of Latvia during the Interwar Period and after the Restoration of Independence. Journal of the University of Latvia "Law", Vol. 7, 2014, pp. 55–58; *Balodis, R., Lazdiņš, J.* Satversmes vēsturiskā attīstība [Historical Development of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Sagatavojis autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2014, 58.–62. lpp.; *Balodis, R.* Kā cīņa par latgaliešu valodu ietekmēja latviešu valodas statusu [How Fight for the Latgalian Language Influenced the Status of the Latvian Language]. Jurista Vārds, No. 38(1200), 21.09.2021, 25.–31. lpp.

[22] *Lazersons, M.* "Konstitucionāla" likumdošana un Saeimas Publisko tiesību komisija ["Constitutional Legislation" and the Public Law Committee of the *Saeima*]. Jurists, No. 6, 1928, 165.–166. sl.

[23] *Balodis, R.* Latvijas Republikas Valsts prezidenta institūts [The Institution of the President of the Republic of Latvia]. In: Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets [Commentaries on the *Satversme* of the Republic of Latvia. Chapter III. The President. Chapter IV. The Cabinet]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2017, 12.–14. lpp.

the *Satversme*, almost immediately published an article, concluding that the *Saeima* and the *Satversme* did not "work".[24] His appeal to reform the *Satversme*, envisaging a directly elected President of the State, with a broader mandate, who could be an alternative centre of power for balancing the *Saeima*, maintained a constitutional discussion and atmosphere of doubts throughout the period of pre-war parliamentarism (1922–1934).[25] Simultaneously, it seems that, during the first and, apparently, also the second period of independence, a major cause of the weakness of the parliamentary system was not really the *Satversme* itself but rather the regulation on the *Saeima* election,[26] which facilitated fragmentation of the *Saeima*, intensified by the lack of democratic traditions and parliamentary experience.[27] And this is characteristic of both the pre-war and the present convocations of the *Saeima*. Experts hold that the political fragmentation in the pre-war convocations of the *Saeima* was facilitated exactly by "excessively proportional law on elections", which did not define an election "barrier" for having seats in the *Saeima*.[28] On the other hand, in the contemporary convocations of *Saeima*, although the number of factions is smaller, they actually have always been formed by alliances of several parties. At the same time, it cannot be ignored that the voter turn-out for the first four elections of the *Saeima* was high – usually, more than 80 % of those eligible to vote participated (election of the 3rd *Saeima* was an exception, with 74.9%), whereas in the last election of the 14th *Saeima* in 2022, only 59.41% of those eligible to vote participated.[29]

1.2. The *Satversme* during the period of authoritarian regime (1934–1940)

It needs to be admitted frankly that, during the inter-war period, the *Satversme* did not have particularly good "public relations". The intellectually brilliant opponents of the *Satversme* succeeded in maintaining an atmosphere of constant constitutional crisis, from which, accordingly, the demand to reform the *Satversme* was derived. Moreover, as elsewhere in the world, it was easier to blame the *Satversme* and the parliamentary state system, enshrined in it, for the failures in the development of the Latvian State.[30]

In the conditions of global economic crisis, the *Satversme* could not be accused of inability to ensure stability of the parliamentary system. Organisers of the *coup d'état* made use of the decline of democracy, prevailing in Europe in the 1930s, caused by

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[24] *Bergs, A.* Bet viņa neiet [But it Does Not Work]. Latvis, No. 391, 23.12.1922.

[25] *Bergs, A.* Satversmes grozījumu projekts [Draft Amendments to the *Satversme*]. Latvis, No. 3162, 22.05.1932.

[26] Likums par Saeimas vēlēšanām [Law on the *Saeima* Elections]. Valdības Vēstnesis, No. 141, 30.06.1922.

[27] See more: *Kusiņš, G.* Parliamentarism in Latvia: An Overview. Rīga: The *Saeima* of the Republic of Latvia, 2023, pp. 40–50.

[28] *Lēbers, D. A., Bišers, I.* Ministru kabinets. Komentārs Latvijas Republikas Satversmes IV nodaļai "Ministru kabinets" [The Cabinet. Commentary on Chapter IV of the *Satversme* of the Republic of Latvia "The Cabinet"]. Rīga: Tiesiskās informācijas centrs, 1998, 11.–13. lpp. See also: *Rothschild, J.* East Central Europe between the Two World Wars. Seattle and London: University of Washington Press, 1998, pp. 374–375; Judgement by the Constitutional Court of the Republic of Latvia on 23 September 2002 in case No. 2002-08-01.

[29] See more: 14. Saeimas vēlēšanas [Election of the 14th *Saeima*]. Available: https://sv2022.cvk.lv/pub/aktivitate [last viewed 04.02.2023].

[30] *Balodis, R., Lazdiņš, J.* Satversmes vēsturiskā attīstība [Historical Development of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Sagatavojis autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2014, 66. lpp.

the global economic crisis, whereas the promise to reform the *Satversme*, undoubtedly, was quite convenient front of legality for the organisers of the coup.[31]

The parliamentary development of Latvia was interrupted on 15 May 1934 and the period of authoritarianism, Latvian nationalism and the cult of Kārlis Ulmanis' personality began. Although Kārlis Ulmanis, the leader of the authoritarian regime, announced the reform of the *Satversme* as one of the main aims,[32] the regime did not make any decision on suspending the *Satversme*.[33] From the constitutional perspective, the *Satversme* remained valid. Clearly, the greatest part of the *Satversme* was not functioning in the conditions of Ulmanis' regime. For example, Article 1 of the *Satversme*, which provides that Latvia is a democratic republic, or the provisions that set out the rights of the totality of Latvian citizens and the *Saeima*.[34] However, in view of the fact that Ulmanis' Government, in accordance with its declaration of 18 May 1934[35], formally had taken over only the *Saeima's* functions, part of other articles and chapters of the *Saeima* remained functional. Although the authoritarian regime attempted, in all possible ways, to diminish politically the significance of the *Satversme*,[36] it was used, in a fragmented way, until the very Soviet occupation in 1940. The Senators of the Latvian Senate, while in exile following the occupation in Latvia, in 1948, arrived at the following conclusion: since until the very occupation of Latvia not a single law had been adopted to revoke or invalidate the *Satversme*, the *Satversme*, hence, had been valid and effective.[37]

1.3. Reinstatement of the *Satversme* (1990–1993)

The *Satversme* was reinstated in full by the 5th convocation of the *Saeima*, which commenced work on 6 July 1993, with a separate announcement on the entire

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31 See more: *Ščerbinskis, V.* 1934. gada 15. maija apvērsums: cēloņi, norise un sekas [Coup of 15 May 1934: Causes, Course, and Consequences]. In: Apvērsums. 1934. gada 15. maija notikumi avotos un pētījumos [The Coup: Events of 15 May 1934 in Sources and Research]. Sastādītāji Dr. hist. Valters Ščerbinskis un Dr. hist. Ēriks Jēkabsons. Rīga: Latvijas Nacionālais arhīvs, Latvijas arhīvistu biedrība, 2012, 9.–24. lpp.; *Taurēns, J.* Iekšējā un starptautiskā situācija pirms apvērsuma [Domestic and International Situation before the Coup]. In: 15. maija Latvija [Latvia of the 15th of May]. Rīga: Latvijas Mediji, 2017, 63.–69. lpp.

32 Ministru prezidenta K. Ulmaņa runa radiofonā 1934. g. 18. maijā [Broadcast of Prime Minister K. Ulmanis Speech on the Radio on 18 May 1934]. Valdības Vēstnesis, No. 110, 19.05.1934.

33 *Kusiņš, G.* Latvijas Republikas 1922.gada Satversmes atjaunošana [Reinstating the *Satversme* of the Republic of Latvia of 1922]. In: Nepārtrauktības doktrīna Latvijas vēstures kontekstā [Continuity Doctrine in the Context of Latvian History]. Autoru kolektīvs prof. T. Jundža zinātniskā vadībā. Rīga: Latvijas Zinātņu akadēmijas Baltijas stratēģisko pētījumu centrs, 2017, 297. lpp.; *Levits, E.* An Interview with Dietrich A. Loeber. In: The Baltic States at Historical Crossroads. Political, economic, and legal problems and opportunities in the context of international co-operation at the beginning of the 21st century. A collection of scholarly articles. Second revised and expanded edition. *Jundzis, T.* (ed.). Rīga: Latvian Academy of Sciences, 2001, pp. 39–41.

34 Sal.: *Žvinklis, A.* No autoritārisma līdz padomju totalitārismam: manipulācijas ar Latvijas Republikas Satversmi [From Authoritarianism to Soviet Totalitarianism: Manipulations with the *Satversme* of the Republic of Latvia]. In: Latvijas valstiskumam 90. Latvijas valsts neatkarība: ideja un realizācija [Latvian Statehood Turns 90. Independence of the Latvian State: Ideas and Implementation]. Rīga: Latvijas vēstures institūta apgāds, 2010, 224. lpp.

35 Valdības deklarācija [Government's Declaration]. Valdības Vēstnesis, No. 110, 19.05.1934.

36 See more: *Kusiņš, G.* Latvijas Republikas 1922.gada Satversmes atjaunošana [Reinstating the *Satversme* of the Republic of Latvia of 1922].In: Nepārtrauktības doktrīna Latvijas vēstures kontekstā [Continuity Doctrine in the Context of Latvian History. Autoru kolektīvs prof. T. Jundža zinātniskā vadībā. Rīga: Latvijas Zinātņu akadēmijas Baltijas stratēģisko pētījumu centrs, 2017, 292.–297. lpp.

37 Senatoru atzinums [Senators' Opinion]. Latvju Ziņas, No. 29, 17.04.1948.

Satversme coming into effect.[38] Merely a couple of months after the *Satversme* came into effect, the 5th convocation of the *Saeima* implemented a radical constitutional reform, aligning the existing state system with the requirements of the *Satversme*.[39] Looking back at the events of those time, one might be, in a slightly ironic sense, grateful to Kārlis Ulmanis' indecisiveness on the issue of reforming the *Satversme* because we, in difference to Lithuania and Estonia, did not have an adopted constitution with authoritarian content, and, thus, the *Satversme* could be reinstated.

The decisive influence in favour of reinstating the *Satversme*, rather than adopting a new constitution was exerted by the Latvian diplomatic and consular service abroad and Latvians in exile, who, throughout the period of occupation, had been persistently promoting the *Satversme,* believing that the direction, pointed out by the Latvian Central Council and Senators, was the best constitutional solution, which could be used for reinforcing the principle of state continuity.[40] The work to promote reinstatement of the *Satversme* began in 1948, in the post-war refugee camps in Germany, when the Senators of the Latvian Senate adopted their opinion and, also, when Kārlis Vanags wrote the first commentary on the *Satversme*.[41] The contribution made by Egils Levits also needs to be recognised[42] since he was the one who included in the concept document of the Declaration of Independence of 4 May 1990[43] the provision on reinstating the core articles of the *Satversme* (Articles 1, 2, 3 and 6 of the *Satversme*) and their validity during the transition period.

The activism of exile Latvians (regarding reinstatement of the *Satversme* in full) might have remained only a law policy proposal, because the transitional parliament, the Supreme Council, was quite sceptical about the possibility of reinstating the old *Satversme*. However, the fast development of events linked to the collapse of the USSR made politicians act without delay. Whatever members of the Supreme Council had thought prior to the coup of August 1991 in the capital of the USSR Moscow, following

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[38] Latvijas Republikas Saeimas paziņojums [Declaration by the *Saeima* of the Republic of Latvia]. Latvijas Republikas Saeimas un Ministru kabineta Ziņotājs, No. 30, 14.10.1993.

[39] *Balodis, R., Lazdiņš, J.* Satversmes vēsturiskā attīstība [Historical Development of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Sagatavojis autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2014, 78. lpp. See more extensively in: *Levits, E.* Latvijas tiesību sistēmas attīstības iezīmes uz XXI gadsimta sliekšņa [Features in the Development of Latvian Legal System on the Threshold of XXI Century]. In: Latvijas tiesību vēsture (1914–2000) [History of Latvian Law (1914–2000)]. Prof. Dr. iur. D. A. Lēbera redakcijā. Rīga: LU žurnāla "Latvijas Vēsture" fonds, 2000, 492.–495, 504. lpp.

[40] See more: *Deksnis, E. B., Beķere, K.* Latviešu trimdas loma valsts neatkarības idejas uzturēšanā (1945–1991) [The Role of Latvians in Exile in Maintaining the Idea of Independent Statehood]. In: Nepārtrauktības doktrīna Latvijas vēstures kontekstā [Continuity Doctrine in the Context of Latvian History]. Autoru kolektīvs prof. T. Jundža zinātniskā vadībā. Rīga: Latvijas Zinātņu akadēmijas Baltijas stratēģisko pētījumu centrs, 2017, 233.–235. lpp.

[41] *Vanags, K.* Latvijas valsts Satversme [*Satversme* of the Latvian State]. [B.v].: L. Rumaka apgāds Valkā, 1948.

[42] Following the victory of the Latvian Popular Front at the election of the Supreme Council on 18 March 1990, the draft declaration on the restoration of independence, prepared by Egils Levits, comprised the aim to achieve full reinstatement of the *Satversme,* to be reached gradually. See more: *Levits, E.* 4. maija Deklarācija Latvijas tiesību sistēmā [Declaration of the 4th of May within the Latvian Legal System]. In: 4. maijs. Rakstu, atmiņu un dokumentu krājums par Neatkarības deklarāciju [The 4th of May. Collection of Articles, Recollections and Documents about the Declaration of Independence]. Dr. habil. Tālava Jundža redakcijā. Rīga: LU žurnāla "Latvijas Vēsture" fonds, 2000, 60. lpp

[43] Par Latvijas Republikas neatkarības atjaunošanu [On the Restoration of Independence of the Republic of Latvia]. Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, No. 20, 17.05.1990.

it their views on reinstating the *Satversme* in full changed.[44] On 21 August 1991, the Supreme Council adopted the constitutional law "On the Statehood of the Republic of Latvia",[45] on the basis of which the restoration of Latvia's independence was internationally recognised in full. Its Section 1 clearly envisages progression towards reinstatement of the *Satversme* in full, rather than drafting of a new constitution,[46] as previously was set out in para. 7 of the Declaration of Independence.[47] There were, in total, three instances when decisions were taken on reinstating of the *Satversme* following the restoration of Latvia's independence – initially, it was declared as being partly in force (1990), following it, committing to achieve its reinstatement in full (1991), and, after three years, reinstating it in full (1993).

After the *Satversme* was reinstated, it was swiftly "mastered", and its regulation – "adopted", until the myth of the *Satversme* as an outstanding monument of the Latvian legal thought and undoubtedly wise authors of the *Satversme*, who had been able to draft such a successful and balanced constitution, took root.[48] In a way, it reminds of the response to the US approach, strengthening the *Satversme's* authority in Latvia and giving to society the illusion of constitutional stability. The story about "the *Satversme* never becoming outdated" allowed parties applying law "to read into" the laconic constitutional provision contemporary regulation, thus, focusing on the legal findings of a contemporary democratic legal system.[49] In developing "the cult of the *Satversme*", the conviction consolidated, at least among professionals, that radical revision of the *Satversme* might be a socio-political taboo.[50] Such sentiments were widespread in the legal science already after restoration of Latvia's independence, rooted in the assumption that the *Satversme*, in general, was a constitution that had been drafted in a balanced way and ensured stable functioning of the parliamentary system.[51]

The authors are of the opinion that the decision by the Supreme Council, the revolutionary legislator of the transition period, to abandon the idea of writing a new constitution but just to reinstate the *Satversme* in full was the best decision. Firstly, it allowed a fast and revolutionary transformation of the constitutional

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[44] See more: *Kusiņš, G.* Latvijas Republikas 1922. gada Satversmes atjaunošana [Reinstating the *Satversme* of the Republic of Latvia of 1922]. In: Nepārtrauktības doktrīna Latvijas vēstures kontekstā [Continuity Doctrine in the Context of Latvian History]. Autoru kolektīvs prof. T. Jundža zinātniskā vadībā. Rīga: Latvijas Zinātņu akadēmijas Baltijas stratēģisko pētījumu centrs, 2017, 302.–310. lpp.

[45] Par Latvijas Republikas valstisko statusu [On the Statehood of the Republic of Latvia]. Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, No. 42, 24.10.1991.

[46] *Balodis, R., Lazdiņš, J.* Satversmes vēsturiskā attīstība [Historical Development of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the *Satversme* of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Sagatavojis autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2014, 76.–77. lpp.

[47] See more: *Balodis, R., Kārkliņa, A., Danovskis, E.* The Development of Constitutional and Administrative Law in Latvia after the Restoration of Independence. Journal of the University of Latvia "Law", No. 5, 2013, pp. 48–49.

[48] See more: *Balodis, R.* Satversme pārkāpj 100 gadu slieksni, mokoties ar relatīvisma un tiesu aktīvisma kaitēm [The *Satversme* Steps over the Threshold of 100 Years, Plagued by Relativism and Judicial Activism]. Available: https://telos.lv/satversmes-100-gadu-slieksnis/ [last viewed 04.02.2023].

[49] See more: *Pleps, J., Pastars, E, Plakane, I.* Constitutional Law. Rīga: Latvijas Vēstnesis, 2022, pp. 52–72. Available: https://juristavards.lv/wwwraksti/JV/BIBLIOTEKA/GRAMATAS/KT_ENG.PDF [last viewed 04.02.2023].

[50] Ibid, pp.76-77.

[51] *Lēbers, D. A., Bišers, I.* Ministru kabinets. Komentārs Latvijas Republikas Satversmes IV nodaļai "Ministru kabinets" [The Cabinet. Commentary on Chapter IV of the *Satversme* of the Republic of Latvia "The Cabinet"]. Rīga: Tiesiskās informācijas centrs, 1998, 11.–13. lpp.

foundations of the state system and return to the traditions of Western constitutional law. Secondly, it radically distanced the legal system from socialist (Soviet) understanding of law and its methodology.[52] Thirdly, the reinstatement of the *Satversme* meant not only formal restoration of its text but also revival of its spirit – the values of the *Satversme,* methodology of its application and constitutional theory.

1.4. Amendments to the *Satversme*

From its very origins, the *Satversme* has never been conceived as an unchangeable supreme truth, cut in stone, but, quite on the contrary, the authors of the *Satversme* have always reckoned with the need to introduce amendments over time, and respective procedures were defined. We can see it when reading Articles 76–79 of the Satversme, which envisage two constitutional legislators in Latvia – the people (totality of citizens) and the *Saeima*. Both are equal in their rights to amend the *Satversme*.[53] Again, it has to be noted, that, until now, the totality of citizens as the constitutional legislator has been unable to amend the *Satversme* even once, the cause of it could be the majority of vote in a referendum, required to amend the *Satversme*, i.e., at least half of those citizens eligible to vote in Latvia must vote for the amendments.[54] At the same time, the *Saeima*, as the constitutional legislator, has introduced into the *Satversme* fifteen amendments, in total.[55] Among these, only one amendment to the *Satversme* was made before the coup of 15 May 1934. Thus, basically, the *Satversme* has been amended after its reinstatement.

Review of amendments to the *Satversme* allows concluding that the *Saeima*, as the constitutional legislator, has not substantially amended the *Satversme*, originally created by the Constitutional Assembly. Systemic innovations (e.g., regulation on local governments, system of public administration, etc.) have been introduced by ordinary laws, adopted by the *Saeima*, without affecting the *Satversme*. The constitutional order of the State, defined by the Constitutional Assembly, still has been retained actually unchanged, introducing into the *Satversme* only some cosmetic corrections.[56]

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[52] See more: *Levits, E.* Latvijas tiesību sistēmas attīstības iezīmes uz XXI gadsimta sliekšņa [Features in the Development of Latvian Legal System on the Threshold of XXI Century]. In: Latvijas tiesību vēsture (1914–2000) [History of Latvian Law (1914–2000)]. Autoru kolektīvs prof. D. A. Lēbera redakcijā. Rīga: LU žurnāla "Latvijas Vēsture" fonds, 2000, 504. lpp.

[53] *Dišlers, K.* Ievads Latvijas valststiesību zinātnē [Introduction to the Science of Latvian Public Law]. Rīga: A. Gulbis, 1930, 204.–208. lpp.

[54] National referenda on amendments to the *Satversme* have been held twice. On 2 August 2008, the referendum was held on amendments to the *Satversme* that would grant the right to no less than 1/20 of voters to initiate dissolution of the *Saeima*, whereas referendum held on 18 February 2012 pertained to amendments to the *Satversme,* proposing to define Russian as an official language, alongside the Latvian language. On both occasions, amendments were dismissed because the majority vote, required in Article 79 of the *Satversme*, was not obtained. See: *Briede, J.* Satversmes 78. pants [Article 78 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Commentaries on the *Satversme* of the Republic of Latvia. Chapter V. Legislation]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2019, 292. lpp.

[55] See more: *Balodis, R., Kuzņecovs, A.* Latvijas Republikas Satversmes grozījumi [Amendments to the *Satversme* of the Republic of Latvia]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Commentaries on the *Satversme* of the Republic of Latvia. Chapter V. Legislation]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2019, 220.–258. lpp.

[56] Nevertheless, the constitutional structure of the Republic of Latvia was substantially influenced by creation of the Constitutional court, membership of the Republic of Latvia in the European Union from 1 May 2004 and adoption of the new, more detailed and conceptual preamble to the *Satversme*. The Constitutional Court strengthened the European dimension of the *Satversme* and developed

The qualified procedure for amending provisions of the *Satversme*, actually, has facilitated changing the state system by adoption of regular laws.

It is significant that the *Saeima*, by amendments to the *Satversme*, has lowered the quorum, defined in the *Satversme*, for the referendum on the accession to the European Union and changes to these relations, envisaging a lower threshold of the required quorum and the majority vote. This happened right before the accession to the European Union, to ensure more secure vote. Likewise, the term in office has been extended for the President and the *Saeima*, and the course of some constitutional procedures has been specified.

Following reinstatement of the *Satversme*, the *Saeima* has included two new and sizeable chapters in the *Satversme* (Chapter VIII "Fundamental Human Rights" and elaborated Preamble), enshrined the Latvian language as the only official language, as well as defined the constitutional grounds for Latvia's membership in the European Union. Among amendments to the *Satversme,* the amendments,[57] which added a new body of state power to the order of the Latvian State – the Constitutional Court, should be deemed as being essential, the Court has been granted the right to review the constitutionality of laws and declare them incompatible with the *Satversme* and void.[58] This innovation should be recognised as the most important amendment to the *Satversme*, which has influenced the development of the *Satversme* and the Latvian state system.

Already during the first period of independence, professor Kārlis Dišlers concluded that "a correct opinion on the order of a state cannot be provided solely on the basis of its constitutional law", because constitutions, in the practice of application thereof, are being expanded and change.[59] The science of constitutional law, application of the *Satversme* in the functioning of the State bodies, creating precedents and customs for further practice, as well as application of the *Satversme* in courts, by determining, with the help of findings made in judicature, and developing the content of the *Satversme's* provisions have significantly influenced the understanding of the *Satversme's* provisions.[60] Actually, numerous important issues related to the development of the *Satversme* have not been resolved by formal amendments to the *Satversme* but through changing practice of the State's constitutional bodies or by expanding case law. The Constitutional Court plays a decisive role in these processes, as the interpretation of the basic law, included in the Court's rulings, has a generally binding force.

In the context of the *Satversme's* centenary, it should be kept in mind that the *Satversme*, nevertheless, has been functioning in full for less than half of these hundred years. To be quite exact, out of these hundred years, the *Satversme* has been applied in full in the legal and social reality only for forty-one years. Considering

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the concept of the living constitution where major constitutional changes were introduced not by formal constitutional amendments, but in the case law of the Constitutional Court.

57 Grozījums Latvijas Republikas Satversmē [Amendment to the *Satversme* of the Republic of Latvia] (05.06.1996). Available: https://likumi.lv/ta/id/63346-grozijums-latvijas-republikas-satversme [last viewed 04.02.2023].

58 See more: *Rodiņa, A., Spale, A.* Satversmes 85. pants [Article 85 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VI. Court. Chapter VII. The State Audit Office]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2013, 119.–152. lpp.

59 *Dišlers, K.* Latvijas Satversme [The *Satversme* of Latvia]. In: Latvieši II [Latvians II]. Rakstu krājums. Rīga: Valters un Rapa, 1932, 147. lpp.

60 See more extensively in: *Pleps, J.* Satversmes iztulkošana [Interpreting the *Satversme*]. Rīga: Latvijas Vēstnesis, 2012, 31.–33. lpp.

that we have very limited access to the experience of applying the *Satversme* during the first period of independence, mainly from the *Saeima's* transcripts and Kārlis Dišlers' books, a period in the application of the *Satversme*, which has been studied in full, is only thirty years long (1993–2023). The understanding of the *Satversme* and a notion of the scope of its provision have formed and developed exactly during this period.

2. Flaws of and possible improvements to the *Satversme*

2.1. Outdated article of the *Satversme*

The architecture of the *Satversme*, its internal system and the extremely laconic or textually sparing style of expression reflect the legal technique at the beginning of the previous century and the specificity of legal Latvian of the time. Untypical in adopting constitutions, the final text of the *Satversme* formed during the second and the third reading at the sittings of the Latvian Constitutional Assembly, by voting on the submitted proposals. During the readings, significant corrections were made to the draft offered by the Committee of the *Satversme*. Decisions made regarding the name of the parliament, the procedure for electing the President and his mandate, as well as the people's legislative initiative ran contrary to the conclusions made by the Committee. This left an impact upon the quality of the *Satversme's* text, leaving, of course, also deficiencies and flaws.

For example, the Constitutional Assembly accepted only during the third reading, in Article 78 of the *Satversme*, the right of no less than 1/10 of voters to submit not only fully elaborated draft amendments to the *Satversme* but also a fully elaborated draft law.[61] Since this was decided on only in the third reading, regulation on the required quorum and the majority of vote for a draft law, submitted by voters, was not included in Article 79 of the *Satversme*.[62] The *Saeima*, as the constitutional legislator, tried to eliminate this deficiency by the first amendments to the *Satversme*,[63] whereas Article 73 of the *Satversme* on laws that cannot be transferred for a referendum has remained unamended.[64] Relatively recently, the Constitutional Court has concluded that a draft law, fully elaborated by no less than 1/10 of voters, cannot be submitted concerning such issues, regarding which later a referendum could not be held.[65]

Similarly, the dismissal of the second part of the *Satversme* in the third reading meant that also the article, included therein, which granted the right to the Cabinet to restrict or suspend a person's fundamental rights during the state of emergency,

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[61] *Briede, J.* Satversmes 78. pants [Article 78 of the *Sartversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Commentaries on the *Satversme* of the Republic of Latvia. Chapter V. Legislation]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2019, 281. lpp.

[62] *Briede, J.* Satversmes 79. pants [Article 79 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Commentaries on the *Satversme* of the Republic of Latvia. Chapter V. Legislation]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2019, 295.–296. lpp.

[63] Pārgrozījumi Latvijas Republikas Satversmes 74. un 79. pantā [Amendments to Articles 74 and 79 of the *Satversme* of the Republic of Latvia] (21.03.1933). Valdības Vēstnesis, No. 74, 31.03.1933.

[64] *Kārkliņa, A., Lazdiņš, J., Lejnieks, M.* Satversmes 73. pants [Article 73 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Commentaries on the *Satversme* of the Republic of Latvia. Chapter V. Legislation]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2019, 157.–158. lpp.

[65] Judgement by the Constitutional Court of the Republic of Latvia on 12 February 2014 in case No. 2013-05-01, para. 14.4.

was dismissed. A constitutional restriction, defining the extent, to which the Cabinet could limit a person's fundamental rights in such circumstances, was not added to Article 62 of the *Satversme*, which granted to the Cabinet the right to declare the state of emergency.[66] Later, in 1998 adopting Chapter VIII of the *Satversme*, the link between Article 62 and Article 116 was no longer maintained.

It has to be said that the amendments introduced by the *Saeima* into the *Satversme* during the second period of independence have, at times, increased deficiencies and ambiguities in the text. For example, by moving from a two-day *Saeima* election to the election held on a single day,[67] all references to the length of the *Saeima* election day, made in the *Satversme*, have not been revised. Article 9 of the *Satversme* still refers to "the first day of election", whereas in introducing the dissolution of the *Saeima* upon the proposal of no less than 1/10 of voters,[68] the required reference to recalling of the *Saeima* is not included everywhere. It is still missing from Article 13 of the *Satversme*, which regulates the procedure of the early *Saeima* election.

The amendment to Article 82 of the *Satversme*, which includes institutional enumeration of the court system,[69] actually duplicating Article 86 of the *Satversme*, which has left this issue open for regulation in law[70], should be recognised as awkward.

Article 116 of the *Satversme*, clearly, should be seen as being "extravagant", it envisages restrictions to a person's fundamental rights, attempting to cover in one article restrictions on all fundamental rights, being unable to do that correctly till the end. Already at the moment of its adoption, Article 116 was seen as the weakest and most complex construction of entire Chapter VIII of the *Satversme* and a potential "Achilles heel" in applying human rights.[71] For example, Article 116 of the *Satversme* does not refer to the need in a democratic society and proportionality as a condition for restricting fundamental rights. Such addition was submitted for a discussion but the deputies dismissed it.[72] The Constitutional Court has prevented

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[66] *Pleps, J*. Satversmes 62. pants [Article 62 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets [Commentaries on the *Satversme* of the Republic of Latvia. Chapter III. The President. Chapter IV. The Cabinet]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2017, 620. lpp.

[67] Grozījumi Latvijas Republikas Satversmē [Amendments to the *Satversme* of the Republic of Latvia] (04.12.1997). Available: https://likumi.lv/ta/id/46270-grozijumi-latvijas-republikas-satversme [last viewed 04.02.2023].

[68] Grozījumi Latvijas Republikas Satversmē [Amendments to the *Satversme* of the Republic of Latvia] (08.04.2009). Available: https://likumi.lv/ta/id/191210-grozijumi-latvijas-republikas-satversme [last viewed 04.02.2023].

[69] 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 04.02.2023].

[70] *Pleps, J.* Latvijas Republikas Satversmes grozījumu analīze: VI. nodaļa "Tiesas" [Analysis of Amendments to the *Satversme* of the Republic of Latvia. Chapter VI "Courts"]. Likums un Tiesības, No. 5(45), 2003, 133.–134. lpp. Although, compare.: *Neimanis, J*. Satversmes 82. pants [Article 82 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. VI nodaļa. Tiesa. VII nodaļa. Valsts kontrole [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VI. Courts. Chapter VII. The State Audit Office]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2013, 39. lpp.

[71] *Levits, E*. Piezīmes par Satversmes 8. nodaļu – Cilvēka pamattiesības [Notes on Chapter 8 of the *Satversme* – Fundamental Human Rights]. Cilvēktiesību Žurnāls, No. 9/12, 1999, 38.–40. lpp. See also: *Mits, M*. Satversmes Eiropas cilvēktiesību standartu kontekstā [The Constitutional Court in the Context of European Human Rights Standards]. Cilvēktiesību Žurnāls, No. 9/12, 1999, 64.–69. lpp.; *Buka, A*. Satversmes astotā nodaļa – medus muca ar… [Chapter Eight of the *Satversme* – a Barrel of Honey with…] Jurista Vārds, No. 9(116), 11.03.1999.

[72] *Mits, M*. European Convention on Human Rights in Latvia. Impact on Legal Doctrine and Application of Legal Norms. Lund: Media Truck, 2010, p. 164.

potential problems in the application of Article 116 of the *Satversme*, by creating in its judicature an elaborated standard for restricting a person's fundamental rights that is compatible with Latvia's international commitments in the area of human rights.[73]

More than ever before, the development of Latvia's legal system has been influenced by the processes of convergence, involving international law and legal systems of countries of the world.[74] Due to these changes, the possibilities of applying some provisions of the *Satversme* have changed. For example, the development of international law prohibits states from declaring an aggressive war. Thus, at present, actually, application of Article 43 of the *Satversme*, which allows the President to declare war on the basis of the *Saeima's* decision, would be close to impossible.[75] The Commission of Constitutional Law, under the auspices of the President[76], as well as the special working group of the *Saeima*, which analysed the possibilities of improving the *Satversme*[77], have pointed to Latvia's international commitments in this area.

The brevity of the *Satversme* and its openness to further elaboration by laws, adopted by the legislator, to a large extent do not expand extensively or almost do not reflect on the constitutional level several important areas. Attempts have been made to describe in maximum detail mandates of the *Saeima* and the President, whereas the matter of the mandate and the role in the state system of the Cabinet and the judicial power has been dealt with in a minimum scope. In a way, such structural disbalance conceals the dominant centre of power within the parliamentary system – the Cabinet, signalling, as it were, by the scope of regulation dedicated to it, that it is less significant than the *Saeima* and the President. Obviously, in practice, this flaw has caused "deviations" in the independence of independent authorities, making the parliament and the government certain of their right to limit the discretion of independent authorities. In some cases, this has led to terminating the functioning of independent authorities, with not too well-founded reasons. This, of course, leads to the questions whether the right balance has been set within the state system and whether, indeed, all is well with the separation of powers in the *Satversme*. Likewise, the *Satversme* is focusing in great detail on performance of one function of the State – legislation, totally neglecting matters of executive power and administration of justice. This architecture of the *Satversme* does not provide visual reflection of the true balance

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[73] See more: *Pleps, J*. Satversmes 116. pants [Article 116 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības [Commentaries on the *Satversme* of the Republic of Latvia. Chapter VIII. Fundamental Human Rights]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2013, 758.–763. lpp.

[74] *Blūzma, V*. Latvijas konstitucionālo tiesību vēstures teorētiskās problēmas [Theoretical Problems in the History of Latvian Constitutional Law]. Jurista Vārds, No. 23(528), 17.06.2008.

[75] *Lejnieks, M., Pleps, J*. Satversmes 43. pants [Article 43 of the *Saeima*]. In: Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets [Commentaries on the *Satversme* of the Republic of Latvia. Chapter III. The President. Chapter IV. The Cabinet]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2017, 261.–265. lpp.

[76] Par Valsts prezidenta funkcijām Latvijas parlamentārās demokrātijas sistēmas ietvaros [On the Functions of the President within the Framework of the Latvian System of Parliamentary Democracy]. In: Valsts prezidenta Konstitucionālo tiesību komisija. Viedokļi: 2008–2011 [Constitutional Law Commission under the Auspices of the President. Opinions: 2008–2011]. Rīga: Latvijas Vēstnesis, 2011, 155. lpp.

[77] 12. Saeimas Juridiskās komisijas deputātu darba grupas Valsts prezidenta pilnvaru iespējamai paplašināšanai un ievēlēšanas kārtības izvērtēšanai atzinums [Opinion of the working group of members of the 12th *Saeima*'s Legal Committee on possible expansion of the powers of the President and evaluation of the election procedure]. Available: https://www.saeima.lv/lv/par-saeimu/saeimas-darbs/deputatu-grupas/darba-grupa-valsts-prezidenta-pilnvaru-iespejamai-paplasinasanai-un-ievelesanas-kartibas-izvertesana [last viewed 04.02.2023]. Paras 7.3.1. and 7.3.2.

of powers within the system of separation of state powers and creates a misleading notion of the actual significance of the executive power within the state system.

2.2. Algorithms of referenda

The Constitutional Assembly envisaged a politically active totality of Latvian citizens, willing to change their lives and influence the political order. This is proven by the extensive inclusion into the *Satversme* of elements of direct democracy – both referenda and electors' right to legislate. The right to participate in decision-making, granted to the totality of citizens, considerably exceeds the rights defined for the people in constitutions of other European states.[78] Actually, the *Satversme* envisages two legislators with equal, full rights – the *Saeima* and the totality of Latvian citizens[79], of which the first should be considered as being ordinary, but the second – as extraordinary.[80] This gives grounds for characterising the system of the Latvian state as representative democracy in the typical form of parliamentary democracy with strong elements of direct or plebiscitary democracy.[81]

However, this is a rather theoretical characterisation because, in practice, the situation is not as rosy since exercise of this right is linked to high thresholds, directly set in the *Satversme* and laws. Due to these thresholds, exercising the right pertaining to the totality of citizens to legislate has seldom been successful in real life. Exercising the voters' right to legislate was made complicated by amendments to the law "On National Referendums, Legislative Initiatives and European Citizens' Initiative",[82] following which, it is actually impossible to succeed in collecting the signatures of 1/10 of voters to submit a draft law. In Latvia, referenda on draft laws, initiated by voters, could be divided into two periods: before and after the referendum on language of 2012.[83] Before the referendum of 2012, the initiators of a draft law,

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78 *Levits, E.* Demokrātiskā valsts iekārta, brīvas vēlēšanas un parlamentārā demokrātija. Struktūra, loģika un priekšnosacījumi [Democratic State System, Free Elections, and Parliamentary Democracy. Structure, Logics, and Preconditions]. In: Parlamentārā izmeklēšana Latvijas Republikā 1. Parlaments. Parlamentārā kontrole [Parliamentary Inquiry in the Republic of Latvia 1. The Parliament. Parliamentary Control]. Prof. R. Baloža zinātniskā redakcijā. Rīga: Latvijas Vēstnesis, 2016, 21. lpp.

79 See more: *Levits, E., Kuzņecovs, A., Medina, L., Caics, A., Tralmaka, I*. Satversmes 64. pants [Article 64 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. V nodaļa. Likumdošana [Commentaries on the *Satversme* of the Republic of Latvia. Chapter V. Legislation]. Autoru kolektīvs prof. R. Baloža zinātniskā vadībā. Rīga: Latvijas Vēstnesis, 2019, 23. lpp.

80 The *Satversme* also prescribes substantial limitations on the use of the referendum. For example, according to the Article 73, the budget and laws concerning loans, taxes, customs duties, railroad tariffs, military conscription, declaration and commencement of war, peace treaties, declaration of a state of emergency and its termination, mobilisation and demobilisation, as well as agreements with other nations may not be submitted to the referendum. Futhermore, according to the Article 75, if the *Saeima*, by not less than a two thirds majority vote, determine a law to be urgent, it may not be submitted to the referendum.

81 *Levits, E.* Demokrātiskā valsts iekārta, brīvas vēlēšanas un parlamentārā demokrātija. Struktūra, loģika un priekšnosacījumi Democratic State System, Free Elections, and Parliamentary Democracy. Structure, Logics, and Preconditions]. In: Parlamentārā izmeklēšana Latvijas Republikā 1. Parlaments. Parlamentārā kontrole [Parliamentary Inquiry in the Republic of Latvia 1. The Parliament. Parliamentary Control]. Prof. R. Baloža zinātniskā redakcijā. Rīga: Latvijas Vēstnesis, 2016, 39. lpp.

82 Grozījumi likumā "Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu" [Amendments to the law "On National Referendums, Legislative Initiatives and European Citizens' Initiative] (08.11.2012). Available: https://likumi.lv/ta/id/251973-grozijumi-likuma-par-tautas-nobalsosanu-un-likumu-ierosinasanu- [last viewed 04.02.2023].

83 Par grozījumiem Latvijas Republikas Satversmē [On Amendments to the *Satversme* of the Republic of Latvia] (2012). Available: https://www.cvk.lv/lv/tautas-nobalsosanas/par-grozijumiem-latvijas-republikas-satversme-2012 [last viewed 04.02.2023].

submitted by voters, could try to organise it, hoping to succeed; however, after 2012, when the *Saeima* amended the law, "filters" were made so tight that the voters' right to initiate any draft law now exists only on paper.[84]

Increasing democratic participation and legitimacy, which would bring stability and sustainability to the State, should be the primary objective of the power, which could be facilitated by returning to the people conviction that everyone can influence the power in the most direct way – his or her vote at the referendum.[85]

We have taken over from the first period of parliamentarism a caution or even scepticism towards instruments of direct democracy in legislation and algorithms of the *Satversme* or constitutional "formulae" for the required quorum and majority vote at referenda.[86] Although quorum plays an important role and their expedience is rooted in the very nature of the people's rule, which prevents a small part of the people from imposing its will upon majority, the current situation is clearly indicative of the right to a referendum as an absolutely "empty right".[87] To put it more precisely, a right that is only written "on paper" in a supreme law but in practice is non-functional. If the defined quorum and burdens are too high and complicated, it is an obstacle to any collective decision, which stalls constitutional development. It should be examined, whether the quorum and majority vote, set in the *Satversme*, as well as the procedure for exercising the voters' right to legislate should not be reviewed to make them actually applicable.

2.3. The President as an opportunity to improve the state system

There have been many discussions on the need to improve the *Satversme* within the Latvian constitutional practice, during both the first and the second period of independence, and the majority of them have pertained to the institution of the President. The minority of the Constitutional Assembly already saw the possibility for balancing the system of separation of powers, providing, alongside the *Saeima*, as an alternative centre of power, the President, elected by the people and with a broader mandate.[88] After the *Satversme* entered into force, changing the procedure for electing the President and revising of his mandate have been seen as a real possibility for improving and stabilising the state system of Latvia, diminishing the excesses and weakness of the parliamentary system.[89]

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[84] See also: *Kūtris, G.* Referendumi jeb tautas nobalsošanas: cik tas ir reāli [Referenda or the People's Vote: How Real is it]. Jurista Vārds, No. 42(844), 28.10.2014.

[85] See more: *Balodis, R.* Par tautas tiesībām un faktiskām iespējām grozīt Latvijas Republikas Satversmi [On the Rights and Actual Possibilities of the People to Amend the *Satversme* of the Republic of Latvia]. In: Tiesības un tiesiskā vide mainīgos apstākļos [Law and Legal Environment in Changing Circumstances]. Latvijas Universitātes 79. starptautiskās zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2021, 411.–419. lpp.

[86] Arveds Bergs, Member of the Constitutional Assembly and the first convocations of the *Saeima*, used the concept "formula" instead of algorithms.

[87] See more: *Balodis, R.* Cik aktuāla ir senā diskusija par tautas nobalsošanas iespējamību Latvijā [How Relevant is the Old Discussion about the Possibility of a Referendum in Latvia]. Jurista Vārds, No. 16(1178), 20.04.2021; *Balodis, R.* The Procedure for Amending the Satversme of the Republic of Latvia and the Substance of Restrictions Established by It. Juridiskā zinātne/Law, Vol. 14, 2021, pp. 21–48.

[88] See more: *Lazdiņš, J.* Valsts prezidenta institūta tapšana Latvijā [Formation of the Institution of the President of the State in Latvia]. Jurista Vārds, No. 46(745), 13.11.2012.

[89] See also: Satversmes reforma Latvijā: par un pret [Reform of the *Satversme* in Latvia: Pros and Cons]. Rīga: Sociāli ekonomisko pētījumu centrs „Latvija", 1995; Par Valsts prezidenta funkcijām Latvijas parlamentārās demokrātijas sistēmas ietvaros [On the Functions of the President within the Framework of the Latvian System of Parliamentary Democracy]. In: Valsts prezidenta Konstitucionālo tiesību

Within the Latvian state system, the President has been envisaged a ceremonial, symbolic and representative role. Pursuant to the *Satversme*, he is elected to office by the *Saeima* in open ballot with 51 votes – by the parliamentary majority's simple decision. Max Laserson, Member of the *Saeima*, once noted that, pursuant to the construction of the *Satversme*, the President, actually, had been turned into a harmonious part of the parliament, working together with the *Saeima's* majority as "the President in the Parliament".[90] Another Member of the *Saeima,* Paul Schiemann, has pointed out that the President has indirect "derivative power", granted by the *Saeima*, which subjects him to the *Saeima*. Paul Schiemann also has recognised that, after the *Satversme* entered into force, the entire power became concentrated within the parliament, achieving "absolutism of the Parliament", where the President could not be an equivalent counterweight to the will of the *Saeima's* majority.[91] It has to be recognised that, at present, the parliament's absolutism has taken the upper hand and has even progressed, albeit the proposals to adjust the state system, envisaging the President, elected by the people, as "a counterweight" to the Parliament, have not waned.[92] This is the right place to mention that election of the President is solely the parliament's prerogative only in some countries of the European Union (alongside Latvia, these are only Greece, Estonia, Italy, Malta, and Hungary), where – compared to Latvia – the procedure of election is much more complicated and an open ballot is not envisaged. The general trends in development show that direct election of the President is the predominant model also in the parliamentary republics in Europe. Although, within the public discourse, expanding the President's mandate is emphasised, it must be noted that changing the model for electing the President does not automatically mean expanding the President's powers and replacing the parliamentary system by a presidential one. Each of these issues may be discussed and decided on separately.

The institution of impeachment also should be introduced into the *Satversme*, establishing special procedure for removing the President from office because, currently, the *Satversme* does not set out the criteria for instances when the *Saeima* has the right to remove the President from office, therefore, a situation where the *Saeima* decides to remove the President from office for purely political reasons cannot be excluded.[93] Pursuant to the first sentence of Article 53 of the *Satversme*, the President does not bear political responsibility, although, actually, the President is a political figure, whose prerogative is intervening into politics and influencing the policy implemented by the *Saeima's* majority and the government. In a democratic

komisija. Viedokļi: 2008–2011 [Constitutional Law Commission under the Auspices of the President. Opinions: 2008 – 2011]. Rīga: Latvijas Vēstnesis, 2011, 103.–178. lpp.

[90] *Lazerson, M*. Vlastj prezidenta Latvii [Power of the Latvian President]. *Segodnja*, No. 37, 15.02.1922.

[91] *Šīmanis, P*. Latvijas Satversmes astoņi gadi [Eight Years of the Latvian *Satversme*]. In: *Šīmanis, P*. Eiropas problēma [A Problem for Europe]. Rakstu izlase. Rīga: Vaga, 1999, 25.–26. lpp.

[92] See: 12. Saeimas Juridiskās komisijas deputātu darba grupas Valsts prezidenta pilnvaru iespējamai paplašināšanai un ievēlēšanas kārtības izvērtēšanai atzinums [Opinion of the working group of members of the 12th *Saeima*'s Legal Committee on possible expansion of the powers of the President and evaluation of the election procedure]. Available: https://www.saeima.lv/lv/par-saeimu/saeimas-darbs/deputatu-grupas/darba-grupa-valsts-prezidenta-pilnvaru-iespejamai-paplasinasanai-un-ievelesanas-kartibas-izvertesana [last viewed 04.02.2023]. [

[93] See more: *Kārkliņa, A*. Valsts prezidenta impīčmenta institūta juridiskie aspekti (II) [Legal Aspects of the Procedure for Impeaching the President of the State (II)]. Likums un Tiesības, No. 3(67), 2005.

republic, an official should not be without political responsibility for their political actions or failure to act.[94]

It is important to note that the proposals, made quite some time ago, regarding strengthening the creative function of the President, remain relevant. The President's creative function could be expanded exactly in the direction of the judicial power, for example, by entrusting to him the chairing of the Judicial Council, granting to the President the right to propose candidates for the office of the Prosecutor General, the President of the Supreme Court and Justices of the Constitutional Court for the *Saeima's* vote.[95] Not only would this provide the possibility for using the institution of the President more effectively, but it would also make the procedure of selecting officials of the judicial power more constructive.[96]

2.4. Improving regulation on crisis management

It has been long-recognised that the regulation on crisis management, included in the *Satversme*, needs serious improvements.[97] The *Satversme* comprises regulation on the state of emergency, pertaining only to threats caused by war or civil insurrection (Article 62 of the *Satversme*) but not to any other troubles in life, for example, natural disasters or pandemic, etc.[98] COVID-19 pandemic and the efforts to overcome the threats caused by it reminded, once again, that such constitutional regulation was necessary, envisaging not only for authorities the mandate needed to prevent disasters and the right to take emergency measures, but also defining constitutionally the limits of the executive power's discretion.[99]

To counterbalance this lack, in 2013, the law "On Emergency Situation and State of Exception"[100] was adopted, which envisaged the possibility to declare an emergency situation in such cases.[101] In fact, the procedure of Article 62 of the *Satversme* has been copied into the law, attributing the possibilities of applying the emergency legal regime, set out in it, also to cases of such threats that are not even referred to in the aforementioned provision of the *Satversme*. The solution, chosen by the legislator,

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[94] *Dišlers, K.* Latvijas Republikas prezidenta politiskā atbildība [Political Responsibility of the President of the Republic of Latvia]. Tieslietu Ministrijas Vēstnesis, No. 2, 1922, 53.–67. lpp.

[95] *Monciunskaite, B.* The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession. Croatian Yearbook of European Law and Policy, Vol. 18, 2022, pp. 143–144.

[96] See more: *Balodis, R.*, *Kārkliņa, A*. Valsts tiesību attīstība Latvijā: otrais neatkarības laiks [Development of Public Law in Latvia: Second Period of Independence]. Latvijas Universitātes žurnāls "Juridiskā zinātne/Law", Vol. 1, 2010, 40.–41. lpp.

[97] For example: *Jundzis, T*. Ārkārtējo situāciju un krīžu vadība: tiesiskā regulējuma nepilnības [Management of Emergency Situations and Crises. Deficiencies of Legal Regulation]. Likums un Tiesības, No. 2(6), 2000; Par Valsts prezidenta funkcijām Latvijas parlamentārās demokrātijas sistēmas ietvaros [On the Functions of the President within the Framework of the Latvian System of Parliamentary Democracy]. In: Valsts prezidenta Konstitucionālo tiesību komisija. Viedokļi: 2008–2011 [Constitutional Law Commission under the Auspices of the President. Opinions: 2008–2011]. Rīga: Latvijas Vēstnesis, 2011, 153.–155. lpp.

[98] *Balodis, R.* Ārkārtējās situācijas normatīvais regulējums: vēsture un nākotnes izaicinājumi [Normative Regulation on Emergency Situation: History and Future Challenges]. Jurista Vārds, No. 6(1168), 09.02.2021.

[99] See more: *Balodis, R., Danovskis, E.* Functionality Problems of Collegial Government Institutions During the COVID-19 Pandemic and Solutions for the Future. Juridiskā zinātne/Law, 2021, No. 14, pp. 197–215.

[100] Par ārkārtēju situāciju un izņēmuma stāvokli [On Emergency Situation and State of Exception] (07.03.2013). Available: https://likumi.lv/ta/id/255713-par-arkartejo-situaciju-un-iznemuma-stavokli [last viewed 04.02.2023].

[101] See more: *Druvaskalns, K*. Kā saprast jēdzienu "ārkārtējo situācija" [How to Understand the Concept of "Emergency Situation"]. Jurista Vārds, No. 2(649), 11.01.2011.

is quite questionable from the perspective of constitutional law because, substantially, the government has been granted extraordinary mandate by an ordinary law, without regard for the *Satversme*.

The experience gained during COVID-19 pandemic in organising crisis management suggests necessary improvements to the *Satversme*, envisaging in it, alongside the state of exception, also conditions for declaring an emergency situation, its procedure and the necessary restrictions.[102] Likewise, the *Satversme* should include regulation on restricting a person's fundamental rights in emergency situations, during the state of exception and war, eliminating the deficiency that once was caused by dismissing the Second Part of the *Satversme*.

The period of COVID-19 pandemic also reaffirmed the scepticism, once expressed by experts of constitutional law[103], regarding the hasty and politicised deletion of Article 81 from the *Satversme*[104], without replacing it by equivalent instruments of delegated legislation, which would give the right to the Cabinet, in case of need, to act as the legislator and, in an emergency situation, issue regulations with the force of law. The management of emergency situation has clearly shown that the Cabinet needs such mandate, and the government's right to issue regulations with the force of law during the period of special regime should be envisaged.[105] A quite completed proposal of the respective wording has been drafted, it would be worth serious discussions.[106]

Unless the regulation on emergency situation is reviewed and revised, we can expect also in the future that the government's regulations will be unnecessarily repeatedly re-approved by the *Saeima*. Such redundant duplication causes unnecessary contradiction in the application of emergency regulation, causing questions about the government's role in such moments, as well as makes the legislator co-responsible for such situations, actually, prohibiting from setting into motion the mechanism of parliamentary control during the post-crisis period, which would allow analysing the mistakes made during the period of crisis.

Russia's full-scale invasion in Ukraine of 24 February 2022 and the war it has launched in Ukraine, threatening the existing political and legal order in Europe, has created a new "reality of crisis".[107] Although a formal state of exception or extraordinary situation have not been declared, in some cases, the decisions made by the *Saeima* and the government are actually linked to managing the crises caused by Russia's war, the existence of the crisis is accepted by all, although it has not been

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[102] *Balodis, R*. Ārkārtas situācijās Saeimai pilnvaras uz laiku ir jānodod valdībai [In Emergency Situations, the *Saeima* should Temporarily Transfer its Mandate to the Government]. Jurista Vārds, No. 18(1128), 05.05.2020.

[103] See more: Juristi analizē Valsts prezidentes rīcību un Satversmes 81. pantu. Lietpratēji atbild uz "Jurista Vārda" jautājumiem [Lawyers Analyse the Actions of the President and Article 81 of the *Satversme*. Experts Answer Questions Put by "Jurista Vārds"]. Jurista Vārds, No. 12(465), 20.03.2007.

[104] Grozījumi Latvijas Republikas Satversmē [Amendments to the Satversme of the Republic of Latvia] (03.05.2007). Available: https://likumi.lv/ta/id/157308-grozijumi-latvijas-republikas-satversme [last viewed 04.02.2023].

[105] *Balodis, R*. Ir nepieciešama adekvāta pēcnācējnorma svītrotā Satversmes 81. panta vietā [Adequate Successor Provision Replacing Deleted Article 81 of the *Satversme* is Needed]. Jurista Vārds, No. 43(1153), 27.10.2020.

[106] *Levits, E*. Satversme ārkārtas apstākļos [The *Satversme* in Emergency Conditions]. Jurista Vārds, No. 18(1128), 05.05.2020.

[107] See also: *Levits, E*. Satversmes simtgade jaunajos ģeopolitiskajos apstākļos [Centenary of the *Satversme* in the New Geopolitical Conditions]. Jurista Vārds, No. 18(1232), 03.05.2022.

formally declared.[108] Actual management of the threats of war causes risks and valid concerns regarding restricting a person's fundamental rights properly in such circumstances. Russia's war in Ukraine has reinforced the trends from COVID-19 crisis regarding restrictions on fundamental rights both in Latvia and elsewhere.[109]

2.5. Constitutional relativism

Another important feature, which should not be overlooked, is the fact that, after reinstatement of the *Satversme,* several important changes to it have occurred without formal amendments. This has happened by changing opinions of parties applying the *Satversme* on this or that matter. Initial sticking to the written word, letter,[110] rather strictly adhering to grammatical interpretation of provisions of the *Satversme*, over time has shifted towards a much more dynamic interpretation of it. The *Satversme* is viewed as a living constitution, developing with the times[111] and such that can be influenced by parties applying law. Egils Levits has been the one who has promoted this approach in a targeted way and encouraged the parties applying the *Satversme* to develop it creatively.[112] As the result of this, interpretation of the *Satversme* also allows that, which has not been written into the *Satversme's* text and has not been permitted textually by the constitutional legislator.

Thus, the *Satversme* of the second period of independence is marked by a phenomenon, which might be called constitutional relativism or freer interpretation.[113] Initially, this method was successfully mastered by parties applying the *Satversme* in the political process (the *Saeima*, the President, and the Cabinet), ensuring development of the *Satversme* through ordinary laws, without formal amendments to the *Satversme.* This began with the election of the 5th convocation of the *Saeima* in 1993 when, contrary to the provision of Article 8 of the *Satversme*, the Supreme Council defined in the Election Law of the 5th *Saeima*[114] another minimum age for voters. Perhaps, this can be written down as taking constitutional law lessons in practice since, after being elected, the 5th convocation of the *Saeima* amended the *Satversme* urgently, to align the minimum age of electors in the *Satversme* and the Law on

[108] For example: Grozījumi Latvijas Pareizticīgās Baznīcas likumā [Amendments to Law on Latvian Orthodox Church]. Available: https://likumi.lv/ta/id/335376 [last viewed 04.02.2023]; Grozījumi Imigrācijas likumā [Amendments to Immigration Law]. Available: https://likumi.lv/ta/id/331565-grozijumi-imigracijas-likuma [last viewed 04.02.2023].

[109] Likums "Par pagaidu papildu prasībām Saeimas deputātu un pašvaldību domju deputātu darbam" [Law "On Temporary Additional Requirements for the Work of Members of the *Saeima* and Councillors of Local Government Councils"]. Available: https://likumi.lv/ta/id/32764 [last viewed 04.02.2023].

[110] For example: *Sinaiskis, V*. Lietderība un noteikumi likumu tulkošanā (Sakarā ar dep. Goldmaņa neaizskaramību) [Expedience and Rules in Interpretation of Laws (In Connection with Deputy Goldmanis' Immunity)]. Jurists, No. 3, 1928; *Cielēns, F*. Latvijas Republikas Satversmes noteikumi par deputātu imunitāti [Rules of the *Satversme* of the Republic of Latvia on Deputies' Immunity]. Tieslietu Ministrijas Vēstnesis, 1929, No. 1/2.

[111] See more: *Pleps, J*. Satversmes iztulkošana [Interpreting the *Satversme*]. Rīga: Latvijas Vēstnesis, 2012, 184.–188. lpp.

[112] For example: *Levits, E*. Satversme 1995. gada 18. novembrī [The *Satversme* on 18 November 1995]. Diena, No. 270, 17.11.1995.; *Levits, E.* Tiesību normu interpretācija un Satversmes 1. panta demokrātijas jēdziens [Interpretation of Legal Provisions and the Concept of Democracy of Article 1 of the *Satversme*]. Cilvēktiesību Žurnāls, No. 4, 1997.

[113] See more: *Balodis, R*. Satversme pārkāpj 100 gadu slieksni, mokoties ar relatīvisma un tiesu aktīvisma kaitēm [The *Satversme* Steps over the Threshold of 100 Years, Plagued by Relativism and Judicial Activism]. Available: https://telos.lv/satversmes-100-gadu-slieksnis/ [last viewed 04.02.2023].

[114] Par 5. Saeimas vēlēšanām [On the Election of the 5th *Saeima*] (20.10.1992). Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, No. 46/48, 03.12.1992.

Election of the *Saeima*.[115] At the same time, for example, transformation of the President's role within the Latvian state system occurred and the scope of his mandate was expanded, contrary to provisions initially made in the *Satversme*.[116] In the same way, i.e., without formal amendments to the *Satversme* and the Rules of Procedure of the *Saeima*, during COVID-19 pandemic, the *Saeima* has introduced remote sittings of the *Saeima* and its Committees, as well as e-*Saeima* digital platform.[117]

It should be kept in mind that the science of Latvian constitutional law also takes a positive view on the creative development of the *Satversme*. For example, the idea of the inviolable core of the *Satversme* and Latvia's constitutional identity has been defined exactly as the opinion of constitutional law experts, which was quite quickly taken over into the practice of applying the *Satversme*.[118] The concept of the core of the *Satversme*, as well as the expanded introduction to the *Satversme* have guided the understanding of the *Satversme* as a relative document.

The Constitutional Court has been particularly active in dynamic interpretation of the *Satversme*, in its rulings, the Court has expanded significantly the scope of the *Satversme*, diminishing the possibility for the *Satversme's* text becoming outdated, and developed the Latvian constitutional law.[119]

It is impossible to develop a correct notion of the *Satversme* without the findings, included in the Constitutional Court's rulings, because many constitutional principles and provisions have evolved through the interpretation of this Court. In fact, this has also marked a shift of the constitutional power away from the formal constitutional legislator – the *Saeima* and the totality of Latvian citizens, in favour of the Constitutional Court as the interpreter of the *Satversme*.[120] This process has been facilitated by the parliament's inability to cope with procedures that regulate the parliament, as well as the parliament's incapacity to promote public trust in good legislation.[121] The *Saeima* has been given signals, serious enough, asking it "to improve the process of legislation and ensure that qualitative laws are adopted in due procedure" because it is incompatible with "the standards of a modern democratic state, governed by the rule or law".[122] However, the parliament has been unable

[115] Grozījums Latvijas Republikas Satversmē [Amendment to the *Satversme* of the Republic of Latvia] (27.01.1994). Available: https://likumi.lv/ta/id/57946-grozijums-latvijas-republikas-satversme [last viewed 04.02.2023].

[116] See, for example: *Pleps, J*. Piebriestošā prezidentūra [Swelling Presidency]. Available: https://providus.lv/raksti/piebriestosa-prezidentura/ [last viewed 04.02.2023].

[117] *Rodiņa, A., Lībiņa-Egnere, I.* E-*Saeima*, one of the first parliaments in the world ready to work in fully remote mode. In: The impact of the health crisis on the functioning of Parliaments of Europe, pp. 70–80. Available: https://www.robert-schuman.eu/en/doc/ouvrages/FRS_Parliament.pdf [last viewed 04.02.2023].

[118] 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.

[119] See more: *Plepa, D., Pleps, J*. Satversmes tiesas ietekme uz Latvijas tiesiskās sistēmas attīstību [The Constitutional Court's Impact upon the Development of the Latvian Legal System]. Jurista Vārds, No. 49(952), 06.12.2016.

[120] *Pleps, J*. Satversmes iztulkošana [Interpreting the *Satversme*]. Rīga: Latvijas Vēstnesis, 2012, 54.–56. lpp.

[121] *Pleps, J.* Likumdošanas procesam jāveicina sabiedrības uzticēšanās [Legislative Process should Promote Public Trust]. Available: https://lvportals.lv/viedokli/299267-likumdosanas-procesam-javeicina-sabiedribas-uzticesanas-2018 [last viewed 04.02.2023].

[122] Judgement of the Constitutional Court of the Republic of Latvia on 12 April 2017 in case No. 2017-17-01; Judgement of the Constitutional Court of the Republic of Latvia on 12 April 2018 in case No. 2017-17-01.

to respond to it properly and all encouragements by the parliamentary opposition, the President or the Ombudsman have been plainly ignored. The parliament itself has been incapable, for a long time, to implement meaningful revision of the Rules of Procedure of the *Saeima*, improving both the procedures of legislation and internal organisation of its work, the need for which has been long-recognised.[123] Holding several events to celebrate the centenary of the first Rules of Procedure of the *Saeima*, the *Saeima* has not used the opportunity to modernise its work.

The Constitutional Court's judicial activism has created confusion in the centres of political power as politically important matters are no longer decided politically but are now resolved by court rulings. An example of this is both the initial activism of the Constitutional Court by limiting, through its judgement, both the Cabinet's right to issue regulations within the framework of law and the delegated right to legislate, included in Article 81 of the *Satversme*.[124] Likewise, application of the principle of good legislation, developed by the Constitutional Court, which has tangibly restricted the *Saeima's* discretion in the legislative process, remains sensitive.[125] Interpretation of Article 110 of the *Satversme* by the Constitutional Court, including into the concept of "family" also same-sex couples, and envisaging the legislator's obligation to elaborate regulation that would ensure legal protection of such couples, is a challenge for the legislator and parties applying law.[126] This has caused not only discussions about the particular legal matter but also conceptual reflections on separating the competences of the legislator and the Constitutional Court and the dialogue between branches of power in applying the *Satversme*.[127]

Law policy discussions about the limits of judicial activism and correct approach to interpretation of the *Satversme* are only just starting in Latvia's society.[128] It is clear that judicial activism is linked to the quality(weakness) of the parliament's work, which, actually, invites the court, in defending persons' fundamental rights, to intervene into the process of legislation and "step into the legislator's shoes".[129]

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[123] For example: *Āboltiņa, S.* Likumdošanas procesa norise un kvalitāte – no Saeimas skatupunkta [The Course and Quality of Legislative Procedure – from the *Saeima's* Perspective]. Jurista Vārds, No. 41(944), 11.10.2016.

[124] See more: *Jelāgins, J.* Tiesību pamatavoti [Basic Sources of Law]. In: *Jelāgins, J.* Latvija ceļā uz tiesiskumu [Latvia on its Paths towards the Rule of Law]. Rakstu krājums. Rīga: Tiesu Namu Aģentūra, 2020, 107.–113. lpp.

[125] See more: *Engīzers, K.* Labas likumdošanas principa ģenēze Latvijas tiesiskajā sistēmā [Genesis of the Principle of Good Legislation within the Latvian Legal System]. Jurista Vārds, No. 49(1211), 07.12.2021.

[126] Judgement of the Constitutional Court of the Republic of Latvia on 12 November 2020 in case No. 2019-33-01.

[127] See more: *Briede, J.* Ģimene [Family]. Jurista Vārds, No. 7 (1221), 15.02.2022. *Balodis, R.* Satversme pārkāpj 100 gadu slieksni, mokoties ar relatīvisma un tiesu aktīvisma kaitēm [The *Satversme* Steps over the Threshold of 100 Years, Plagued by Relativism and Judicial Activism]. Available: https://telos.lv/satversmes-100-gadu-slieksnis/ [last viewed 04.02.2023]; *Margeviča, A.* Konstitucionālās krīzes nebija. Intervija ar Satversmes tiesas priekšsēdētāju Aldi Laviņu [There was no Constitutional Crisis. Interview with the President of the Constitutional Court Aldis Laviņš]. Diena, 29.03.2023., No. 50(9023).

[128] For example: *Osipova, S.* Tiesiska valsts vai "tiesnešu valsts" [A State Governed by the Rule of Law or "Judges' State]? In: *Osipova, S.* Nācija, valoda, tiesiska valsts: ceļā uz rītdienu [Nation, Language, State Governed by the Rule of Law: On the Path towards Tomorrow]. Rakstu krājums. Rīga: Tiesu Namu Aģentūra, 2020, 313.–322. lpp.; *Balodis, R.* Satversme pārkāpj 100 gadu slieksni, mokoties ar relatīvisma un tiesu aktīvisma kaitēm [The *Satversme* Steps over the Threshold of 100 Years, Plagued by Relativism and Judicial Activism]. Available: https://telos.lv/satversmes-100-gadu-slieksnis/ [last viewed 04.02.2023].

[129] See more: *Feldhūne G.* "Likuma klusēšana" un Satversmes tiesas competence ["Silence of Law" and the Competence of the Constitutional Court]. Likums un Tiesības, No. 3(31), 2002, 83.–86. lpp.

Respectively, weakness of the parliament, its ineffective work and political stagnation is the true cause of judicial activism.[130]

Examination of similar discussions in the USA allows concluding that they may last for centuries and, possibly, each generation will have its own answers regarding the correct relations between the legislator and the judicial power. With consolidation of stable ideological parties, they, similarly to the USA, might become inclined to select and approve of liberal or conservative Justices of the Constitutional Court, upon which the 13th convocation of the *Saeima* has placed particular focus.[131] However, it is important that this discussion is held within the framework of the *Satversme*, respecting the principles of a parliamentary republic, independence of the judicial power and separation of state powers, included in the *Satversme*, as well as strengthens and develops a democratic state, governed by the rule of law, in Latvia and the authority of the *Satversme* as the basic law of the State.

Summary

The fate of the *Satversme* is closely intertwined with Latvia's statehood, its historic meanderings, initial rapture upon its adoption (1922), followed by authoritarianism (1934), which announced a reform of the *Satversme*, as well as the following years of occupation by two totalitarian regimes – the Nazi and the Soviet (1940–1990). The *Satversme* was adopted in pre-war Latvia and was reinstated following restoration of Latvia's independence. No other analogue is found in the world, and the case of *Satversme* is so special that it cannot be overlooked against the backdrop of other national constitutions. Over time, the *Satversme* has become an important element of the national identity, which has been carefully cultivated, in particular, during the last decade.

The decision, made following restoration of Latvia's independence, to reinstate the *Satversme* in full, rather than write a new constitution, was right and far-sighted. Reinstatement of the *Satversme* meant not only a formal restoration of its text but also a revival of its spirit – the values of the *Satversme,* methodology of its application and constitutional theory. Reinstatement of the *Satversme* allowed the legislator, initially, to "master" the system of the *Satversme* and, afterwards, to form and develop it.

14 amendments to the *Satversme*, adopted after the restoration of independence, have not significantly changed the original *Satversme*, created by the Constitutional Assembly. At the same time, some flaws in the text of the *Satversme* still have not been eliminated. It is time to align regulation of the *Satversme* with Latvia's international commitments in the area of national defence and to improve the current constitutional provisions of the *Satversme* on crisis management, which revealed their low effectiveness during COVID-19 pandemic. To decrease the growing gap between the power and society, with the purpose of increasing the legitimacy of power and reinforce the separation of powers, the algorithms of the *Satversme* regarding

[130] It should be noted that judicial activism is mostly viewed and conceptualized as a non-legal category, which, nevertheless, is used in the constitutional law. It is rather a category more characteristic of sociological, political science, or interdisciplinary discourse. See more: *Mesonis, G.* Judicial Activism in the Context of the Jurisprudence of the Constitutional Court. In: Konstitucionālās tiesas aktīvisms demokrātiskā valstī. Satversmes tiesas 2016.gada konferences materiālu krājums. Judicial Activism of a Constitutional Court in a Democratic state. Proceedings of the 2016 Conference of the Constitutional Court of the Republic of Latvia. Rīga: Latvijas Republikas Satversmes tiesa, 2016, pp. 342–361.

[131] *Monciunskaite, B.* The Risks to Judicial Independence in Latvia, pp. 142–145.

the referendum and in regulation on legislative initiative, the model of the *Saeima* elections and the procedure for electing the President should be revisited.

Parliamentary weakness and inability to ensure qualitative work, by resolving in good legislative procedure, in a meaningful and sustainable way, issues of long-term national development, has facilitated judicial activism. If the *Saeima* itself is unable to provide political solution to problems, they, inevitably, sooner or later are dealt with in proceedings before the Constitutional Court. Development of legal system and equivalent dialogue between powers requires qualitative growth of the *Saeima* as the legislator elected by voters, and improvements to the legislative process. Likewise, the parliament should develop a political dialogue about the model for electing the President and his mandate, "returning" referenda to citizens and other important matters pertaining to the development of the state system, since postponing of such discussions and stagnation does not promote citizens' faith in the State and its aims and, in the long-term, may endanger Latvia's democracy.

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Perspectives and Methodological Peculiarities in Developing the Form of Governance in the Republic of Armenia

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The current article considers the issues concerning perspectives and methodological peculiarities of developing the model of governance in the Republic of Armenia. The history of developing the form of governance in the Republic of Armenia, advantages and disadvantages of different forms of governance, factors and circumstances, which should underlie the selection of the form of governance are studied in the article. The author concludes that, while speaking on the forms of governance, we are often guided by fictional perceptions, which should be overcome and cannot serve as the basis for reforms concerning the aforementioned issue. Moreover, in the result of processes of legal convergence, the forms of governance have borrowed from each other the mechanisms that are not originally typical of them, and from this aspect their rapprochement can frequently be noted. The author notes that the problems, solution of which is the main reason for continuous changes of the form of governance, will not be solved in conditions of new reforms implemented by the same logic. Hence, the axis of the problem of the further improvement of the model of governance in the Republic of Armenia should be transformed from the issue of making a choice between this or that form of governance, and the attention should primarily be focused on improving the mechanisms of separation and balance of powers, as well as forming and strengthening constitutional and political traditions and culture.

Keywords: parliamentary, presidential, semi-presidential forms of governance; constitutional reforms; constitutional and political culture; politics; legal convergence; methodology of constitutional developments.

Contents

Introduction

The issues concerning the form of governance have always been subject to wide discussions in the Republic of Armenia. Moreover, all the constitutional reforms covered this issue, and viewpoints on both advantages and disadvantages of all the forms of governance have been raised in the framework of these discussions. Notably, since the restoration of independence in 1991, Armenia, at different stages, "tested" all the three forms of governance known in comparative constitutional law[1]. At the same time, extensive discussions on perspectives of the possible change of the existing, at concrete moment, form of governance have never stopped. Likewise, the debates persist in the context of ongoing constitutional developments. Notwithstanding the fact that the Constitutional Reforms Council of the Republic of Armenia voted for maintaining and developing parliamentary form of governance on 30 November 2022,[2] discussions on the need to change the model of governance are still continuing in the society, as well as legal and political communities.

Noting the aforementioned circumstance, the article will touch upon the perspectives of developing the form of governance in the Republic of Armenia.

The aim of the research is to reveal the perspectives and methodological peculiarities of the development of the model of governance in the Republic of Armenia, in particular, to present the perspective upon whether there is a need to change the form of governance of the state, or whether there should be improvements in the mechanisms of separation and balance of powers. In order to reach these aims, the following issues were studied: history of the development of the form of governance in the Republic of Armenia; peculiarities of different forms of governance in the modern world; advantages and disadvantages of different forms of governance; factors and circumstances, underlying the selection of the form of governance.

The following research methods have been used: literature review, historical, comparative, qualitative, quantitative methods, etc.

1. History of the development of the form of governance in the Republic of Armenia

In 1991–1995, the presidential model of governance existed in Armenia. The Constitution of 1995 adopted presidential-parliamentary model of the semi-presidential form of governance with extensive authorities defined for the president.[3]

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[1] Constitution of the Republic of Armenia (the original text and the amendments). Available: https://concourt.am/en/normative-legal-bases/constitution-of-ra [last viewed 10.07.2023]. Պողոսյան Վ., «Կառավարման ձեւի էվոլյուցիան Հայաստանում. Արդյունքներ եւ հեռանկարներ» // Հայկական քաղաքագիտական հանդես [*Poghosyan, V.* The evolution of the form of governance in Armenia. Results and perspectives]. Armenian Journal of Political Science, Vol. 2, issue 2, 2014, pp. 71–80.

[2] ՀՀ Սահմանադրական բարեփոխումների խորհրդի 30.11.2022 թվականի քվեարկության արդյունքներ [Voting results of 30.11.2022 of the Constitutional Reforms Council of the Republic of Armenia]. Available: https://moj.am/article/3377 [last viewed 10.07.2023].

[3] Հայաստանի Հանրապետության Սահմանադրություն [The Constitution of the Republic of Armenia]. (05.07.1995). Available: https://www.arlis.am/documentview.aspx?docID=1 [last viewed 10.07.2023].

As a result of 2005 constitutional reforms, the Republic of Armenia made a transition to the parliamentary-presidential model of semi-presidential form of governance.[4] After the 2015 constitutional reforms, the Republic of Armenia adopted the parliamentary form of governance.[5]

Although a new model of governance was adopted, as a result of every reform, in the context of the processes preceding the changes, the model existing at that stage was presented as non-viable. The main problems included inconsistent implementation of the principle of separation and balance of powers, as well as the low level of constitutional and political culture. Moreover, it has been emphasized in the context of all the reforms that the suggested new solutions and the change of the model of governance, along with strengthening the proper level of constitutional and political culture, would solve the aforementioned problems.[6] The reality is that notwithstanding the continuously specified problems and the new solutions suggested for them, the existence of those problems and non-viability of the model of governance existing at any given stage have been a subject of discussions to date, and many problems have not been solved yet. Clearly, the methodology of revealing the existing problems and suggesting solutions for them has not served its main goal, hence, it needs to be re-evaluated.

The following question arises in this context: which is the main problem in the implementation of this methodology, and should how this methodology be re-evaluated?

2. Distinctive traits of different forms of governance in the modern world

The first issue is that, as a rule, while speaking about the forms of governance in our society, we are frequently guided by "mythical" perceptions. For instance, we often believe that in the parliamentary form of governance the parliament has the primary role, and vice versa, – in the presidential system the primary role belongs to the president, etc. Meanwhile, the aforementioned perceptions cannot be considered

[4] Հայաստանի Հանրապետության Սահմանադրություն [The Constitution of the Republic of Armenia]. (27.11.2005). Available: https://www.arlis.am/documentview.aspx?docID=75780 [last viewed 10.07.2023].

[5] Հայաստանի Հանրապետության Սահմանադրություն [The Constitution of the Republic of Armenia]. (06.12.2015). Available: https://www.arlis.am/documentview.aspx?docID=143723 [last viewed 10.07.2023].

[6] The following problems have continuously been defined: expressions of shadow relations and subjectivism in implementing state-power authorities; over-personalization and over-centralization of the political system; obvious disproportion of the real scope of authorities of various constitutional bodies and their political responsibility; overcoming the differences between the Constitution and the real life; excluding convergence of political, administrative and economic potential; necessity of establishing constitutional guarantees for: ensuring public-legal responsibility and program-aimed activities of the state power; more consistent implementation of the constitutional principle of separation and balance of powers; guaranteeing the balance between functional, balancing and restricting authorities of state power bodies; ensuring proper functionality and functional independence of different branches of power; increasing the role of the National Assembly in the issues of formation of state power and governance bodies to the necessary level; effective activities of the parliamentary minority and strengthening its balancing role; effective legislative activities; parliamentary oversight mechanisms (Concept Paper on the Constitutional Reforms of the Republic of Armenia, Elaborated by the Specialized Commission on Constitutional Reforms adjunct to the President of the Republic of Armenia. Yerevan, September 2014. Available: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2014)033-e, [last viewed 16.06.2018].

as thorough and precise from the professional viewpoint. Particularly, in presidential system of governance the parliament has serious parliamentary oversight mechanisms. At the same time, numerous heads of executive power with high reputation are known in many modern states with parliamentary form of governance. In this context, there is an intesesting opinion, according to which, while presenting a general definition on this complicated issue, it is important not to overestimate the differences between various classifications[7].

In its classical definition, the parliamentary form of governance is the system of governance, where executive is elected by the legislature and is responsible to it, while in case of the presidential form of governance the power is divided between two separately elected bodies – parliament and president. Presidential elections are usually direct, and presidential power cannot be terminated by the parliament, except in the cases of gross violations related to official authorities.[8]

Hence, the first circumstance, which should be stated in this context, is that the functional sphere of all the branches of power is the same, no matter which model of governance is chosen. More precisely, in all the systems, the parliamentary functions are implemented by parliament, which has corresponding mechanisms of parliamentary oversight. The executive or judicial functions, in turn, are not transmitted from one power to another. For instance, in the United States, which is the most successful system with the presidential form of governance, implementation of many presidential authorities is conditioned with the existence of the advice, consent or approval of the Congress or one of its houses. According to the Constitution, the Congress may impeach the President and remove him/her from the office for treason, bribery, or other high crimes and misdemeanours. Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court are nominated and appointed by the President with the advice and consent of the Senate, Treaties are also made with the advice and consent of the Senate.[9] The noted role of the Senate is not ceremonial, and can be axial for implementing presidential authorities. For instance, after the death of Justice Antonin Scalia in 2016, Barack Obama nominated Merrick Garland to fill the vacancy of the Justice of the US Supreme Court. Meanwhile, after this nomination by the Democratic President, the Republican majority of the Senate factually blocked the appointment of the candidate. The Senate majority leader declared any appointment by the sitting president to be null and void, and that the Supreme Court justice should be appointed by the next president. The Republican majority of the Senate Judiciary Committee held no proceedings on the issue, and there was no voting in the Senate. As a result, the President could not implement his constitutional authority until the end of his tenure.[10] The example shows that serious mechanisms of parliamentary oversight and separation and balance of powers exist and are factually operational in the United States.

Moreover, originally the founding fathers were thinking about the Congress as a branch of power with more important and axial authorities than those of the president and Supreme Court. At the same time, they defined numerous mechanisms of checks

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[7] *Gerring, J., Thacker, C. S., Moreno, C.* Are Parliamentary Systems Better? Comparative Political Studies, Vol. 42, issue 3, 2009, p. 15. Available: https://www.bu.edu/sthacker/files/2012/01/Are-Parliamentary-Systems-Better.pdf [last viewed 04.01.2022].

[8] Ibid.

[9] US Constitution, Article II.

[10] What Happened with Merrick Garland in 2016 And Why It Matters Now. 29 June 2018. Available: https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now [last viewed 04.01.2022].

and balances in order to prevent concentration of absolute power in its hands.[11] The founding fathers had no goal to establish a strong presidential power, as they did not want to have a monarch resembling the English monarchy.[12] The Congress was the dominant power in 1800s–1930s. However, strong personalities of presidents have increased the factual role of the presidential power in the system of the US state power over time.[13]

We should also take into consideration that processes of transformation of mechanisms typical for various models of governance are taking place in the modern world. In contemporary parliamentary republics, for instance, a tendency of personalization of parties is visible. On the basis of this circumstance, the researchers even draw a conclusion that in such cases the institute of the prime minister gradually becomes similar to the institute of the president in the presidential model of governance. Notwithstanding these conclusions, in the literature of early 1990s the unequivocal assertion was common, according to which even in these cases prime minister cannot directly apply to the people as the president does, cannot require dissolution of the parliament and new elections.[14] In the author's opinion, this conclusion cannot be considered to be universal in the modern world, as the opposite situations factually exist in different parliamentary countries.

It is also important that many heads of executive power in the countries with parliamentary form of governance have a high reputation, hence, an axial role in the victory of the concrete party in parliamentary elections. This very often automatically leads to non-thorough implementation of parliamentary oversight mechanisms, when, as a consequence of personalization of political parties, the axial role of the leader of the party and the future head of the executive power in parliamentary elections, the executive and its leader become dominant in the system of the state power. In this context, it is a frequent occurrence that, despite formal preservation of the idea that is underlying parliamentary form of governance, according to which the executive is elected by the legislature and is responsible to the latter, nevertheless, in many cases the opposite logic factually prevails.

Moreover, originally the institute of the president in parliamentary republics was based on the idea that he/she will have a symbolic and ceremonial role in the system of power. The president was elected via indirect mechanisms, for instance, by the parliament or by a body specially established for this purpose. Remarkably, many modern parliamentary states have transformed the aforementioned idea and, in some countries, the president is now elected in direct election. For instance, in Czechia, which is a republic with parliamentary form of governance, the president has been elected via direct elections since 2012.[15] It is also interesting that in comparison with other parliamentary republics, the Czech President has serious authorities in

[11] The Powers of Congress. American Government. Available: https://www.ushistory.org/gov/6a.asp [last viewed 04.01.2022].

[12] The Presidency: The Leadership Branch? American Government. Available: https://www.ushistory.org/gov/7.asp [last viewed 04.01.2022].

[13] Essential increase of this role took place during the presidency of Franklin Roosevelt (see The Evolution of the Presidency. American Government. Available: https://www.ushistory.org/gov/7a.asp [last viewed 04.01.2022].

[14] See *Linz, J. J.* The Perils of Presidentialism. Journal of Democracy, Vol. 1, issue 1, Winter 1990. The Johns Hopkins University Press, p. 52. Available: https://scholar.harvard.edu/levitsky/files/1.1linz.pdf?fbclid=IwAR3JCDm0TJdkqoyV1nW4LHjiIxVISQ4sUshROmjySMtLRlFanoHcZNgdVgw [last viewed 04.01.2022].

[15] Articles 54, 56 of the Czech Constitution.

certain spheres. For instance, the latter shall dissolve the Chamber of Deputies in cases defined by the Constitution, shall be the Commander in Chief of the Armed forces, etc.[16]

The above leads to a conclusion that, although the main distinctive feature between the aforementioned two models of governance from the classical viewpoint is the order of formation of the executive power and its responsibility mechanisms, the processes of convergence have resulted in a situation when in the modern world even the models of governance have borrowed from each other the mechanisms originally non-typical for them, and in many cases their rapprochement is noted from this viewpoint.

At the same time, the following idea should serve as the basis for the solution of the discussed issue: the "mythical" perceptions on forms of governance should be overcome, and it must be noted that the functional sphere of each branch of power is the same in any model of governance – the legislative power is always implemented by the parliament with corresponding mechanisms of parliamentary oversight. The executive or judicial functions, in turn, are not transformed from one branch of power to another.

3. Advantages and disadvantages of different forms of governance

Literature presents both advantages and disadvantages concerning all the forms of governance. Moreover, while presenting the same model of governance, some authors highlight the advantages of the latter, whereas for the other group of researchers the same form of governance shows numerous disadvantages. For instance, some authors, touching upon the disadvantages of the presidential system of governance, mention that it is less probable for this system to have a presidential cabinet composed of strong and independent members. Moreover, it is emphasized that, in comparison with the head of executive in parliamentary form of governance, it is extremely difficult to remove the president in the presidential model of governance, when he/she loses the trust of the party or the people. Even if the polarization increases to the level of violence and illegalities, the president can persistently continue to occupy his/her office. Besides, the absence of a monarch or "a president of republic" with a symbolic role in presidential model deprives this system of flexibility and possibilities of restricting the power. Dual legitimacy is presented as the next disadvantage of the presidential form of governance. The reason thereof is that in conditions of having both president and parliament elected via direct elections (hence, representing the will of the people), there is no democratic mechanism to solve the conflicts between the executive and legislative powers.[17] Another group of researchers believes that the parliamentary form of governance has the following advantages: stronger political parties, concentrated electoral accountability, more flexible possibilities for policy-making, more institutionalized political environment, decisive leadership, etc.[18]

There is not much literature, pointing out the disadvantages of the parliamentary system of governance. The existing viewpoints concern the following circumstances: in this system, the members of parliament become too strong, "arrogant" and there is a high probability of misusing the power; the prime minister is loyal and faithful

[16] Certain decisions of the President defined by the Constitution shall be countersigned by the Prime Minister or by a member of the Government so authorized by the Prime Minister (Articles 35, 63 of the Constitution of Czech Republic).

[17] See *Linz, J. J.* The Perils, pp. 62–68.

[18] See *Gerring, J., Thacker, C. S., Moreno, C.* Are Parliamentary Systems, pp. 28–29.

to his/her party; there is an uncertainty of the system of governance and instability of government; an overload of the functions of cabinet; an absence of specialization of leaders, which can lead to inefficiency; an uncertainty of the term of office of the prime minister.[19]

The same situation concerns the advantages and disadvantages of the semi-presidential system of governance. According to some researchers, the main advantages of this form of governance are the following: flexibility, stability of the executive, its addressed responsibility. The same arguments lead other authors to the opposite conclusion, in particular, that semi-presidential form does not suggest solutions for the problem of contradiction of different majorities formed in the result of dual democratic legitimacy. Moreover, the semi-presidential form of governance does not result in stability of governments. For instance, the stability of governments is low in Finland (45 governments over 54 years – 1944–1988), Portugal (14 governments over 20 years – 1976–1998), the Eastern European semi-presidential countries do not attest to the stability of governments either. Although the direct election of the president is considered by the proponents of the semi-presidential form of governance as a possibility for the people to directly choose the head of executive, the president does not automatically become the head of executive power or the parliamentary majority just as a result of direct election. "Semi-presidential form is a system, where both the parliamentary and the presidential elections separately have an impact on the formation of the government. This firstly concerns France. A person, having an axial role in the sphere of executive power, is directly elected via presidential elections, nevertheless, he/she, in comparison with the presidential form of governance, is not the head of executive power. Hence, it is impossible to disregard the political orientation of the parliamentary majority. In case of "coexistence", there are no direct elections of executive power, besides, suspicions and uncertainties emerge in social opinion on the issue of what kind of role shall each of the two heads of executive power have separately. In case of coincidence of majorities, there is no precise identification of the prime minister and his/her team because of their frequent changes".[20]

The above examples show that researchers present both positive and negative perspectives concerning the same form of governance. Moreover, often the same circumstances lead them to essentially different, even opposite conclusions, when the same factor is presented by one group of authors as an advantage, whereas the others consider it as a disadvantage. In this context, Sartori's idea is worth mentioning, according to which, as a rule, while fairly criticizing the system, in which we live, we are often mistaken, defining alternatives for that system and providing the alternative with mythical advantages. If the presidential system is criticized, this does not yet mean that the opposite model – parliamentary one – is a "good alternative".[21]

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[19] See *Chukwuemeka, E. S.* Advantages and Disadvantages of Parliamentary System of Government. 17 May 2020. Available: https://bscholarly.com/advantages-disadvantages-parliamentary-system-government [last viewed 04.01.2022].

[20] Detailed approaches on advantages and disadvantages of the semi-presidential system of governance can be found in *Poghosyan, V.* The evolution, pp. 71–80.

[21] See *Zaznaev, O.* Sovremennaya diskussiya o luchshej forme pravleniya. Uchenye zapiski Kazanskogo universiteta, Gumanitarnye nauki [*Zaznaev, O.* Contemporary debate about the best form of governance]. Scientific Notes of Kazan University, Humanitarian Science, Vol. 155, issue 1, 2013, p. 201. Available: https://kpfu.ru/portal/docs/F1642033109/155_1_gum_23.pdf [last viewed 29.08.2023].

Notwithstanding the above, the viewpoint prevails in literature, according to which from the aspect of strengthening democratic systems, overcoming conflicts between the branches of power, parliamentary form of governance is much more beneficial and efficient, as well as has numerous advantages in comparison with the presidential one.[22] Moreover, it is highlighted that the absolute majority of stable democracies in the world are parliamentary systems, where executive is formed by parliamentary majority and is dependent on it. Whereas the only presidential democracy with long history of continuity exists in the United States.[23] The interesting fact here is that the mentioned viewpoint prevails also in the American research.

Regarding the semi-presidential model of governance, the author of the current article holds that from the doctrinal viewpoint the main disadvantage of the presidential form – the absence of proper mechanisms for overcoming conflicts between the two elected bodies due to dual legitimacy – is not overcome in conditions of this model, either. Moreover, the president elected in direct elections does not become the head of executive power or parliamentary majority, simultaneously implementing particular authorities, which presuppose factual governance of the executive. This leads to dualism in the governance of the executive power, as a result, neither the president, nor the prime minister implement their functions with a thorough and complex responsibility. Serious disproportion between the axial authorities of the president in the sphere of executive power and his/her political responsibility emerges, since in semi-presidential system of governance there are no proper and sufficient mechanisms of adequate political responsibility of the president.

Concerning the experience of implementation of various forms of governance in practice, the world has the most versatile forms of governance. For instance, the parliamentary form of governance exists in such countries, as Estonia, Germany, Greece, India, Hungary, Israel, Italy, Latvia, Czechia, Armenia, Bulgaria, Croatia, Austria, Bosnia and Herzegovina, Iceland, Serbia, Slovakia, Slovenia, Lebanon, Malta, Pakistan, etc. The presidential form of governance exists, for instance, in US, Argentina, Brazil, Bolivia, Chile, Dominican Republic, Indonesia, Kenia, Liberia, Mexica, Nigeria, Nicaragua, Paraguay, Turkey, Turkmenistan, Venezuela, Belarus, Kazakhstan, Tajikistan, Uzbekistan, etc. Semi-presidential form of governance exists in Algeria, Egypt, France, Lithuania, Poland, Portugal, Romania, Tunisia, Ukraine, Azerbaijan, Russia, Syria, etc.

The presented list of states shows that all the forms of governance have both successful and unsuccessful practices of implementation. At the same time, as mentioned above, from the aspect of strengthening a stable democracy, the number of countries, which adopted parliamentary system, is greater.

On the basis of the aforementioned ideas, can a conclusion be drawn that there is no perfect form of governance that represents only advantages and disadvantages? If yes, which should be the main factors, underlying the choice among the different forms of governance?

From the doctrinal viewpoint one can certainly specify the advantages and disadvantages of models of governance, which, as stated above, are not always perceived unanimously. From this viewpoint, the author considers classical forms of governance more acceptable,[24] as in these systems there is a clear separation and

[22] See, for instance, *Linz, J. J.* The Perils. *Gerring, J., Thacker, C. S., Moreno, C.* Are Parliamentary Systems.
[23] See *Linz, J. J.* The Perils, p. 51.
[24] Wording "classical form of governance" is used in order to point out the parliamentary and presidential forms of governance.

balance of powers, there is no dualism in the governance of executive, the authorities and political responsibility of the bodies of executive power and its head are proportional, there are proper legal and political mechanisms for overcoming conflicts between the branches of power.

However, the presented analysis leads the author to a conclusion that the criterion for selection of this or that model of governance cannot be based solely on the idea of highlighting advantages of one form and disadvantages of the other one, or on the presented doctrinal factor, – it requires a much more thorough and complex approach.

4. Factors and circumstances, underlying the selection of the form of governance

4.1. Criteria and methodology for diagnosing the necessity of changing the form of governance

One of the main disadvantages typical for many modern constitutional systems is "normative fetishism". The essence of the latter is in the fact that in these systems there is a stable perception that social progress is achieved solely by means of improving the existing formal norms and creating new ones. The paradox is that though non-viability of normative fetishism is continuously approved by concrete examples of various scales, thinking and logic of this kind continue to underlie reforms.[25]

From the aspect of guaranteeing social progress, we should firstly overcome the presented way of thinking and exclude the role of the latter in the context of various changes, including constitutional reforms.

With this regard, the author believes that any change in the text of the Constitution, transformation of any institution and mechanism should satisfy the following important criteria and should be implemented, observing the methodology to be discussed further below: it is necessary to precisely reveal the problems, suggest solutions for them, assess the existence of casual relationship between the revealed problems and suggested solutions, assess the possible risks of the noted solutions, analyse problems and solutions from the aspect of all the relevant spheres (legal, politological, psychological, sociological, etc.), combine the received data and adopt a decision on the necessity of this or that amendment or its absence just in the result of this. In case of not maintaining these criteria, there is a serious threat to have "normative fetishism" as a consequence, which, as noted before, should not serve as the basis for constitutional amendments. Otherwise, any change can become a process with an end in itself.

The aforementioned general criterion concerning constitutional amendments is applicable also to the reforms concerning the form of governance. In particular, noting the history of continuous changes of the model of governance, it would be naïve to think that a new similar institutional change implemented with the same logic will lead to a successful result.

[25] See also *Manasyan, A.* Constitutional Stability as an Important Prerequisite for Stable Democracy. Yerevan, 2019, pp. 104–105.

4.2. Factors, conditioning efficient implementation of a model of governance

Besides the above-mentioned methodology, the circumstances explained below should be considered in case of any change in the model of governance.

The approach prevails in literature, according to which the efficiency of implementing this or that model of governance is conditioned by a number of additional factors – political, sociological, economical, historical, etc.[26] Moreover, it is stated that "it is necessary to combine the institutional advantages and disadvantages of forms of governance and their models with the context of a particular state, and try to find the most favourable option, corresponding to this context. While designing the form of governance on a particular state, firstly, it is necessary to take into account the political culture and political system of the state".[27]

Therefore, in the conditions of the above-mentioned reality, when almost all forms of governance have been tested in the Republic of Armenia, nevertheless, the stated problems continue to be unsolved, the author holds that the solutions should be sought not through continuous changes of the form of governance, but in overcoming the mentioned factors. In particular, the improper level of constitutional and political culture, the continuous attempts of over-centralization and over-personalization of power, the permanent culture of violating even the existing mechanisms of separation and balance of powers, the instability of the party, hence, also the political system, etc., are the problems, which have been stated repeatedly, yet have not been solved in a satisfactory manner in the conditions of none of the models. Moreover, these are the problems, which mostly derive not from unperfect legal regulations, but from numerous political, economic, social, historical, psychological factors.

The analysis presented in the current article shows that at this stage the priority from the aspect of the development of the model of governance in Armenia should not be changing this or that legal regulation, but instead – overcoming the above-mentioned problems, as well as developing and implementing solutions in the framework of the noted criteria and methodology.

Developing and strengthening proper constitutional and political culture and traditions have the primary role in this context. Moreover, the following is axial from the viewpoint of the discussed issue: formation of culture and traditions requires time, it is not a process presupposing a little step, but a gradual one, which cannot be implemented over a short period of time. Hence, continuous changes of a model of governance, which appears "wrong", is no less dangerous than holding on to a particular form –such changes almost exclude formation of traditions and culture, leading to instability of the political and constitutional system. Researchers emphasize that, while drawing a conclusion concerning the models of governance, not only the current situation in the country should be noted, but also its institutional history, in particular, how many years the parliamentary or presidential system has operated in the country. The reason is that time is needed in order to allow the institutions to visibly impact the quality of governance. The state, which fluctuates from one form of governance to another, cannot expect immediately visible, polar changes in the quality of governance. In reality, the aforementioned changes accumulate over time, when the new institutional rules begin to exert an impact upon actions and expectations.[28]

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[26] See *Gerring, J., Thacker, C. S., Moreno, C.* Are Parliamentary Systems, p. 30.
[27] See *Poghosyan, V.* The evolution, p. 70.
[28] See *Gerring, J., Thacker, C. S., Moreno, C.* Are Parliamentary Systems, p. 16.

Hence, a necessity of strengthening political and constitutional culture and traditions, as well as excluding continuity/frequency of such serious changes should be considered axial.

4.3. Excluding supremacy of political factor in selecting the model of governance

The next important circumstance is that, although the selection of the model of governance is, *inter alia*, a result of political choice, the political factors cannot and should not prevail in the process of decision-making about the aforementioned issue. In other words, if the aim is to ensure successful, efficient and professional constitutional development, amendments to the text of the Constitution, transformation of this or that institution cannot be implemented just on the basis of political interests and preferences of particular political force/forces.

It is obvious that the political environment has an undeniable impact on the choice of constitutional solutions and their factual realization. The reason is that almost in all modern constitutional systems the constitutions are adopted and amended as a result of direct participation of political forces, notwithstanding the fact whether the constitutional regulations are adopted by the parliament, special body established for this aim, or the people. At the same time, participation and impact of political forces in the process of constitutional developments cannot transform the Constitution to a document, having an exceptionally political nature. For political forces, constitutional developments are necessary primarily for gaining and preserving power, as well as forming and developing a desirable model of separation and balance of powers. This becomes essential from the viewpoint of their entire role in the process of constitutional developments. Hence, an approach must be noted, according to which Constitution-makers are usually interested just in the idea of insetting such a system, which would be beneficial for them personally, for their party, or their voters. From this perspective, the model of governance defined in the Constitution is a result of a very conditional political struggle, which has little or no connection with the long-term potential of state governance.[29]

Hence, notwithstanding the undeniable impact of the political environment on the Constitution, the latter is not a document solely of a political nature. Legal and political aspects are closely interrelated from the viewpoint of Constitution, and guaranteeing proper balance between them has an exceptional importance from the aspect of ensuring constitutional stability. From this viewpoint, one should be guided by the logic that law and politics should have one main common goal – regulation of social relations by guaranteeing the principle of rule of law. And in such conditions it becomes obvious that the Constitution should not be a tool for politics, but instead – a bound, a framework for it. Moreover, constitutional developments should not express the current political preferences and interests, yet be superior to them and define a fundamental legal framework for political actors and events.[30] In other words, constitutional policy should be clearly differentiated from the current politics, and the Constitution should not be a part of the ongoing political game, but have a role of defining the rules of that game.

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[29] See *Gerring, J., Thacker, C. S., Moreno, C.* Are Parliamentary Systems, p. 27.

[30] With this regard see also CDL-AD(2010)001, Report on Constitutional Amendment, Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11–12 December 2009). Available: http://www.venice.coe.int/docs/2010/CDL-AD%282010%29001-e.pdf [last viewed 20.01.2018].

It is worth mentioning in this context that, according to various studies, in all the situations, when political elites have been trying to use the Constitution to gain political dominance, the final result has been the paradox "Constitution without constitutionalism."[31] This, in the author's opinion, is unacceptable from the viewpoint of guaranteeing constitutional stability and stable democracy.

Moreover, the author believes that Constitution should not be subject to amendment with every change of political situation in the state, or formation of a new political majority. The Constitution has a fundamental role from the aspect of regulating social relations and cannot be used as a tool for solving ongoing political problems. Moreover, the Constitution is not just a document with a highest legal force, but also a symbol of a concrete constitutional system, and from this viewpoint the Basic Law holds a symbolic significance. Hence, the Constitution should in reality be perceived by the society as a fundamental document, the symbol of the constitutional system, it should create a feeling of the factually existing constitutionalism, and not of a political declaration accidentally adopted or amended pursuant to each political event. Hence, the frequency of constitutional amendments cannot be conditioned exclusively by the balance of political forces and its mathematical calculation. The ways of constitutional amendments and the process of their realization should form such a public perception that the Constitution is a stable document, a symbol of a concrete constitutional system and cannot be amended at a whim of political will formulated by the political majority of the day. The opposite situation can make the proper realization of constitutional norms impossible and lead to the distortion of values, underlying constitutional stability, as well as of such values typical for the Rule-of-Law State as predictability and legal certainty, excluding the perception of the Constitution as a symbol of a concrete constitutional system.

Regarding the issue at hand, The Venice Commission has continuously stated that overly frequent changes of the Constitution have a negative impact from the viewpoint of constitutional and political stability.[32.] Moreover, the Commission with regret emphasized[33] the constitutional amendments in Croatia – during a very short time[34], the Constitution was amended twice, not permitting an opportunity to use the possibilities provided by the first amendment.[35]

Summarizing the above, it should be stated that if the aim of amendments is to ensure successful, efficient and professional constitutional reform, the change of the form of governance cannot be implemented solely on the basis of political interests and preferences of concrete political force/forces.

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[31] See *Vliet, M. van, Wahiu, W., Magolowondo, A.* Constitutional reform processes and political parties: principles for practice. The Hague: NIMD, 2012, p. 12. Available: https://openaccess.leidenuniv.nl/bitstream/handle/1887/30222/ASC-075287668-3333-01.pdf?sequence=1 [last viewed 16.06.2018].

[32] See CDL-AD(2010)001, *Report on Constitutional Amendment*, Adopted by the Venice Commission at its 81st Plenary Session (Venice, 11–12 December 2009). Available: http://www.venice.coe.int/docs/2010/CDL-AD%282010%29001-e.pdf [last viewed 20.01.2018].

[33] See CDL-PI(2015)023, Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending the Constitution // European Commission for Democracy through Law (Venice Commission), Strasbourg, 22 December 2015. Available: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2015)023-e [last viewed 16.06.2018].

[34] The point concerns 2000 and 2001 constitutional amendments.

[35] See more detailed information on interconnections of constitutional stability and politics in *Manasyan, A.* Constitutional Stability, pp. 45–53, 64–66.

Summary

Summarizing the above, classification of the forms of governance in the modern world is conditional. Moreover, as a result of the processes of legal convergence even the models of governance have borrowed from each other the mechanisms previously not typical for them, and from this viewpoint their rapprochement is visible in many cases. From the doctrinal viewpoint, the author considers the classical forms of governance more acceptable. The reason is that these systems of governance contain a clear separation and balance of powers, and there is no dualism in the governance of the executive. Moreover, the authorities and political responsibility of the bodies of the executive power and its head are proportional, there are proper legal and political mechanisms for overcoming conflicts between the branches of power.

At the same time, the analysis of the factors presented in the article leads to a conclusion that the problems that are present in our social system, which are always stated as bases for changes of the form of governance, will not be solved under conditions of new reforms implemented by the same logic. Hence, the author holds that the emphasis of reforms should not be the choice of this or that form of governance or definition of their advantages or disadvantages, and the debate should not be delineated along these issues. Moreover, in the author's opinion, it is not expedient to choose a particular classical form of governance and supplement it with the distinctive traits of another model. The reason is that in this case acquire a mixed form of governance instead of a classical one. Consequently, one of the main methodological aspects for properly regulating the mechanisms of separation and balance of powers is to keep them in compliance with the chosen form of governance.

Obviously, some mechanisms of separation and balance of powers in the Republic of Armenia need to be improved. For instance, the following circumstances can become a subject for discussion: Is there a need to inset mechanisms of self-dissolution of the parliament? Are constitutional regulations on the Armed Forces adequate for our legal, political and defense systems? Is there a need to change the process of selection of judges of the Court of Cassation prescribed by the Constitution? In the author's opinion, these are issues, which have led to problems from various perspectives, hence, they should be properly addressed during constitutional reforms.

At the same time, noting the whole analysis presented in the article, the author maintains that the necessity of improvement of the aforementioned constitutional mechanisms is not conditioned by the circumstance of non-viability of this or that model of governance, or the new choice among these forms. Moreover, ceaseless and continuous changes of the model of governance can increase the threat of instability of the political and constitutional system to a maximum level, excluding a possibility for development of adequate traditions and culture. This can lead to more disastrous consequences than the existence and maintenance of this or that model which appears "wrong". The negative consequences can essentially increase in case of making institutional transformations solely on the basis of political interests and preferences.

Hence, in case of any reform of the model of governance, we should refrain from "normative fetishism", noting the criteria and methodology of diagnosing the necessity of the change of the model and the factors, conditioning the efficiency of any form of governance.

Noting the above, the author believes that, from the viewpoint of the further improvement of the model of governance in the Republic of Armenia, the axis of the issue should be transferred away from the debate about making a choice between this or that form of governance, and the main attention should instead be concentrated

on the improvement of mechanisms of separation and balance of powers, as well as on the formation and development of proper constitutional and political traditions and culture.

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Subordinated Bonds and the Fulfilment of Their Obligations in the Event of State Aid

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A bond is a debt security, under which its issuer undertakes to repay to the bondholder the principal of the bond and the interest (the coupon) at a specified point in time, which is to be considered as the redemption of bonds. Bonds have several types: bonds issued by the public sector, bonds issued by capital companies, publicly available bonds, private bonds, convertible bonds, contingent convertible (CoCo) bonds, exchangeable bonds, exchange bonds, callable bonds, subordinated bonds, etc. In economic circulation, subordinated bonds are widespread securities. The subordinated obligation in the bond distinguishes the subordinated bond from other bonds. At the same time, the underlying relationship entails significant risks for the fulfilment of the obligations arising from the bond, which is outweighed by the higher profitability of such bonds. However, there are cases where the obligations arising from subordinated bonds are never met. Such cases may be based not only on the insolvency of the issuer of the subordinated bonds but also on the existence of State aid received by the issuer. In view of the recent financial difficulties of several banks, the likelihood of an issuer that has received State aid being able to meet its obligations under subordinated bonds becomes a particularly acute matter.

Keywords: subordinated bonds, securities, subordinated obligation, State aid, insolvency proceedings.

Contents

Introduction

The global economic turmoil caused by Russia's illegal invasion of Ukraine in February 2022 and the resulting rising energy and commodity prices also had an impact on financial markets and their participants. This was the basis for decisions by both the European Central Bank[1] and the Open Market Committee of the Federal Reserve System of the United States of America (hereinafter – the US) to raise the base interest rates.[2] As a result of these decisions, the base interest rate in both the European Union and the US reached its highest level since 2007, when the world experienced one of its worst financial crises.

As a result of these financial market turbulences, both *Credit Suisse*,[3] a Swiss-based credit institution, and *Silicon Valley Bank*,[4] a credit institution based in the US state of California, experienced financial difficulties in March 2023. Although *Credit Suisse* was merged into the Swiss-based *UBS Group AG*[5] and *Silicon Valley Bank's* deposit and loan portfolio was acquired by the North Carolina-based *First Citizens Bank*[6], without the direct involvement of public funds in the rescue of these two credit institutions, there are a number of cases in history where it has not been possible to restore credit institutions to solvency without public funding.

Between January 2007 and June 2012, a total of 85 credit institutions from around the world experienced insolvency problems. 37 of them were rescued with the involvement of public funds (state and municipal).[7] The list of these credit institutions includes *Parex banka*, which operated in the Republic of Latvia and whose rescue, through the state-owned joint stock company *Latvijas Hipotēku un zemes banka*, involved a total of almost 1 billion lats from the Latvian state budget.[8]

Credit institutions can use a variety of mechanisms to strengthen their financial position, from borrowing money to issuing various securities. Specific loans and the proceeds of certain securities, such as subordinated bonds, may even be credited to the capital of the credit institution, thereby strengthening it.

At the same time, credit institutions facing financial difficulties are particularly concerned about the ability of their customers and investors to recover the funds they are owed. Even if a credit institution has sufficient funds to meet the claims of all its customers (depositors) and investors, in some cases, for example, because of State aid, some of its customers and investors may not be able to recover their funds at all.

The purpose of this article is to provide an insight into subordinated bonds, the concept and nature of the subordinated obligations they contain, as well as the

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1 Key ECB interest rates. Available: https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.lv.html [last viewed 07.04.2023].

2 ASV turpina celt procentu likmes aizdevumiem [The US continues to raise interest rates on loans]. Available: https://www.lsm.lv/raksts/zinas/ekonomika/23.03.2023-asv-turpina-celt-procentu-likmes-aizdevumiem.a502005/ [last viewed 07.04.2023].

3 Latest update for our clients and stakeholders. Available: https://www.credit-suisse.com/about-cs/en.html [last viewed 07.04.2023].

4 What Happened to Silicon Valley Bank? Available: https://www.investopedia.com/what-happened-to-silicon-valley-bank-7368676 [last viewed 07.04.2023].

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6 What Happened to Silicon Valley Bank? Available: https://www.investopedia.com/what-happened-to-silicon-valley-bank-7368676 [last viewed 07.04.2023].

7 List of banks acquired or bankrupted during the Great Recession. Available: https://en.wikipedia.org/wiki/List_of_banks_acquired_or_bankrupted_during_the_Great_Recession [last viewed 07.04.2023].

8 PAREX bankas restrukturizācija [Restructuring of PAREX Bank]. Available: https://www.possessor.gov.lv/darbibas-jomas/problematiskie-aktivi/parex-bankas-restrukturizacija [last viewed 07.04.2023].

modalities of the fulfilment of the obligations arising from such bonds, by revealing the limitations that the fact that the borrower (issuer) has received State aid imposes on the fulfilment of the obligations arising from subordinated bonds and other subordinated obligations.

1. Subordinated bonds and subordinated obligations arising from them

Before explaining the nature of a subordinated bond and the subordinated obligations it contains, it is first necessary to understand what a bond is. According to Article 1(1)(43) of the Financial Instruments Market Law,[9] a bond is a "debt security" or "transferable securitised debt". In Latvian financial literature, a bond is defined as a debt security that evidences an investment of its owner's funds and confirms the issuer's obligation to pay a regular fixed income and to reimburse the nominal value of this security at a specified maturity date,[10] whereas *Forbes*, the world-famous economic magazine, explaining the term "bond", stated that: "Bonds are investment securities whereby an investor lends money to a business or government for a fixed period of time in exchange for regular interest payments."[11] Therefore, bonds as debt securities are not only found in the private sector but also in the public sector.[12]

According to the data from the Securities Industry and Financial Markets Association, the size of the bond market, or the total amount of publicly traded bonds issued on an exchange, was USD 126.9 trillion worldwide in 2021.[13] At the same time, bonds come in several forms: publicly traded bonds, privately traded bonds, secured and unsecured bonds, as well as convertible bonds, contingent convertible bonds, mandatory convertible bonds, reverse convertible bonds, exchangeable bonds, exchange bonds, callable bonds, discounted bonds, and subordinated bonds, etc.

A look at the *Nasdaq Riga* corporate debt securities list shows that subordinated bonds account for a fifth (9 out of 44 issues) of all bonds issued and currently traded in the Baltics.[14] Subordinated bonds are therefore a common type of bond in civil circulation.[15]

Subordinated bonds were first issued in the US, when the *General Finance Corporation* issued subordinated bonds at 5% for a maturity of 10 years, an unprecedentedly high interest rate for 1936. Following the example of the *General*

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[9] Finanšu instrumentu tirgus likums [Financial Instrument Market Law] (20.11.2003). Available: https://likumi.lv/ta/id/81995-finansu-instrumentu-tirgus-likums [last viewed 07.04.2023].

[10] *Praude, V*. Finanšu instrumenti 1 [Financial instruments 1]. Rīga: Burtene, 2009, 217. lpp.

[11] *Napoletano, E*. What is a Bond? Available: https://www.forbes.com/advisor/investing/what-is-a-bond/ [last viewed 07.04.2023].

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[13] 2022 Capital Markets Fact Book. Available: https://www.sifma.org/wp-content/uploads/2022/07/CM-Fact-Book-2022-SIFMA.pdf [last viewed 07.04.2023].

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[15] *Zeņķis, P*. Subordinētās obligācijas – jēdziens un būtība [Subordinated bonds – concept and essence]. In: Latvijas Republikas Satversmei – 100. Latvijas Universitātes 80. starptautiskās zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2022, 103.–109. lpp.

Finance Corporation, other major US corporations began to use this form of financing to boost their economic growth.[16]

The key difference between subordinated bonds and other similar instruments and other types of bonds and loans is the subordination of the enforcement of the claims embodied in them. Subordination (*Nachrangigkeit* – German) means that in the event of insolvency (or liquidation of the borrower (issuer)), all claims of senior creditors (including those arising from ordinary bonds) are satisfied first, then the claims of the holder of the subordinated claim and finally the claims of the equity providers (shareholders)[17] for payment of the liquidation quota arising from the equity securities they hold.

German legal doctrine recognises that, even historically, the most important distinction that distinguished any other agreement from a subordinated agreement was that, in the case of such an agreement, a subordinated obligation was created along with the principal obligation, whereby the person lending his funds to the merchant at the same time undertook not to demand the accelerated repayment of that loan, and also agreed to be a party to one of the last rounds of creditors in the event that the merchant to whom the funds were lent went into insolvency, liquidation or reorganisation proceedings.[18] In view of this, it was recognised at an early stage of the development of this instrument that a situation in which subordinated obligations would be satisfied before "ordinary" obligations would not be permissible.[19]

The legal definition of subordinated obligations in the regulatory framework of the Republic of Latvia is provided, for example, in Article 1(59) of the Credit Institution Law,[20] stating that subordinated obligations are –

> *…obligations which arise for a credit institution from a loan (regardless of the type of the transaction entered into) and which, on the basis of the agreement entered into with the credit institution, gives the right to the lender to reclaim the loan early only in case of insolvency or liquidation of the credit institution and only after satisfying the claims of all other creditors, however, prior to satisfying the claims of shareholders.*

In the Roman-Germanic legal system, it is generally stated that a non-statutory subordinated loan covers various types of loan in which the claims of the lender can be satisfied only after the claims of other creditors in the insolvency or liquidation process of the borrower.[21] Therefore, a subordinated loan and the obligations arising from it may also be embodied in a bond as a security.

At the same time, subordinated obligations are also known as mezzanine financing (*Mezzanine-Finanzierung* – German). The most common form of mezzanine financing

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[16] *Johnson, R.* Subordinated Debentures: Debt That Serves as Equity. The Journal of Finance, Vol. 10, 1955, p. 4.

[17] *Westermann, H. P. (Red.), Berger, K. P.* Münchener Kommentar zum Bürgerlichen Gesetzbuch [Munich Commentary on the Commercial Code]. Band 4. Schuldrecht. Besonderer Teil I. §§ 433–534. Finanzierungsleasing. CISG. 8. Auflage. München: C. H. Beck, 2019, Vorbemerkung (Vor § 488), Rn. 107.

[18] *Calligar, M*. Subordinated Agreements. Yale Law Journal, Vol. 70, 1971, p. 376.

[19] Ibid., p. 378.

[20] Kredītiestāžu likums [Credit Institution Law] (05.10.1995). Available: https://likumi.lv/doc.php?id=37426 [last viewed 07.04.2023].

[21] *Herresthal, C. (Red.), Fest, T*. Münchener Kommentar zum Handelsgesetzbuch [Munich Commentary on the Commercial Code]. Band 6. Bankvertragsrecht. Recht des Zahlungsverkehrs. Kapitalmarkt- und Wertpapiergeschäft. Ottawa Übereinkommen über Internationales Factoring. 4. Auflage. München: C. H. Beck, Verlag Vahlen, 2019, N. Einlagengeschäft, Rn. 96.

is the mezzanine loan, of which the subordinated loan is one type.[22] However, mezzanine financing may be secured by means of various legal transactions[23] in which a subordinated obligation is created at the time of the conclusion of an agreement containing a clause establishing a subordinated obligation or by means of a public offer by a commercial company to create a subordinated obligation to which the creditor's consent has been expressed. For example, a tender offer for a subordinated bond on a stock exchange.[24]

In the case of mezzanine financing, crowdfunding (*Crowdfunding-Finanzierung* – German), venture capital financing (*Risikokapital-Finanzierungen* – German) or any other complex financing, the subordination of fulfilment of the obligations does not derive from a rule of law but from an agreement – a private law arrangement between the parties.[25]

This is also in line with the Latvian legal framework. For instance, point 2.1 of Cabinet of Ministers Regulation No 241 "Rules on mezzanine loans to improve the competitiveness of economic operators"[26] states that a mezzanine loan is:

> *a long-term investment loan with an increased credit risk. It is subordinated to a long-term loan or financial leasing provided by a credit institution or its subsidiary and is reinforced by a lower level of collateral than a long-term loan or financial leasing provided by a credit institution or its subsidiary.*

Consequently, in accordance with point 4 of the said Regulation, the procedure for granting mezzanine loans shall be determined in accordance with civil law agreements.

Mezzanine financing is one of the modern forms of financing which, because of its structure, cannot be credited either to equity or outside or leveraged capital and is in fact considered to be a kind of intermediate financing characterised, on the one hand, by increased participation in business risks compared with outside capital and, on the other hand, by its exclusion from the share capital of the company, which in turn implies that the provider of this financing is not entitled to participate in the management of the capital company. The main objective of mezzanine financing is to improve the capital structure of the capital company, the mezzanine borrower, by increasing the equity quota within a certain time limit, thereby allowing it to raise outside capital while avoiding the creation of minority shareholders or increasing their influence over the company's decision-making freedom.[27]

In contrast to ordinary obligations, subordinated obligations could be considered as "debt serving as equity".[28] This is based on the fact that, in the case of subordinated bonds, the proceeds from their issue may be credited to the issuer's capital, which

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[22] *Derleder, P., Knops, K.-O., Bamberger, H. G. (Hrsg.), Hoffmann, J.* Deutsches und europäisches Bank- und Kapitalmarktrecht [German and European banking and capital market law]. Band 1. 3. Auflage. Berlin, Heidelberg: Springer, 2017, § 24, Rn. 96.

[23] Ibid., pp. 94–95.

[24] *Zeņķis, P.* Subordinētās obligācijas, 103.–109. lpp.

[25] Ibid.

[26] Noteikumi par mezanīna aizdevumiem saimnieciskās darbības veicēju konkurētspējas uzlabošanai [Rules on mezzanine loans to improve the competitiveness of economic operators] (13.05.2014). Available: https://likumi.lv/ta/id/266226-noteikumi-par-mezanina-aizdevumiem-saimnieciskas-darbibas-veiceju-konkuretspejas-uzlabosanai [last viewed 07.04.2023].

[27] *Derleder, P., Knops, K.-O., Bamberger, H. G. (Hrsg.), Hoffmann, J.* Deutsches und europäisches, Rn. 84–85.

[28] *Everett, E.* Subordinated Debt – Nature and Enforcement. Business Lawyer (ABA) Vol. 20, 1965, p. 954.

in turn implies that the creation of subordinated obligations may serve as a tool to increase the capital available to the issuer itself.

Specific regulation at the European Union level on the legal effect of subordinated investments on capital is foreseen for credit institutions and investment brokerage firms. These legal issues are governed by Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms (hereinafter – Regulation 575/2013).[29] According to Article 62 of Regulation 575/2013, subordinated loans, irrespective of their form, are to be considered, alongside other financial instruments, as an investment in the Tier 2 capital of a firm if a number of the conditions laid down in Article 63 of Regulation 575/2013 can be established.[30]

[29] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance. OJ, L 176, 27.06.2013, pp. 1–337. Available: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32013R0575 [last viewed 07.04.2023].

[30] Capital instruments shall qualify as Tier 2 instruments, provided that the following conditions are met: (a) the instruments are directly issued by an institution and fully paid up; (b) the instruments are not owned by any of the following: (i) the institution or its subsidiaries; (ii) an undertaking in which the institution has participation in the form of ownership, direct or by way of control, of 20% or more of the voting rights or capital of that undertaking; (c) the acquisition of ownership of the instruments is not funded directly or indirectly by the institution; (d) the claim on the principal amount of the instruments under the provisions governing the instruments ranks below any claim from eligible liabilities instruments; (e) the instruments are not secured or are not subject to a guarantee that enhances the seniority of the claim by any of the following: (i) the institution or its subsidiaries; (ii) the parent undertaking of the institution or its subsidiaries; (iii) the parent financial holding company or its subsidiaries; (iv) the mixed activity holding company or its subsidiaries; (v) the mixed financial holding company or its subsidiaries; (vi) any undertaking that has close links with entities referred to in points (i) to (v); (f) the instruments are not subject to any arrangement that otherwise enhances the seniority of the claim under the instruments; (g) the instruments have an original maturity of at least five years; (h) the provisions governing the instruments do not include any incentive for their principal amount to be redeemed or repaid, as applicable by the institution prior to their maturity; (i) where the instruments include one or more early repayment options, including call options, the options are exercisable at the sole discretion of the issuer; (j) the instruments may be called, redeemed, repaid or repurchased early only where the conditions set out in Article 77 are met, and not before five years after the date of issuance, except where the conditions set out in Article 78(4) are met; (k) the provisions governing the instruments do not indicate explicitly or implicitly that the instruments would be called, redeemed, repaid or repurchased early, as applicable, by the institution other than in the case of the insolvency or liquidation of the institution and the institution does not otherwise provide such an indication; (l) the provisions governing the instruments do not give the holder the right to accelerate the future scheduled payment of interest or principal, other than in the case of the insolvency or liquidation of the institution; (m) the level of interest or dividends payments, as applicable, due on the instruments will not be amended on the basis of the credit standing of the institution or its parent undertaking; (n) where the issuer is established in a third country and has been designated in accordance with Article 12 of Directive 2014/59/EU as part of a resolution group the resolution entity of which is established in the Union or where the issuer is established in a Member State, the law or contractual provisions governing the instruments require that, upon a decision by the resolution authority to exercise the write-down and conversion powers referred to in Article 59 of that Directive, the principal amount of the instruments is to be written down on a permanent basis or the instruments are to be converted to Common Equity Tier 1 instruments; where the issuer is established in a third country and has not been designated in accordance with Article 12 of Directive 2014/59/EU as a part of a resolution group the resolution entity of which is established in the Union, the law or contractual provisions governing the instruments require that, upon a decision by the relevant third-country authority, the principal amount of the instruments is to be written down on a permanent basis or the instruments are to be converted into Common Equity Tier 1 instruments; (o) where the issuer is established in a third country and has been designated in accordance with Article 12 of Directive 2014/59/EU as part of a resolution group the resolution entity of which is established in the Union or where the issuer is established in a Member State, the instruments

It is the subordination itself that puts creditors whose claims arise from subordinated obligations at a major disadvantage compared to "ordinary" creditors.[31] An opinion of the Advocate General of the Court of Justice of the European Union, explaining the nature of subordinated obligations, states that a subordinated obligation from the perspective of the creditor means:

> *to make funds available to the issuer over a particularly long period of time* […]. *A higher return than would be yielded by an ordinary loan serves to reward both the term over which the capital invested is committed and the associated risk attaching to its repayment. After all, the capital is repayable only after the claims of all other creditors, including unsecured creditors, have been satisfied.*[32]

Thus, in accordance with the recognition of the Constitutional Court of the Republic of Latvia, it can be judged already from the nature of subordinated obligations that the subjects of subordinated obligations assume with them a significant risk of commercial activity, which also includes a potential restriction or even loss of property rights in the event of unsuccessful commercial activity.[33]

It follows from the above that, for a debtor (issuer) not facing financial difficulties, subordinated bonds with the subordinated obligation they contain are not very different from other types of bonds and loans. This is also confirmed by the recognition in German legal doctrine that outside insolvency and liquidation proceedings there are no restrictions on the enforcement of the claims (other than those already mentioned).[34]

However, it must be emphasised that the subordination of the claim does not start with the commencement of insolvency or liquidation proceedings, but long before,[35] which bondholders should be aware of when acquiring subordinated bonds with higher risk-taking to obtain higher returns.[36] The above has also been recognised by the Constitutional Court of the Republic of Latvia, stating that:

> *The risk that in the event of financial difficulties of a commercial company the fulfilment of the subordinated obligations might be restricted was assumed*

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may only be issued under, or be otherwise subject to the laws of a third country where, under those laws, the exercise of the write-down and conversion powers referred to in Article 59 of that Directive is effective and enforceable on the basis of statutory provisions or legally enforceable contractual provisions that recognise resolution or other write-down or conversion actions; (p) the instruments are not subject to set-off or netting arrangements that would undermine their capacity to absorb losses.

31 *Zeņķis, P.* Subordinētās obligācijas, 103.–109. lpp.

32 Opinion of Advocate General Yves Bot of 12 November 2015 in case No. C-483/14, para. 34. Available: https://curia.europa.eu/juris/document/document.jsf;jsessionid=F7143F19E60E9522CF0F27034578069E?text=&docid=171401&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1680980 [last viewed 07.04.2023].

33 Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

34 *Goette, W., Habersack, M., Kalss, S. (Hrsg.), Verse, D. A., Schürnbrand, J.* Münchener Kommentar zum Aktiengesetz [Munich Commentary on the Stock Corporation Act]. Band 4. §§ 179–277. 5.Auflage. München: C. H. Beck, 2021, Erster Unterabschnitt, Kapitalerhöhung gegen Einlagen, Vorbemerkung, Rn. 38.

35 *Giedinghagen, J., Keller, T.* Das qualifizierte Nachrangdarlehen [The qualified subordinated loan]. Neue Juristische Wochenschrift Spezial, 2020, Heft 7.

36 *Berger, K. P.* Fremdkapitalnahe Mezzanine-Finanzierungen [Debt-based mezzanine financing]. Zeitschrift für Bankrecht und Bankwirtschaft, 2008, Heft 2.

by the persons with the establishment of the subordinated obligations, namely by agreeing to become the subjects of the subordinated obligations.[37]

The primary disadvantage that a person assumes to suffer for a particularly high return is that the creditor has no means of obtaining early repayment of its loan and, in the event of the liquidation, insolvency or reorganisation of the company, the creditor will only receive its payment after all "ordinary" creditors, but before the claims of shareholders (members) have been satisfied.[38] These differences between subordinated obligations and "ordinary" obligations (e.g. a loan) lead to the conclusion that these obligations are primarily distinguished from ordinary obligations by their order of fulfilment rather than by any substantive differences in the legal framework.[39]

Accordingly, neither the fact that the funds underlying the obligation may be used to carry out operations which are normally carried out with equity capital, such as increasing the borrowing base, nor the fact that, from the perspective of creditors, the transfer of funds to a merchant by way of a subordinated obligations may in certain respects be treated as a contribution to the capital of the undertaking, alter the nature of the obligation.[40] In particular, if a subordinated obligation is created by the acquisition of subordinated bonds issued, the obligations arising from those subordinated bonds must first be treated as obligations arising from the bond, and only when this is relevant (for example, in the event of the liquidation or insolvency of the issuer) is it worth analysing further the subordinated aspects of those bonds.[41]

Finally, it is important to note that the subordination clause cannot be waived by the parties. In particular, the subordination clause agreement must not be conditional and fixed-term, i.e., it cannot be for a shorter term than the main obligation, otherwise the funds transferred to the issuer from the subordinated loan as part of the bond issue will inevitably be converted into an ordinary loan. Thus, in certain respects, such an arrangement for legal purposes may be regarded as an agreement for the benefit of third parties – all other creditors.[42]

2. State aid and its impact on the fulfilment of subordinated obligations

At the same time, insolvency problems of a subordinated bond issuer will not necessarily lead to the insolvency proceedings of the issuer ending in the liquidation of that issuer. Although, following the adoption of Regulation (EU) No. 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund[43] (hereinafter – Regulation 806/2014), public funds generally should not

[37] Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No 2014-36-01, para. 15.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[38] Judgment of the Court of Justice of the European Union of 19 July 2016, Case C-526/14, Kotnik and Others, para. 27. Available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62014CJ0526 [last viewed 07.04.2023].

[39] *Everett, E.* Subordinated Debt, p. 955.

[40] Ibid., p. 954.

[41] *Zeņķis, P.* Subordinētās obligācijas, 103.–109. lpp.

[42] *Herresthal, C. (Red.), Fest, T.* Münchener Kommentar zum Handelsgesetzbuch, Rn. 90–91.

[43] Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain

be involved in the rescue of a credit institution, the use of public funds to resolve the insolvency of a credit institution through the Single Resolution Fund is not entirely excluded. Regulation 806/2014 allows for the granting of "extraordinary public financial support", which constitutes State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union[44] pursuant to Article 3(1)(29) thereof, to rescue the financial difficulties of a credit institution.

Thus, while the lessons from the financial crisis of 2007–2009 have limited the use of State aid to rescue credit institutions, they have not been completely ruled out. At the same time, even if State aid is granted and the issuer obtains sufficient funds to cover all creditors' claims, the granting of State aid still has a significant impact on the fulfilment of the issuer's subordinated obligations.

The Constitutional Court of the Republic of Latvia has initiated a number of cases following constitutional complaints of shareholders of *Parex banka* and persons related to them, in which the issue of the impact of State aid on the receipt of the fulfilment of the obligations arising from the subordinated obligations has been examined.[45] The authors of this article, at the request of the Constitutional Court, have also provided their opinion on the impact of State aid on the receipt of the fulfilment of obligations arising from subordinated obligations and the legality of such restrictions in one of such cases.

For example, in case No. 2020-49-01[46] initiated before the Constitutional Court of the Republic of Latvia, the compliance of Article 8(1) and Article 8^{1}(2) and (3) of the Law on Control of Aid for Commercial Activity[47] with Articles 1, 91, 92 and 105 of the Constitution of the Republic of Latvia[48] was contested. Article 8(1) of the Law on Control of Aid for Commercial Activity states:

> *If a commercial company which is facing financial difficulties receives aid in accordance with the laws and regulations governing aid for commercial activities, from the moment of granting aid for commercial activities until the end of the provision of aid, observing the provisions laid down in the decision of the European Commission or national laws and regulations on granting aid and irrespective of the effective legal obligations of a commercial company, the commercial company is prohibited from fulfilling subordinate obligations (including the prohibition to repay a loan, calculate, accumulate*

investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010. OJ, L 225, 30.7.2014, pp. 1–90. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0806 [last viewed 07.04.2023].

[44] Consolidated version of the Treaty on the Functioning of the European Union. OJ, C 326, 26.10.2012, pp. 47–390. Available: https://eur-lex.europa.eu/legal-content/LV/TXT/?uri=celex%3A12012E%2FTXT [last viewed 07.04.2023].

[45] See, for instance: Judgment of the Constitutional Court of the Republic of Latvia of 27 May 2021 in case No. 2020-49-01 Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search= [last viewed 07.04.2023]; Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[46] Judgment of the Constitutional Court of the Republic of Latvia of 27 May 2021 in case No. 2020-49-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search= [last viewed 07.04.2023].

[47] Komercdarbības atbalsta kontroles likums [Law on Control of Aid for Commercial Activity] (19.06.2014). Available: https://likumi.lv/ta/id/267199-komercdarbibas-atbalsta-kontroles-likums [last viewed 07.04.2023].

[48] 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 23.03.2023].

or pay out an interest or other remuneration for such loan) irrespective of the moment when the subordinate obligations were established.

Therefore, Article 8(1) of the Law on Control of Aid for Commercial Activity prohibits the issuer from fulfilling its subordinated obligations, including, for example, the redemption of subordinated bonds, until the end of the aid granted to it.

The authors have already concluded that the early enforcement of claims arising from subordinated bonds and other subordinated obligations is only possible in the event of insolvency or liquidation of the issuer, which is why in some respects such a subordination arrangement for legal purposes can be considered as an agreement for the benefit of third parties – all other creditors. State aid to a commercial company facing difficulties also has a similar function.

When granting State aid, States aim to promote economic or social development.[49] As is clear from the annotation to the law "Amendments to the Credit Institution Law" of 29 October 2009,[50] the purpose of State aid to credit institutions is to help restructure a bank facing financial difficulties and restore its liquidity.[51] The Constitutional Court of the Republic of Latvia has recognised that "State aid protects the whole of society from the negative consequences that could result from the mismanagement and subsequent insolvency of a commercial company".[52] It is financial stability that is considered to be the most important factor in assessing the need for State aid to the financial sector.[53]

It is important that State aid is granted to commercial companies to remedy the negative consequences of their financial difficulties.[54] Given that banks are at the heart of the financial system, granting State aid to a bank avoids negative consequences not only for the bank but for the financial system as a whole, including the bank's customers and investors.

At the same time, it must be emphasised that granting State aid to a bank does not protect all its customers and investors. As recognised by the Constitutional Court of the Republic of Latvia, "The fundamental right to property enshrined in Article 105 of the Constitution does not guarantee the right to be protected from business risk. Shareholders and subordinated creditors may benefit from the successful operation of

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[49] European Commission. Common Principles for an Economic Assessment of the Compatibility of State Aid Under Article 87.3, p. 1. Available: https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf [last viewed 07.04.2023].

[50] Grozījumi Kredītiestāžu likumā [Amendments to the Credit Institution Law] (22.10.2009). Available: https://likumi.lv/ta/id/199747-grozijumi-kreditiestazu-likuma [last viewed 07.04.2023].

[51] Likumprojekta "Grozījumi Kredītiestāžu likumā" anotācija [Annotation to the draft law "Amendments to the Credit Institution Law"]. Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/ACBEA9C446D6A9B9C225764E003B2835?OpenDocument [last viewed 07.04.2023].

[52] Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01, para. 20. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[53] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'). OJ, C 216, 30 July 2013. Available: https://eur-lex.europa.eu/legal-content/LV/TXT/PDF/?uri=CELEX:52013XC0730(01)&from=EN [last viewed 07.04.2023].

[54] Decision of 18 September 2017 of the Panel of the Constitutional Court of the Republic of Latvia on refusal to initiate a case (Application No. 138/2017), para. 7. Available: https://www.satv.tiesa.gov.lv/decisions/kolegijas-2017-gada-18-septembra-lemums-pieteikums-nr-138-2017/ [last viewed 07.04.2023].

a credit institution, but at the same time are exposed to the most substantial risk"[55] and "The State is not obliged to prevent the loss of [property] value due to market factors".[56] Thus, even if State aid is granted, the State does not guarantee the right of a participant in a risky business venture to be protected against commercial risk.[57] This is also established in the case law of the European Court of Human Rights.[58] Since the reduction in the value of the property of shareholders (members) or subordinated obligation lenders and subordinated bondholders results from the fact that the credit institution is in financial difficulties, the fact that those financial difficulties are alleviated by the granting of State aid does not allow shareholders (members) and creditors of subordinated obligations to rely on being protected to the same extent as any other creditor – the depositor.

All State aid measures are based on three factors: the viability of companies, the principle of burden-sharing and competition. State aid must therefore be limited to the minimum necessary and the shareholders and the beneficiary must make an appropriate contribution to the restructuring costs from their own resources.[59] As recognised by the Constitutional Court of the Republic of Latvia, it is precisely because the creditors of the subordinated obligations have accepted that they have the right to demand early fulfilment of the subordinated obligations only in the event of insolvency or liquidation of the commercial company and after all other creditors' claims have been satisfied, but before the claims of members or shareholders have been satisfied, that they must assume co-responsibility in a situation where the commercial company is in financial difficulties.[60]

As explained in the letter of the Minister of Finance to the responsible committee of the Parliament of the Republic of Latvia, with which the proposal for the inclusion of the first paragraph of Article 8 of the Law on Control of Aid for Commercial Activity was submitted, the need and purpose of such regulation is:

> […] *to prevent commercial companies that have received or intend to receive aid granted to commercial companies facing financial difficulties and which have subordinated obligations, not primarily to repay the aid received but to fulfil the subordinated obligations, which is contrary to the interests of society and taxpayers.* […] *Under the draft law, it is presumed that the aid provided to commercial companies will be used primarily to ensure the functioning of commercial companies and not to pursue the pecuniary interests of certain individuals.*[61]

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[55] Judgment of the Constitutional Court of the Republic of Latvia of 19 October 2011 in case No. 2010-71-01, para. 23.6. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-71-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[56] Judgment of the Constitutional Court of the Republic of Latvia of 30 March 2011 in case No. 2010-60-01, para. 17.3. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-60-01_Spriedums.pdf [last viewed 07.04.2023].

[57] Ibid.

[58] *Harris, D. O'Boyle, M., Bates, E., Buckley, C.* Harris, O'Boyle and Warbrick. Law of the European Convention on Human Rights. 2nd ed., Oxford: Oxford University Press, 2009, p. 665.

[59] *De Kok, J.* Competition Policy in the Framework and Application of State Aid in the Banking Sector, European State Aid Law Quarterly, Vol. 14, issue 2, 2015, p. 228. Available: https://www.jstor.org/stable/pdf/26689495.pdf [last viewed 07.04.2023].

[60] Judgment of the Constitutional Court of the Republic of Latvia of 13 October 2015 in case No. 2014-36-01, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-36-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[61] Ibid., para. 18.

As the Constitutional Court of the Republic of Latvia has recognised, if the State is involved in the rescue and restructuring of a commercial company which, without State aid, would most likely become insolvent, and it is as a result of State aid that the commercial company can successfully continue its activities, it would not be in accordance with the principle of justice that those entities, which benefited most when the commercial company was performing well, would not participate in its rescue and restructuring.[62]

Thus, the restriction preventing the enforcement of the subordinated obligations, as required by the European Union in Commission Decision (EU) No. 2015/162,[63] serves the purpose of ensuring that the creditors of the subordinated obligations do not receive an undue advantage, that public funds are not wasted and that the amount of the aid is returned to the State budget as far as possible. This restriction is aimed at safeguarding the important interests of taxpayers and society as a whole, and it is essential that creditors of subordinated obligations also bear a burden that is proportionate to the burden borne by taxpayers when aid is granted to a commercial company.[64]

It follows from the above that State aid is granted with the aim of protecting only depositors and not everyone connected with the credit institution. In particular, given that State aid consists of State budget resources which are the common property of the whole of society, it is granted in the interest of the whole of society. Consequently, the objective of State aid is to protect the public – the depositors – and not individual persons – the shareholders (members) of the credit institution or creditors of subordinated obligations, such as bondholders of subordinated bonds issued by the credit institution.

Even in the absence of State aid, the general framework for the satisfaction of creditors' claims provides that creditors of a credit institution's subordinated obligations and shareholders (members) of a credit institution are protected to a much lesser extent than depositors. This principle is reflected in Articles 139^2 to 139^5 of the Credit Institution Law, according to which the claims of creditors of the credit institution's subordinated obligations are satisfied last and the claims of shareholders (members) are satisfied very last. Although Articles 139^2–139^5 of the Credit Institution Law do not specifically regulate the procedure for repayment of State aid, bearing in mind that the purpose of granting State aid to a bank is to protect its depositors, it must be concluded that repayment of State aid must be made before the claims of the creditors of the subordinated obligations and shareholders (members) are satisfied. Since the State is not obliged to ensure, through the State aid mechanism, that the creditors and shareholders (members) of the subordinated obligations receive the satisfaction of their claims, there is no reason for the credit institution, if it is unable to repay the State aid, to satisfy the claims of the creditors of the subordinated obligations and shareholders (members) first.

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[62] Judgment of the Constitutional Court of the Republic of Latvia of 19 October 2011 in case No. 2010-71-01, para. 19.3. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-71-01_Spriedums.pdf#search= [last viewed 07.04.2023].

[63] Commission Decision (EU) 2015/162 of 9 July 2014 on the State aid SA.36612 (2014/C) (ex 2013/NN) implemented by Latvia for Parex (notified under document C(2014) 4550) Text with EEA relevance. OJ, L 27, 3.2.2015, pp. 12–36. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0162 [last viewed 07.04.2023].

[64] Judgment of the Constitutional Court of the Republic of Latvia of 27 May 2021 in case No. 2020-49-01, para. 25. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/09/2020_49_01_Spriedums.pdf#search= [last viewed 07.04.2023].

It follows that the subordinated bondholders and other creditors of subordinated obligations are exposed to the risk that they will not be able to enforce their claims because the debtor has insufficient funds. At the same time, as recognised by the Constitutional Court of the Republic of Latvia, the right to property does not guarantee the right to be protected from the risk of commercial activity.[65] Consequently, the State is not obliged to prevent the loss of value of property as a result of market factors.[66] Also, at present, no law guarantees that a creditor will always be able to enforce its claims, as there are various risks that may affect this possibility.[67]

At the same time, Article 8^{1}(1) of the Law on Control of Aid for Commercial Activity provides:

> *If a commercial company which is in financial difficulty and receives aid in accordance with the laws and regulations governing aid for commercial activity, not later than six months prior to the term of liquidation of the commercial company specified in the decision of the European Commission or in the national laws and regulations regarding the granting of aid, concludes that the aid for commercial activity has not been fully repaid and will not be repaid until the end of the term of the provision of the aid, the commercial company shall terminate the activity and shall initiate the liquidation procedure of the commercial company, taking into account the conditions provided for in Paragraph two and three of this Article.*

Article $8.^{1}$(2)(1), on the other hand, states that, until the aid for commercial activity is repaid, the inability to repay the aid for commercial activity and the non-fulfilment of the subordinate obligations shall not constitute a basis for initiating insolvency proceedings. Thus, even if the creditors of the subordinated obligations do not receive the satisfaction of their claims, they are not entitled to initiate insolvency proceedings against the commercial company that has received State aid.

By way of comparison, it is also recognised in the German legal literature that the claims of subordinated creditors, like those of member-lenders, cannot compete with the claims of other "regular" creditors and cannot be the basis for insolvency proceedings.[68] Section 19(1) of the German Insolvency Code[69] states that: "overindebtedness is also a reason to open insolvency proceedings for a legal entity." According to Section 19(2) of the German Insolvency Code, on the other hand,

> *Overindebtedness exists if the debtor's assets no longer cover existing obligations to pay, unless it is highly likely, considering the circumstances, that the enterprise will continue to exist for the next 12 months. As regards claims in respect of the restitution of shareholder loans or claims deriving from legal transactions corresponding in economic terms to such a loan for which the creditors and the debtor have agreed, in accordance with*

[65] Judgment of the Constitutional Court of the Republic of Latvia of 30 March 2011 in case No. 2010-60-01, para. 17.3. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-60-01_Spriedums.pdf [last viewed 07.04.2023].

[66] *Harris, D. O'Boyle, M., Bates, E., Buckley, C.* Harris, O'Boyle and Warbrick, p. 665.

[67] Judgment of the Constitutional Court of the Republic of Latvia of 30 March 2011 in case No. 2010-60-01, para. 17.3. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-60-01_Spriedums.pdf [last viewed 07.04.2023].

[68] *Braun, E. (Hrsg.), Bäuerle, E. (Bearb.)*. Insolvenzordnung (InsO) [Insolvency Code (InsO)]. Kommentar. 5, neu bearbeitete Auflage. München: Verlag C. H. Beck, 2012, § 39, Rn. 20.

[69] Insolvenzordnung [Insolvency Statute of the Federal Republic of Germany]. Available: https://www.gesetze-im-internet.de/inso/ [last viewed 07.04.2023].

> *section 39(2), that they rank lower behind the claims set out in section 39(1), nos. 1 to 5 in the insolvency proceedings, consideration is not to be given to the obligations under sentence 1.* [Authors' emphasis]

The German legal doctrine draws the clear conclusion from the cited provision that the non-satisfaction of a claim by a subordinated creditor, just like a claim for repayment of a loan by a shareholder (member), cannot be the basis for the commencement of insolvency proceedings.[70] Thus, in Germany, in all cases, subordinated obligations do not constitute grounds for filing insolvency proceedings, even irrespective of whether the merchant in question has received State aid.

At the same time, it should be noted that according to Article 8^1(3) of the Law on Control of Aid for Commercial Activity, the Enterprise Register of the Republic of Latvia is obliged to exclude a commercial company from the commercial register also if the aid for commercial activity has not been repaid or the subordinated obligations have not been fulfilled in the course of liquidation of the commercial company. Thus, the non-fulfilment of subordinated obligations and the non-repayment in full of aid for commercial activity do not preclude the exclusion of a company that has received aid for commercial activity from the commercial register and the non-fulfilment of these obligations does not constitute grounds for initiating insolvency proceedings.

Consequently, the prohibition in Article 8^1(2)(1) of the Law on Control of Aid for Commercial Activity for creditors of subordinated obligations to file for insolvency proceedings prior to repayment of State aid is also considered logical and appropriate, given the nature of the subordinated obligations. In the authors' view, this provision ensures that the insolvency proceedings of a commercial company which has received State aid are not used as a means of securing the pecuniary interests of creditors of subordinated obligations and shareholders (members), which would be contrary to the purpose of the State aid. However, the regulation in Article 8^1(3) of the Law on Control of Aid for Commercial Activity, which allows for the exclusion of a commercial company that has received State aid from the commercial register irrespective of the fact that the subordinated obligations have not been fulfilled, is a logical step to ensure that such a commercial company is excluded from the commercial register without going through insolvency proceedings, which would be contrary to the purpose of State aid.

In view of all the above, it follows that the granting of State aid to an issuer has a significant impact on the fulfilment of its subordinated bonds and other subordinated obligations. At the same time, given that the purpose of granting State aid to a bank is to protect its depositors and not the creditors of the subordinated obligations and shareholders (members) who are required to participate in the rescue of the credit institution, such restrictions on the enforcement of claims arising from the issuer's subordinated bonds and other subordinated obligations have a legitimate aim which justifies the restriction of the rights of the subordinated bondholders and other creditors of subordinated obligations.

Summary

The main difference between subordinated bonds and other similar instruments, on the one hand, and other types of bonds and loans, on the other hand, is the subordination of the enforcement of the claims embodied in them. Subordination means

[70] *Braun, E. (Hrsg.), Bußhardt, H. (Bearb.)*. Insolvenzordnung, § 19, Rn. 14.

that in the event of insolvency (or liquidation of the borrower (issuer)), all claims of senior creditors (including those arising from ordinary bonds) are satisfied first, then the claims of the holder of the subordinated claim and finally the claims of the equity providers (shareholders) arising from the equity securities they hold. Therefore, a situation in which the receipt of the fulfilment of subordinated obligations precedes the receipt of the fulfilment of "ordinary" obligations is not permissible.

Irrespective of the form in which the subordinated obligations are created, their subordination is not derived from a rule of law but from a contractual agreement. Thus, the creation of subordination is linked to a private law arrangement of the parties.

The funds raised under the subordinated obligations, by their subordinate nature, cannot be credited to either equity or outside or leveraged capital and are in fact regarded as a kind of intermediate capital, characterised, on the one hand, by increased participation in business risks compared with outside capital and, on the other hand, by its exclusion from the share capital of the company, which in turn implies that the creditor is not entitled to participate in the management of the capital company. Thus, in contrast to ordinary obligations, subordinated obligations could be considered as "debt serving as equity". The subordination puts creditors whose claims arise from subordinated obligations at a major disadvantage compared to "ordinary" creditors.

The subordination of a claim under a bond does not begin with the commencement of insolvency or liquidation proceedings of the issuer but with the conclusion of an agreement between the parties to create subordinated obligations.

While the lessons from the financial crisis of 2007–2009 have limited the use of State aid to rescue credit institutions, Regulation 806/2014 and the Single Resolution Mechanism as a whole have not completely ruled it out. At the same time, even if State aid is granted and the debtor (issuer) due to State aid obtains sufficient funds to cover all creditors' claims, the granting of State aid has a significant impact on the fulfilment of the debtor's (issuer's) subordinated obligations.

Article 8(1) of the Latvian Law on Control of Aid for Commercial Activity prohibits the issuer from fulfilling its subordinated obligations, including, for example, the redemption of subordinated bonds, until the end of the aid granted to it. Precisely because the creditors of the subordinated obligations have accepted that they have the right to demand early fulfilment of the subordinated obligations only in the event of insolvency or liquidation of the commercial company and after all other creditors' claims have been satisfied, they must assume co-responsibility in a situation where the commercial company is in financial difficulties. Therefore, the granting of State aid does not allow shareholders (members) and creditors of subordinated obligations to rely on being protected to the same extent as any other creditor – the depositor.

Since State aid is granted for the purpose of protecting only depositors and not everyone connected with a credit institution, and given that State aid consists of State budget resources which are the common property of society as a whole, it is granted in the interest of society as a whole. Consequently, State aid is not intended to protect the shareholders (members) of a credit institution or the creditors of subordinated obligations, such as the bondholders of subordinated bonds issued by a credit institution.

Even in the absence of State aid, the general framework for the satisfaction of creditors' claims provides that creditors of a credit institution's subordinated obligations and shareholders (members) of a credit institution are protected to a much

lesser extent than depositors. This principle is reflected in Articles 139^2 to 139^5 of the Credit Institution Law, according to which the claims of creditors of the credit institution's subordinated obligations are satisfied last and the claims of shareholders (members) are satisfied very last. Although Articles 139^2–139^5 of the Credit Institution Law do not specifically regulate the procedure for repayment of State aid, bearing in mind that the purpose of granting State aid to a bank is to protect its depositors, it must be concluded that repayment of State aid must be made before the claims of the creditors of the subordinated obligations and shareholders (members) are satisfied. The granting of State aid to a debtor (issuer) has a significant impact on the fulfilment of its issued subordinated bonds and other subordinated obligations. At the same time, given that the purpose of granting State aid to a bank is to protect its depositors and not the creditors of the subordinated obligations and shareholders (members) who are required to participate in the rescue of the credit institution, such restrictions on the enforcement of claims arising from the issuer's subordinated bonds and other subordinated obligations have a legitimate aim which justifies the restriction of the rights of the subordinated bondholders and other creditors of subordinated obligations.

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Social Welfare for Ukrainian Citizens in Poland. Selected Aspects

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The objective of the article is to analyse the provisions of the Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country of 12 March 2022 (hereinafter: Act on Assistance or AoAUC) regarding the ability of this group of foreigners to apply for social welfare in Poland. The article reconstructs the personal criteria regarding the right to social welfare for Ukrainian citizens who have come to Poland as a result of the unprecedented aggression of the Russian Federation on the territory of independent Ukraine. It also discusses the principles and procedure of its award to Ukrainian citizens by the authorities of the Polish public administration. *De lege lata* and *de lege ferenda* conclusions are formulated on the extent and forms of social welfare for which Ukrainian citizens may apply.

Keywords: social welfare, Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country, war refugees, war in Ukraine, Republic of Poland.

Contents

Introduction

"The Russian Federation's troops attacked the territory of Ukraine on 24 February 2022. These events led to thousands of Ukrainian citizens starting to head towards Poland seeking refuge.[1] It therefore became necessary to develop legal solutions regarding this group of foreigners."[2] The European Council condemned this unprovoked and unjustified aggression on the very first day of the war, emphasizing, among other things, that Russia had grossly breached international law and the principles of the UN Charter. The European Council also demanded that Russia immediately cease military action and respect Ukraine's sovereignty, territorial integrity and independence.[3] On 4 March 2022, the Council (EU) adopted Implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.[4]

On 9 March 2022, the Polish *Sejm* adopted the Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country,[5] implementing Council Implementing Decision (EU) 2022/382 and resulting in the introduction of temporary protection. The Act represents the first ever use of the instruments of protection provided for in Council Directive 2001/55/EC.[6] It was published on 12 March 2022 in the Journal of Laws of the Republic of Poland and entered into force retrospectively from 24 February 2022. The justification of this Act emphasizes that it is an attempt to respond to the problems that have arisen in the area of ensuring the legality of the stay of people coming from Ukraine to Poland as a result of Russia's aggression against Ukraine.[7] The Act on assistance is in force together with other acts of law to date regarding the legalization and residence of foreigners, and therefore does not rule out other procedures for obtaining temporary protection in Poland for Ukrainian nationals not covered by AoAUC under Article 1(1), in particular, on the basis of Council Implementing Decision (EU) 2022/382 of 04.03.2022.[8] Furthermore, from the national law perspective, it constitutes

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1 See: Council Implementing Decision (EU) 2022/382 of 4.03.2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (OJ L 71, 4.3.2022, pp. 1–6).

2 Uzasadnienie do Rządowego projektu ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa [Justification to the Government bill on assistance to Ukrainian citizens in connection with the armed conflict in Ukraine]. Available: https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2069 [last viewed 21.05.2022].

3 European Council conclusions of 24.02.2022 on Russia's unprovoked and unjustified military aggression against Ukraine. Available: https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/european-council-conclusions-24-february-2022/ [last viewed 17.07.2022].

4 Council Implementing Decision (EU) 2022/382.

5 Ustawa o pomocy obywatelem Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa [The Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country] (12.03.2022), Journal of Laws of 2023, item 103, as amended.

6 Council Directive 2001/55/EC of 20.07.2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of effort between Member States in receiving such persons and bearing the consequences thereof (OJ L EU No. 212, p. 12).

7 Justification to the Government bill on assistance to Ukrainian citizens.

8 *Szmid, K., Sawicki, P.* (eds). Ustawa o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa [The Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country]. Warsaw: C. H. Beck, Legalis Database, 2022.

a *lex specialis* to the Act on Foreigners of 12 December 2013[9] and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland of 13 June 2003.[10]

AoAUC regulates not only issues related to the legalization of the residence of people coming to Poland from Ukraine, but also provides a simplified procedure for employing Ukrainian citizens legally residing in Poland, makes it easier for them to conduct business, and specifies the extent of the assistance organized by voivods, local government units (municipalities, counties and voivodships) and other entities. AoAUC also regulates the matter of the Assistance Fund, the rights of students, academic teachers and researchers who have come from Ukraine, as well as the principles of organizing and operating Polish universities and colleges. Likewise, this Act regulates the principles of education, upbringing, and care provided for children and pupils who are Ukrainian citizens, as well as the principles of taking up and conducting business activity by Ukrainian citizens.[11]

According to official statistics, since Russia's aggression against Ukraine, the Polish Border Guard officers have cleared 13 million people at border crossings coming from Ukraine to Poland.[12] This has resulted in an urgent need for the Polish public administration to provide assistance to Ukrainian citizens who have fled from the Russian aggression.[13] Along with the COVID-19 pandemic, the war in Ukraine has recently become one of the most serious challenges faced by the national public administration in the 21st century. The Russian aggression against Ukraine is primarily a human tragedy, which, in the long term, carries the threat of poverty, homelessness and perhaps even human trafficking. This necessitates providing social support to Ukrainian citizens within the framework of the national social welfare system, which would protect these people from falling into poverty or homelessness and, in the long term, would contribute to their integration into Polish society and enable them to live independently in Poland. It should therefore be emphasized that Article 29 AoAUC provides that social welfare benefits may be granted to Ukrainian citizens on the principles and in the procedure of the Act on Social Welfare of 12 March 2004.[14] Moreover, in the further provisions, AoAUC lays down the possibility for Ukrainian citizens to apply for other forms of social support outside the Act on Social Welfare, as well as for psychological assistance.[15]

1. Subjective aspects of the right to social welfare for Ukrainian citizens under the provisions of AoAUC

In order to analyse the subjective scope of the right to social welfare for Ukrainian citizens in connection with the provisions of AoAUC, it would first be necessary to establish what the subjective scope of this Act is. The beneficiaries of AoAUC are:

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[9] Ustawa o cudzoziemcach [The Act on Foreigners] (12.12.2013), Journal of Laws of 2023, item 1512, as amended, hereinafter: AoF.

[10] Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [The Act on Granting Protection to Foreigners on the Territory of the Republic of Poland] (13.06.2003), Journal of Laws of 2022, item 1264, as amended, hereinafter: AoProt.For.

[11] Article 3(3) AoAUC.

[12] Specified on the basis of the official profile of the Polish Border Guard Service. Available: https://twitter.com/Straz_Graniczna [last viewed 02.07.2023].

[13] *Maczyński, P.* Jak przyznawać świadczenia pomocy społecznej dla obywateli Ukrainy 'krok po kroku' [How to grant social welfare benefits to Ukrainian citizens 'step by step']. LEX/el. 2022 Database.

[14] Ustawa o pomocy społecznej [The Act on Social Welfare] (12.03.2004), Journal of Laws of 2023, item 901, as amended, hereinafter referred to as 'SWA'.

[15] Article 31–33 AoAUC.

1) Ukrainian citizens,
2) Ukrainian citizens who hold a Pole's Card,[16]
3) families of Ukrainian citizens who hold a Pole's Card,
4) spouses of Ukrainian citizens,

who have legally come to Poland since 24 February 2022 because of the war in Ukraine and declare that they intend to stay in the Republic of Poland. It should be noted at this point that stay in the Republic of Poland is considered legal until 4 March 2024.[17] If a Ukrainian citizen leaves Poland for more than 30 days, this deprives him or her of the right of legal residence.[18] According to Article 2(1) AoAUC, Ukrainian citizens, who legally arrived in Poland between 24.02.2022 and the date specified in the regulations issued under Article 2(2) AoAUC and declare that they intend to stay in Poland, are considered persons enjoying temporary protection in the Republic of Poland in the meaning of Article 106(1) AoProt.For. However, the provisions of Chapter 3 of Section III AoProt.For. and Article 87(1)(6) of the Act on the promotion of employment and labour market institutions[19] do not apply to the temporary protection enjoyed by Ukrainian citizens. It is simultaneously worth noting that, in the EU, Council Implementing Decision (EU) 2022/382 of 4.03.2022 applies to Ukrainian citizens, as well as stateless persons and nationals of third countries other than Ukraine who benefited from international protection in Ukraine and their family members, if they resided in Ukraine before 24 February 2022 inclusive. The group of people to whom temporary protection applies under the provisions of this decision is specified by its Article 2, which provides that 'This decision applies to the following categories of persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces that began on that date: (a) Ukrainian nationals residing in Ukraine before 24 February 2022; (b) stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and, (c) family members of the persons referred to in points (a) and (b).'

On the negative side, it should be emphasized that AoAUC does not apply to Ukrainian citizens who have:[20]

1) a permanent residence permit,
2) a long-term EU residence permit,
3) a temporary residence permit,
4) the status of a refugee,
5) subsidiary protection,
6) a tolerated stay permit.

Furthermore, Ukrainian citizens who have filed an application for international protection or declared that they intend to file such an application are not subject to the regulations of AoAUC, unless they withdraw the application or declaration. Ukrainian citizens, who benefit from temporary protection within an EU Member

[16] The procedure and conditions for obtaining a Pole's Card are specified in Ustawa o Karcie Polaka [The Act on the Pole's Card] (07.09.2007), Journal of Laws of 2023, item 192.
[17] Article 2(1) and (2) AoAUC.
[18] Article 11(2) AoAUC.
[19] Ustawa o promocji zatrudnienia i instytucjach rynku pracy [The Act on the Promotion of Employment and Labour Market Institutions] (20.04.2004), Journal of Laws of 2023, item 735, as amended.
[20] Article 2(3)(1) AoAUC.

State other than Poland, which was granted because of military activities in Ukraine among other things, are also not subject to the provisions of this law.[21]

Moving on to the considerations about the subjective scope of the right to social welfare for Ukrainian citizens under the provisions of AoAUC, it should be noted that, in accordance with Article 29(1) AoAUC, social welfare may be granted to Ukrainian citizens residing in Poland whose stay in Poland is considered legal under Article 2(1) AoAUC and who have been entered into the PESEL register.[22] According to Article 30(1) AoAUC, Ukrainian citizens whose family members have returned to Ukraine (e.g. to fight the Russian invaders) are also entitled to social welfare, whereby in this situation, the family member who has returned to Ukraine is not included among the family members.

It follows from the above that, in terms of the conditions for allowing social welfare, AoAUC distinguishes between two groups of potential beneficiaries of this welfare. These are:[23]

1) the people referred to in Article 2(1) AoAUC (Article 29 AoAUC), and
2) Ukrainian citizens legally residing in Poland, whose family members have returned to Ukraine – and therefore people who have already previously stayed in Poland, for example, on the basis of a temporary residence permit (Article 30 AoAUC).

The Ukrainian citizens to whom the provisions of AoAUC are addressed do not have the status of a foreigner under Article 91 SWA, i.e., a refugee, a foreigner benefiting from subsidiary protection or residing in Poland on the basis of a temporary residence permit granted in connection with the circumstance referred to in Article 159(1)(1)(c) or (d) AoF.[24]

Additionally, it should be pointed out that in accordance with Article 5 SWA, both Polish citizens and specific groups of foreigners are entitled to social welfare. Article 5(2)(a) SWA provides that, unless international agreements provide otherwise, foreigners, who are, in particular, persons enjoying international protection, i.e., they have refugee status or temporary protection, are entitled to social welfare. This group of foreigners may apply for the benefits specified in Article 92 SWA. Article 5(2)(b) SWA refers to foreigners who are staying on the territory of the Republic of Poland on the basis of a residence permit for humanitarian reasons or tolerated stay. The SWA provides for assistance in the form of shelter, a meal, necessary clothing and a special purpose benefit for this group of foreigners, and this task is performed by municipalities. However, the groups of foreigners specified in Article 5(2)(a) and (b) SWA do not include the category of foreigners, namely Ukrainian citizens, who are covered by the provisions of AoAUC.[25]

Consequently, Ukrainian citizens can have three statuses under the provisions of national law and, depending on their status, they are entitled to different types

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[21] Article 2(3)(3) AoAUC. See also: Article 2(3)(2) AoAUC.

[22] The PESEL number is an 11-digit numerical symbol uniquely identifying a natural person.

[23] *Klimowicz, I., Jóźwiak, S.* Pomoc społeczna i wsparcie instytucji pomocowych dla uciekinierów wojennych z Ukrainy – wybrane aspekty ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa [Social welfare and support of institutions providing aid to war refugees from Ukraine – selected aspects of the Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that country]. Doradca w Pomocy Społecznej, No. 90, May 2022. Available: https://doradcawpomocyspolecznej.pl/ [last viewed 10.07.2022].

[24] Ibid.

[25] Ibid.

of social welfare. The further part of this article will focus exclusively on Ukrainian citizens to whom the provisions of AoAUC are addressed.

2. Notion and forms of social welfare for Ukrainian citizens under the provisions of AoAUC

In order to clarify, what social welfare benefits can be claimed by Ukrainian citizens who are the addressees of AoAUC and on what conditions, the concept first needs to be explained and the legal regulation of social welfare in Poland should be specified. In the Polish literature on administrative law, social welfare may be understood narrowly or broadly. The narrow understanding of social welfare is related to the legal act dedicated to this matter, namely, the Act on Social Welfare, and the regulations it contains on the general principles and objectives, the type of benefits, and the principles and procedure for providing them, the organization of social welfare and the rules related to control proceedings in social welfare.[26] According to the definition contained in Article 2(1) SWA, the narrow understanding of social welfare should be applied to the institution of the State's social policy, intended to enable people and families to overcome difficult situations in life, which they are unable to overcome using their own rights, resources and capabilities. It is worth emphasizing that the narrow approach to social welfare refers to the principle of subsidiarity, which is formed by Article 2(1) and (3) and Article 2(2) SWA. According to the judgment of the Voivodship Administrative Court in Lublin of 17 January 2019, this principle in social welfare involves the state's obligation to assist the citizen in overcoming a difficult financial situation in which he or his family has found itself. However, the State's obligation is not unconditional, which means that social welfare should only be provided when, having taken advantage of his rights, resources and possibilities, the individual is no longer self-sufficient.[27] However, a broad definition of social welfare is related to all the regulations by which non-equivalent benefits are granted from public funds to satisfy the necessary needs of individuals or families who are unable to overcome the needs on their own.[28] Social welfare understood in this way includes the Acts on housing allowances,[29] on family benefits[30] and on State aid in the upbringing of children.[31]

In social welfare, the benefit, which is the fundamental form of providing social welfare, is the central conceptual category. The benefits from the national social welfare system are addressed to individuals or families,[32] relate to basic matters of

[26] *Nitecki, S.* Prawo do pomocy społecznej w polskim systemie prawnym [The right to social welfare in the Polish legal system]. Warsaw: Wolters Kluwer, 2008, p. 33.

[27] Ruling of the Voivodship Administrative Court in Lublin of 17.01.2019, II SA/Lu 726/18, Lex Database No. 2624773.

[28] *Nitecki, S.* Prawo do pomocy, p. 33.

[29] Ustawa o dodatkach mieszkaniowych [The Act on housing allowances] (21.06.2001), Journal of Laws, 2021, item 2021, as amended.

[30] Ustawa o świadczeniach rodzinnych [The Act on family benefits] (28.11.2003), Journal of Laws, 2023, item 390, as amended.

[31] Ustawa o pomocy państwa w wychowywaniu dzieci [The Act on State aid in the upbringing of children]. 11.02.2016, Journal of Laws, 2023, item 810.

[32] *Sierpowska, I.* Pomoc społeczna jako administracja świadcząca. Studium administracyjnoprawne [Social welfare as an example of a providing administration. A study in administrative law]. Warsaw: Wolters Kluwer Polska, 2012, p. 197.

life of significant importance to the individual (family), and are of a social nature.[33] They represent an instrument, whereby the State aims to guarantee the social security of its citizens.[34]

A list of individual benefits within the scope of the narrowly construed social welfare system was prepared by the legislator in Section II, Article 36 SWA. The benefits listed in this provision constitute an exhaustive list, which includes both monetary and non-monetary benefits. Article 36 SWA only contains a list of social welfare benefits, while the descriptions of the individual benefits and the prerequisites for obtaining them are contained later in the Act.[35] The monetary benefits that can be claimed under the SWA include a permanent benefit, a temporary benefit, a specific purpose benefit, as well as an allowance and loan for becoming economically independent. The non-monetary benefits that can be claimed by this group of foreigners include social work, specialist counselling, shelter, a meal and necessary clothing.[36] Ukrainian citizens may apply for the benefits referred to in Article 36 SWA on the principles and in the procedure of the SWA, and therefore, in principle, on the same principles as Polish citizens,[37] as discussed in detail below.

In addition, AoAUC provides for the possibility to grant Ukrainian citizens social benefits other than those referred to in Article 36 SWA, such as a one-off monetary benefit of PLN 300 per person for subsistence, in particular to cover expenditure on food, clothing, footwear, personal hygiene products and housing fees,[38] and they may also be granted food aid under the Fund for European Aid to the Most Deprived.[39] It is equally important that, in accordance with Article 26 AoAUC, people staying legally in Poland on the basis of Article 2(1) AoAUC are entitled to other forms of social support, such as family benefits, upbringing benefit 500+ (provided that the children are also living in the Republic of Poland), the 'Good start' allowance and family care capital. These forms of assistance are outside the Act on Social Welfare, among others, in the Act on State Aid in the Upbringing of Children.

Free psychological assistance should be considered a particularly important form of broadly defined non-monetary form of social welfare for Ukrainian citizens in connection with the traumas of war experienced by these people. Its provision is amongst the government administration tasks delegated to the municipality, and is financed through a special purpose grant from the state budget. Therefore, Ukrainian citizens can benefit from this form of assistance in the municipalities, which constitute the basic units of local government in Poland in the light of Article 164(1) of

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[33] *Nitecki, S.* Prawo do pomocy, p. 197.

[34] *Sierpowska, I.* Bezpieczeństwo socjalne jako kategoria dobra publicznego – na przykładzie pomocy społecznej [Social security as a category of a public good – based on the example of social welfare]. In: Administracja dóbr i usług publicznych [Administration of public goods and services], *Woźniak, M.* (ed.). Warsaw: Difin, 2013, p. 87.

[35] *Cendrowicz, D.* Sytuacja administracyjnoprawna adresata świadczeń z zakresu pomocy społecznej [The administrative law situation of a social welfare beneficiary]. Wrocław: Uniwersytet Wrocławski. E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii, 2017, p. 80.

[36] Article 36(1) SWA.

[37] Article 29(1) AoAUC

[38] Article 32 AoAUC

[39] Article 33 AoAUC

the Constitution of the Republic of Poland[40] and are closest to the local communities and the problems affecting them, including those of a social nature.[41]

It is worth emphasizing at this point that, in Poland, it is the municipalities and the municipal social welfare centres (or social services centres) operating in them that bear the main burden of providing benefits under the SWA[42]. Municipalities are the basic entities of the administration providing social welfare, although numerous tasks in this area are also performed by the counties and voivodship authorities, whereby voivodships, as regional governmental communities, do not perform tasks of a benefit nature. Such distribution of public tasks within the framework of social welfare is in line with the systemic assumptions that are applicable under the Polish Constitution and the basic systemic principles, which include the principle of subsidiarity and the principle of decentralization.[43]

3. Procedure for granting social welfare to Ukrainian citizens in connection with the provisions of AoAUC

In social welfare, in principle, benefits are granted on the basis of an administrative decision through a formalized administrative procedure. The procedure for awarding benefits in the form of an administrative decision is regulated by the SWA in Section II, Chapter 7 SWA. "Proceedings in the case of social welfare benefits". The regulations of a procedural nature contained in the SWA do not regulate all the issues related to handling administrative proceedings in social welfare. The provision of Article 14 SWA stipulates that, unless the SWA provides otherwise,[44] in matters not regulated in the SWA, the provisions of the Administrative Procedures Code[45] shall apply.

In administrative proceedings regarding benefits from social welfare in the narrowly construed sense, an important role is played by the family community interviews, the procedure and principles of which are regulated by the Regulation of the Minister of the Family and Social Policy on the family community interview.[46] A community interview is a basic and obligatory element of proceedings on taking evidence in social welfare, while the inability to conduct it prevents the authority from assessing the actual financial, family and living situation of the person applying for the benefit. Consequently, the award of a benefit by way of an administrative decision, without procedural steps taken in the form of a family community interview intended to gather a full set of evidence, means that the decision issued in such proceedings is defective.[47]

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[40] Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland] (02.04.1997), Journal of Laws No. 78, item 483, as amended.

[41] *Skoczylas, A., Piątek, W.* Komentarz do art. 16 [Commentary on Article 16]. In: Konstytucja RP. Komentarz. Tom 1 [Constitution of the Republic of Poland. Commentary. Volume 1], *Safjan, M., Bosek, L.* (eds). Warsaw: C. H. Beck, 2016, p. 443.

[42] Articles 17 and 18 SWA.

[43] *Lipowicz, I.* Samorząd terytorialny jako podmiot administracji świadczącej [Local self-government as a providing administrative entity]. Ruch Prawniczy, Ekonomiczny i Socjologiczny, No. 3, 2015, p. 115.

[44] *Nitecki, S.* Pomoc społeczna. Procedury i tryb przyznawania świadczeń [Social welfare. Procedures of granting benefits]. Wrocław: Gaskor Sp. z o.o., 2011, p. 24.

[45] Kodeks postępowania administracyjnego [The Administrative Procedure Code] (14.06.1960), Journal of Laws, 2023, item 775, as amended, hereinafter referred to as the 'APC'.

[46] Rozporządzenie Ministra Rodziny i Polityki Społecznej w sprawie rodzinnego wywiadu środowiskowego [Regulation of the Minister of the Family and Social Policy on the family community interview] (08.04.2021), Journal of Laws, item 893.

[47] Ruling of the Supreme Administrative Court of 01.03.2017, I OSK 2407/15, Lex Database No. 2277804.

However, the legislator decided to slightly deformalize the procedure for awarding assistance to Ukrainian citizens seeking refuge in the Republic of Poland from the war waged by Russia. A family community interview is not conducted in administrative proceedings on social welfare benefits, in which a Ukrainian citizen is a party applying for benefits, unless doubts arise as to the content of his or her declaration. According to Article 29(2) AoAUC, social welfare benefits are awarded to Ukrainian citizens on the basis of a declaration on the personal, family, income and property situation. The declaration is made under the sanction of criminal liability for making a false declaration.[48] It is also worth noting that the municipality of the place of residence of the person applying for these benefits has the competence to award the benefits, and therefore the provisions on the local jurisdiction of the municipality in social welfare matters, i.e., Article 101(1)–(4) and (7) SWA, do not apply in cases of this type.

Markedly, in proceedings on social welfare benefits for Ukrainian citizens, the cases must be settled, involving the documents which are not prepared in Polish in their original versions, but in Ukrainian. This can cause certain difficulties in the practice of the social welfare bodies, and a barrier in access to benefits for Ukrainian citizens, because Polish is the official language in Poland. Hence, procedural activities in these proceedings should be conducted in Polish and not in Ukrainian. This results in the need to use translations of documents in the proceedings, as the failure to comply with the obligation to perform official acts in Polish language constitutes a breach of the regulations on proceedings, which can have a significant impact on the outcome of the case.[49]

Summary

The analysis conducted leads to the following conclusions:

The crisis related to Russia's military aggression against Ukraine has posed numerous challenges for the Polish public administration. These are related to the need to provide assistance to Ukrainian citizens who have left their country as a result of the armed conflict in their country. The unprecedented scale of the influx of people from Ukraine is a major challenge for Poland in many areas of operation of the State and the national public administration. The situation has also posed numerous challenges to the institution of social welfare.

The result of the enactment of AoAUC has been that Ukrainian citizens who arrived in Poland after the outbreak of war in connection with the military action in Ukraine are able to apply for social welfare benefits.

Articles 29(2) and 29(3) AoAUC contain simplifications of the procedure in the case of social welfare benefits for Ukrainian citizens encompassed by the provisions of AoAUC. These include waiving a family community interview. However, they do not refer to the procedure of issuing an administrative decision on benefits, the decided majority of which, in accordance with Article 106(1) SWA, are awarded in the form of an administrative decision. Applications for social welfare benefits are made under the general rules envisaged for the given benefit, which are governed by the provisions of SWA.[50]

[48] Article 29(2) in conjunction with Article 2(3) AoAUC.
[49] Ruling of the Supreme Administrative Court of 09.05.2007, I GSK 1414/06, Lex Database No. 351111.
[50] Articles 29(2) and 29(3) AoAUC.

The proceedings on social welfare benefits are conducted in Polish, which is the official language of Poland. The failure to comply with the obligation to perform official acts in Polish constitutes a breach of the regulations on proceedings, which can have a significant impact on the outcome of the case. The exception regarding the ability to use another language in official contacts (other than Polish) is contained in Article 4(19) AoAUC and applies to the application form for assigning a PESEL number and the printout of the confirmation of having created a trusted profile. This does not rule out the introduction of conveniences by a given local government unit through the provision of translations of application forms, or the provision of the assistance of translators.[51]

Social welfare proceedings in Poland are of a transitional nature, coinciding with the time of protection arising from AoAUC and the decision of the EU Council, while the basic principle of social welfare institutions is the principle of subsidiarity. Considering the legal and factual situation of the citizens of Ukraine, who have come to Poland in connection with Russia's aggression in their country, such forms of assistance need to be developed in the long term, which will contribute to their integration into Polish society and will create the opportunities that are necessary for them to start an independent life (e.g., as a result of taking up employment or education).[52]

In the longer term, EU should make efforts to develop a long-term strategy of accepting and integrating Ukrainian citizens into the societies of the EU Member States. Therefore, the EU should increase its assistance to NGOs, which support the efforts of the governments in doing this.[53]

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[51] See: Article 27 of the Constitution of the Republic of Poland.

[52] Pomoc społeczna dla uchodźców [Social welfare for refugees]. Najwyższa Izba Kontroli [Supreme Audit Office of the Republic of Poland]. Available: https://www.nik.gov.pl/plik/id,10216,vp,12539.pdf [last viewed: 10.07.2022].

[53] Uchodźcy z Ukrainy objęci tymczasową ochroną w państwach Europy Środkowej [Refugees from Ukraine under temporary protection in Central European countries]. Available: https://ies.lublin.pl/komentarze/uchodzcy-z-ukrainy-objeci-tymczasowa-ochrona-w-panstwach-europy-srodkowej/ [last viewed: 02.07.2023].

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Ustawa o pomocy społecznej [The Act on Social Welfare] (12.03.2004), Journal of Laws, 2023, item 901, as amended.

Ustawa o promocji zatrudnienia i instytucjach rynku pracy [The Act on the Promotion of Employment and Labour Market Institutions] (20.04.2004), Journal of Laws, 2023, item 735, as amended.

Ustawa o Karcie Polaka [The Act on the Pole's Card] (07.09.2007), Journal of Laws, 2023, item 192.

Ustawa o ewidencji ludności [The Act on the Register of the Population] (24.09.2010), Journal of Laws, 2022, item 1191.

Ustawa o cudzoziemcach [The Act on Foreigners] (12.03.2013), Journal of Laws, 2023, item 1512, as amended.

Ustawa o pomocy państwa w wychowywaniu dzieci [The Act on State Aid in the Upbringing of Children] (11.02.2016), Journal of Laws, 2023, item 810.

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Council Implementing Decision (EU) 2022/382 of 04.03.2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (OJ L 71, 4.3.2022, p.p 1–6).

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Consolidation of the Principle of Democratic Elections in the Law of the Latvian People

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The article provides an analysis of the gradual consolidation of the principle of democratic elections in the election law of the Latvian people during the period from the abolition of serfdom in the Baltic Governorates of the Russian Empire at the beginning of the 19th century until the adoption of the *Satversme* [Constitution] of the Republic of Latvia on 15 February 1922. Abolition of serfdom was chosen as a point of reference for the publication, because "emancipation" gave liberty to the majority of Latvians as persons belonging to the peasant class. Until proclamation of the Republic of Latvia (1918), Latvians gained election experience in electing the councils of civil parishes, cities and the State Duma of the Russian Empire. None of the elections held in the Russian Empire can be considered to be democratic, since the principle of voters' equality was not complied with. Demand for democratic elections as denial of inequality consolidated among the Latvian people by the end of the 19th century. It is proven by the projects of Latvia's autonomy, elaborated even before the democratic February Revolution in the Russian Empire (1917). Following the proclamation of the Republic of Latvia, the legislator only enshrined (documented) in legal acts the will of the Latvian people to elect state and local government officials democratically.

Keywords: democracy, abolition of serfdom, electoral rights, freedom, civil parish community.

Contents

Introduction

Latvians have had to permanently justify and defend their right to live in an independent, democratic and legal country. In this regard, we can mention the explanation written more than 100 years ago by professor **Kār**lis Dišlers about the need to include in Article 1 of "Declaration on the State of Latvia" of 27 May 1920 two words with, actually, identical meaning – "Latvia is a **self-standing** and **independent** republic with a democratic state order" – in the Second Provisional Constitution (*Satversme*) of the Republic of Latvia[1]:

> *[…] one cannot say that this minor verbosity is out of place because the nationalistic "united great" Russia, which, assumedly, once will replace the bolshevist soviet Russia, will use all means to combat and contest the independence of the new states, which emerged from the ruins of Russia, perhaps it will even recognise the self-standing of these states "to a certain extent" but, at the same time, by this it will try to impose upon these states dependence from Russia, "to a certain extent". Therefore, it is important that the Latvian people, through the Constitutional Assembly, very strictly and clearly have formulated their will: to lead a totally self-standing life of the state, independent from any other state*.[2]

The right to live in a self-standing, independent, democratic state governed by the rule of law is not a gift of fate. Professor Rudolf von Jhering noted, for a good reason, in his world-famous publication "Der Kampf um's Recht" (The Struggle for Law) that peace without fight, pleasure without labour belong to the times in Paradise. Every right in this world has been obtained through struggle. Moreover, one should not only be able to gain rights through struggle but should be ready to defend them at any moment.[3]

In the 20th century, Latvians successfully fought for their right to live in a democratic state governed by the rule of law twice; however, until now there have been no studies in legal science, that would explore how the understanding of democratic elections have become consolidated in the law of the Latvian people. Therefore, the author defines as the aim for this article the initiation of scholarly discussion about how the right to elect and the right to be elected to, in accordance with the principle of democracy, state and local government decision-making bodies gradually consolidated into the law of the Latvian people in the period from the beginning of the 19th century until the adoption of the *Satversme* of the Republic of Latvia on 15 February 1922. The beginning of the 19th century was chosen as the point of reference for this publication, because this was the time when serfdom was abolished in the Baltic Governorates of the Russian Empire and the majority of Latvians, as persons belonging to the peasant class, became free.

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1 The Second Provisional *Satversme* of the Latvia consisted of "Declaration on the State of Latvia" and "Provisional Regulation on the Order of the Latvian State of 1 June 1920]. See *Dišlers, K.* Ievads Latvijas valststiesību zinātnē [Introduction to the science of Latvian state law]. Rīga: TNA, 2017, p. 85.

2 *Dišlers, K.* Latvijas pagaidu konstitūcija [Provisional Constitution of Latvia]. Tieslietu Ministrijas Vēstnesis, 1920, No. 2/3, p. 50.

3 *Jhering, R. von.* Der Kampf um's Recht. Zum hundertsten Todesjahr des Autors herausgegeben von Felix Ermacora [The Struggle for Law. Edited by Felix Ermacora for the centenary of the author's death]. Available: Bhttps://www.koeblergerhard.de/Fontes/JheringDerKampfumsRecht_hgvErmacora1992.pdf [last viewed 15.05.2023].

1. Democracy of the civil parish

Professor Immanuel Kant has written that a human being has only one primeval, innate right and this right is: "Liberty […] insofar as it can exist together with every other arbitrariness according to universal law, is this only original innate right to which every human being is entitled by virtue of his humanity."[4] Thus, human liberty is the point of reference for other rights. For the majority of Latvian people, abolition of serfdom also meant that they acquired the status of a free person. Therefore, the author holds that the abolition of serfdom became the point of reference for embodiment of the principle of democracy in the law of the Latvian people.

In the Latvian-populated Baltic Governorates of the Russian Empire, serfdom was abolished during the reign of Alexander I Romanov (*Aleksandr I Romanov*) (1801–1825) by the law of 25 August 1817 in the Governorate of Courland[5] and by the law of 26 March 1819 in the Governorate Livonia[6]. The Latvian-populated lands of the current Latgale (three districts) in the 19th century were part of the Vitebsk Governorate. The Vitebsk Governorate was not considered to be part of the Baltic Governorates. Here, serfdom was abolished later, on the basis of the Manifesto of 19 February 1861[7], issued during the reign of Alexander II Romanov (*Aleksandr II Romanov*) (1855–1881).

After serfdom was abolished, peasants had the obligation and the right to organise and administer the self-government of the civil parish community themselves.

The assembly, the court and the elders of the civil parish were defined as self-government bodies in the Baltic Governorates.

The civil parish assembly was convened on the initiative of the estate's police/board (hereafter – the estate) or with its permission. In the Governorate of Livonia, only one category (*razryad*) of peasants could be invited to the assembly, unless the matter pertained to the interests of the entire civil parish.[8] Predominantly, these were farm owners.[9] In the Governorate of Courland, if servants were invited, then farm owners and servants voted separately. In the case of unresolvable difference of opinion between the farm owners and the servants, the final decision was made by the estate.[10]

The civil parish assembly proposed three candidates for each office (office of the elder and the judge of the civil parish) for three years, and the estate approved one

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[4] „Freiheit (Unabhängigkeit von eines Anderen nötigender Willkür), sofern sie mit jedes Anderen Freiheit nach einem allgemeinem Gesetz zusammen bestehen kann, ist diese einzige, ursprüngliche, jedem Menschen, kraft seiner Menschheit, zustehende Recht." See: *Kant, I.* Die Metaphysik der Sitten [The Metaphysics of Morals]. Stuttgart: Philipp Reclam jun., 2011, Art. E, p. 76.

[5] Uchrezhdenie o Kurlyandskih" krest'yanax" [Decree on the Peasants of Courland] (25.08.1817). Polnoe sobranie zakonov" Rossijskoj imperii [hereafter – PSZ], Vol. XXXIV, No. 27024, 1817. Available: https://nlr.ru/e-res/law_r/search.php?regim=4&page=340&part=737 [last viewed 15.05.2023]. Hereafter, the Internet address and the date of viewing will not be indicated for the laws of the Russian Empire.

[6] Polozhenie o Liflyandskih" krest'yanax" [Regulation on the Peasants of Livonia] (26.03.1819). PSZ, Vol. XXXVI, No. 27735, 1819.

[7] Manifest (19.02.1861). O Vsemilostivejshem" darovanii krepostnym" lyudyam" prav" sostoyaniya svobodnyh" sel'skih" obyvatelej i ob" ustrojstve ih" byta [Manifesto. On the All-Gracious Granting to the Serfs of the Right to the Status of Free Rural People and Their Living Conditions]. PSZ, Vol. XXXVI, No. 36650, 1861.

[8] Polozhenie o Liflyandskih" krest'yanax", Art. 72, 77.

[9] *Kalniņš, V.* Latvijas PSR valsts un tiesību vēsture. I. Feodālisma un topošā kapitālisma laikmets XI–XIX gs. [The History of the State and the Law of the Latvian SSR. I. The Age of Feudalism and Nascent Capitalism XI–XIX c]. Rīgā: Zvaigzne, 1972, p. 264.

[10] Uchrezhdenie o Kurlyandskih" krest'yanax", Art. 46–47.

of the candidates. The estate could decide to not approve any of the candidates and demand new elections. After candidates were proposed repeatedly, one of the three candidates had to be approved to the office. Although under the estate's tutelage, by and large, the principle of democratic rotation of officials was introduced.[11] However, the research by Austra Mieriņa shows that many estates did not always implement the tutelage in a legally correct way because they tried to force peasants, unlawfully, to propose candidates preferred by the estate.[12] Such actions by the estate, clearly, hindered consolidation of the principle of democracy in the self-government of a civil parish.

In the Governorate of Courland, the elder of the civil parish was also the chairman of the civil parish court. Apart from the elder of the civil parish, (at least) three more elders and assessors (members) of the parish court were elected. The majority of elders had to be farm owners, whereas the assessors, in equal numbers, were elected by farm owners and servants.[13] In the Governorate of Livonia, the chairman of the civil parish court did not perform the duties of the civil parish elder. This marked separation between the civil parish court from the civil parish elders. Similarly to the Governorate of Courland, the civil parish community was represented by elders, with the difference that their number did not exceed two persons. Only the persons belonging to the class of farm owners could be elected chairman of the civil parish court, but it was preferable to elect peasants from among the farm owners as parish elders. Both farm owners and servants could be unconditionally elected only as the assessors of the civil parish court.[14] Thus, there was social inequality in the rights of farm owners and servants to hold the supreme positions in the civil parish community.

Following the abolition of serfdom, the self-governance of Latgalians was organised in accordance with the model of domestic (Western) governorates of Russia, taking into consideration the regional particularities. Along the same lines as the Baltic Governorates, the peasants in Latgale could also elect peasant officials . In difference to the Baltic Governorates, peasants of Latgale, apart from civil parish officials and peasant judges, were electing also the officials of a village.[15]

During the period of Soviet power, professor Voldemārs Kalniņš wrote that the civil parish assemblies had had only one task, i.e., to elect the civil parish officials, without analysing the process of democratising the civil parish community, introduced by the abolition of serfdom.[16] This approach, substantially, does not reveal the historical significance of abolition.

At present, obviously, the election of civil parish officials, defined in law, would not be considered to be sufficiently democratic. However, the right, granted to peasants

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[11] Uchrezhdenie o Kurlyandskih" krest'yanax", Art. 33–35; Polozhenie o Liflyandskih" krest'yanax", Art. 90, 98, 101.

[12] *Mieriņa, A.* Agrārās attiecības un zemnieku stāvoklis Kurzemē XIX gs. II pusē. [Agrarian Relations and the Situation of Peasants in Kurzeme in the 2nd Half of XIX c.]. Rīgā: Zinātne, 1968, pp. 212–246.

[13] Uchrezhdenie o Kurlyandskih" krest'yanax", Art. 29–33.

[14] Polozhenie o Liflyandskih" krest'yanax", Art. 89, 98.

[15] Vysochajshe utverzhdennoe Obshchee Polozhenie o krest'yanah", vyshedshih" iz" krepostnoj zavisimosti [The Most Supremely Approved General Regulations on Peasants Freed from the Dependence in Serfdom]. PSZ, Vol. XXXVI, No. 36657, 1861; Vysochajshe utverzhdennoe Obshchee Polozhenie o pozimel'nom" ustrojstve krest'yan", vodvorennyh" na pomeshchich'ih" zemlyah" v" guberniyah": Vilenskoj, Grodnenskoj, Kovenskoj, Minskoj i chasti Vitebskoj [The Most Supremely Approved General Regulations on Land Arrangement for [Peasants] Settled on Nobles' Lands in the Governorates of Vilnius, Grodno, Kaunas, Minsk and Part of Vitebsk Governorate]. PSZ, Vol. XXXVI, No. 36665, 1861, etc.

[16] *Kalniņš, V.* Latvijas PSR, pp. 254–269.

more than 200 years ago, to elect and to be elected as a civil parish official, should not be underestimated. Henceforth, the civil parish officials had to have the skills not only to care for other members of the parish (e.g., be responsible for paying taxes, care for the disabled, set up schools, etc.[17]) but also be able to read and write and make decisions, substantiated by legal norms. The requirement of a certain level of education and ability to apply legal provisions turned into a major incentive for further emancipation of Latvian peasants in the atmosphere of democratic values.

On 19 February 1866, the law "On Public Administration at the Level of Civil Parishes in the Baltic Provinces"[18] (hereafter – the Civil Parish Administration Law) was adopted. The Civil Parish Administration Law changed the relations between the state, the estate and the civil parish.[19] The purpose of the law was to free the civil parish community from the estate's tutelage[20], i.e., to give the right to peasants "to arrange the civic and social life of local peasants on the foundations of self-standing and independence from the estate's influence"[21] and to unify the administration of civil parishes in the Baltic Governorates. Almost 50 years of freedom had proven the ability of Latvian peasants to reason and act independently. Hence, the estates' tutelage had become redundant. The civil parish courts (in the Governorate of Livonia) and district courts (*Hauptmannsgericht*) (in the Governorate of Courland) were entrusted with supervising the functioning of peasant self- administration. On the basis of "Provisional Regulation on Changing the Composition and Jurisdiction of Peasant Bodies" of 9 July 1889, the office of a commissioner for peasant matters was introduced.[22] Thus, the state took over supervision of the functioning of peasant self-administration.

After the adoption of the Civil Parish Administration Law, a civil parish did not become yet a territorial unit of self-administration. The estate remained outside. All registered peasants – farm owners (leaseholders), servants (workers), as well as persons who did not belong to the peasant class but were owners or lessees of peasants' land plots (homes) belonged to the civil parish community.[23] The administration of civil parish community consisted of four bodies: the general civil parish assembly (*obshchij volostnoj skhod*) (hereafter – the assembly), contingent of deputies (*skhod vybornyh*), the civil parish elder with his assistants (*volostnoj starshina s pomoshchnikami*) and the civil parish court (*volostnoj sud*).[24]

Attendance at the assembly was mandatory for all farm owners and lessees of farms (hereafter – the farm owners) and for every tenth elected representative from

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[17] *Ābers, B.* Vidzemes zemnieku stāvoklis 19. gs. pirmā pusē [The Situation of Vidzeme's Peasants in the First Half of the 19th Century]. Rīga: Grāmatu apgādniecība A. Gulbis, 1936, pp. 214–231.

[18] Polozhenie o volostnom" obshchestvennom" upravlenii v" Ostzejskih" guberniyah" [Pribaltijskih" guberniyah"] [On Public Administration of the Civil Parish in Baltic Governorates] (19.02.1866). PSZ, Vol. XLI, No. 43034, 1866.

[19] *Lazdiņš, J.* Abolition of serfdom and organisation of civil parish communities. In: Latvia and Latvians. Vol. II. Collection of scholarly articles. Riga: Latvian Academy of Sciences, 2018, pp. 341–342.

[20] *Schmidt, O.* Rechtsgeschichte Liv-, Est- und Curlands [Legal History of Livonia, Estonia and Curland]. Jurjew (Dorpat): In Commission bei E. J. Karow, 1895, p. 265.

[21] Polozhenie o volostnom" obshchestvennom" upravlenii v" Ostzejskih" guberniyah" [Pribaltijskih" guberniyah"], [introduction].

[22] I. O preobrazovanii sudebnoj chasti v" Pribaltijskih" guberniyah" i II. O preobrazovanii krect'yanskih" prisutstvennyh mest" Pribaltijskih" gubernij. [I I. On the Transformation of the Judiciary in the Baltic Governorates and II. On the Transformation of the Peasant Offices of the Baltic Governorates]. PSZ, Vol. IX, No. 6188, 1889, Art. 1, 8.

[23] *Mucinieks, P.* Latvijas pašvaldību iekārta [Latvian local government system]. Rīgā: LU Studentu padomes grāmatnīcas izdevums, 1938, p. 124.

[24] Pagasta pārvaldes likums, Art. 4.

among the servants. The latter were sometimes scornfully called the tithe-men[25] or gnats.[26] The assembly elected, for the term of three years, all officials of the civil parish (the elder, assistants, judges and the contingent of deputies). The assembly was competent to decide if it was attended by the civil parish elder and at least half of the assembly's members. The decisions were adopted by reaching a common agreement or by a majority vote of those present.[27]

Compared to abolition laws, the rights of the civil parish elder as the supreme representative of the civil parish executive power were consolidated, and a new institution had been added – the contingent of deputies (representatives of the civil parish community). The contingent of deputies signified the decision-making body in matters of the civil parish community and it had the competence to deal with the property, assets of the civil parish, examination of complaints and requests, setting salaries for the officials, and the like.[28]

The Civil Parish Administration Law did not comply with the requirements for civil society. It did not decrease the gap between the estate and the civil parish and, substantially, did not change anything in the fixed structure of classes and social strata. Women were not given electoral rights and farm owners enjoyed privileges, vis-à-vis servants, to be elected elders of the civil parish and chairmen of the civil parish courts. In Latvia of the inter-war period, assistant professor at the University of Latvia Pēteris Mucinieks, assessing the Civil Parish Administration Law from the perspective of democracy, valued it even lower than laws on the abolition of serfdom because, at least formally, after the abolition of serfdom all servants could be invited to the civil parish assembly. This opinion cannot be upheld. As noted above, following the abolition of serfdom, only one category of peasants (usually these were farm owners) could be invited to the civil parish assembly or farm owners and servants voted separately, whereas the Civil Parish Administration Law guaranteed that servants were represented at the civil parish assembly. The social strata of farm owners and servants were not closed. A servant could become a farm owner and a farm owner could be made a servant.[29] Therefore, the author is of the opinion that the Civil Parish Administration Law was closer to the principle of democracy than the abolition laws. In principle, P. Mucinieks admits it indirectly, by noting that the Civil Parish Administration Law, rather than the abolition laws, to a certain extent served as a model for the "Law on the *Satversme* of Latvian Civil Parishes" of 4 December 1918, adopted by the People's Council of the Republic of Latvia".[30]

Thus, following the abolition of serfdom, in the spirit of the times, the foundations for the understanding of a democratic and socially responsible civil parish community were laid. It is for good reason that, at the moment when the State of Latvia was created, the most outstanding poet of the Latvian nations Jānis Pliekšāns (Rainis) dreamt about socialist Latvia.[31]

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[25] *Mucinieks, P.* Latvijas pašvaldību iekārta, p. 125.

[26] *Kalniņš, V., Apsītis, R.* Latvijas PSR, p. 24.

[27] Pagasta pārvaldes likums, Art. 7.

[28] Pagasta pārvaldes likums, Art. 9–12, 15–24, 26–28.

[29] *Ābers, B.* Rundāles pagasta tiesas protokoli 1819.–28. g. [Records of the Court of Rundāle Civil Parish]. In: Tautas vēsturei. Veltījums profesoram Arvedam Švābem [For the People's History. Dedicated to Professor Arveds Švābe] 25.V.1888–25.V.1938. Rīga: Grāmatu apgādniecība A. Gulbis, 1938, p. 339; *Ābers, B.* Vidzemes zemnieku stāvoklis, p. 233

[30] *Mucinieks, P.* Latvijas pašvaldību iekārta, pp. 129–130.

[31] *Lazdiņš, J.* Laime Jāņa Pliekšāna (Raiņa) tiesību filozofijā [Happiness in Jānis Pliekšāns' (Rainis') philosophy of law]. Journal of the Institute of Latvian History, special edition, 2022, pp. 12–16.

Latvians were not represented in the knightly *Landtags* of the Baltics. Therefore, the author holds that the civil parish administration, based on electoral rights, for the majority of Latvian people turned into the sole "school of statehood" until the Republic of Latvia was proclaimed. Moreover, even before the judicial reform of the Russian Empire, launched on 20 November 1864[32], the principle of separation of the administrative and judicial power was integrated into the law on peasants of the Governorate of Livonia. The aim of the law on peasants was not linked to the policy of russification at the end of the 19th century.[33]

2. Experience in electoral rights outside the civil parish community

The Statute of 26 March 1877[34] provided that the Statute on Towns of the Russian Empire of 10 June 1870[35] (hereafter – the Statute on Towns of 1870) entered into force in the Baltic Governorates. Thus, the town councils (*Rath*) as self-administration bodies lost their significance.[36] The Statute on Towns of 1870 provided that, henceforth, the public administration of the town is implemented with the mediation of the electors' assembly of the town, the council and the board of the town.

The electors' assembly of the town was convened with the aim of electing the council of the town for the term of four years. A subject of the Russian Empire who had reached the age of 25 and paid taxes into the town's treasury could become a member of electors assembly of the town.[37] Electors of the town were divided into curiae in accordance with the total sum of the duty to be paid.[38] This complied with the principle, taken over from Prussia, that those who paid taxes/duties participated in the self-administration of the town, moreover, those who paid more were given greater rights.[39] For example, in the city of Riga, three curiae were established according to the amount of duties paid into the city's treasury. Although the number of electors in each curia was different, each curia elected 24 councillors, i.e.: there were 72 councillors in the city of Riga. It is estimated that only 3.4% of the inhabitants of Riga could participate in the first election of the Riga City Council. Latvians were represented in all curiae. Latvians even had relative majority in the third curia (1200 electors) because the second numerically largest group – Russians – was represented by 800 voters. In the coming years, the number of electors increased but

[32] See Uchrezhdeniya sudebnyh" ustanovlenij [Regulation on Courts]. PSZ, Vol. 39, part 2, No. 41475, 1864.

[33] See also *Luts-Sootak, M. Siimets-Gross, H.* Baltic peasants after emancipation – free and equal people or a new social estate in the estate-based society. In: Legal Science: Functions, Significance and Future in Legal Systems II (PDF). The 7th International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019, Riga: University of Latvia (Collection of Research Papers), 2020, pp. 162–164. Available: https://www.apgads.lu.lv/izdevumi/brivpieejas-izdevumi/rakstu-krajumi/lu-juridiskas-fakultates-zinatniska-konference-2/ [last viewed 15.05.2023].

[34] Pravila o primenenii Vysochajshe utverzhdennogo, 16 Iyunya 1870 goda, Gorodovae polozheniya k" gorodam" Pribaltijskih" gubernij [On Applying the Most Supremely Approved Rules on Towns of 16 June 1870 in the Baltic Governorates] (26.03.1877). PSZ, Vol. LII, No. 57101, 1877.

[35] Gorodovoe polozhenie [Statute on Towns] (10.06.1870). PSZ, Vol. XLV, No. 48498, 1870.

[36] *Straubergs, J.* Rīgas vēsture. XII–XX gadsimts [History of Riga. XII–XX century]. Rīga: Latvijas Mediji, 2019, p. 577.

[37] Art. 15–17.

[38] Rīga. 1860–1917. Rīga: Zvaigzne, 1978, pp. 85–87 or Gorodovoe polozhenie (16.06.1870), Art. 24.

[39] *Mucinieks, P.* Latvijas pašvaldību iekārta, p. 56.

the population of Riga was also growing rapidly. Therefore, the number of Rigans with the right to vote proportionally decreased to 2.5%.[40]

On 11 June 1892, the new Statute on Towns was adopted[41] (hereafter – the Statute on Towns of 1892). The Statute on Towns of 1892 abolished the division of electors into curiae. Henceforth, a person who, at least one year before the election, owned or had in possession for life immovable property in the value of 300–3000 roubles, for which the duty had to be paid into the treasury of a town or town-like populated settlement, or a trade-production enterprise of the first-second guild category, was recognised as an elector. For example, in governorate cities like Riga, where population exceeded 100 000 inhabitants, the property qualification was 1500 roubles. It is estimated, based on the data of the Riga City election of 1893, that the number of electors with the right to vote substantially decreased. The study by professor Arveds Švābe shows that, in 1893, only 0.3 % of the total number of inhabitants in Riga, had the right to participate in the election.[42] Due to insufficient property qualification, the majority of the electors in the third curia had lost their elector's right, i.e., minor traders, inn keepers, men of letters, etc.[43], that is, the majority of Latvians. The situation was more favourable for Latvians in small towns. There, Latvians gradually achieved even majority in councils – in 1892 in Jaunjelgava, in 1897 in Valmiera, in 1913 in Ventspils, and elsewhere.[44]

Thus, the Statutes on Towns of 1870 and 1892 gave the right to participate in elections in accordance with the duty paid into the town treasury or property qualification. Such right to participate in the town administration could be characterised as being only conditionally democratic, because only a small number of wealthy townsmen could enjoy political rights in towns (in principle, it was democracy of plutocrats). Hence, for Latvia, later proclaimed as A democratic republic, the model of town administration in the political system of Russian Empire was unacceptable. However, at the end of the 19th century, even such legal regulation was to be considered a progress, because 1) the office of a town councillor no longer was "an office for life" and 2) a small number of Latvians "broke out" of the framework of city parish administration and started gaining experience in town administration.

The revolution of 1905 ushered into Russia changes of democratic nature. On 17 October 1905, during the reign of Nikolai II Romanov (1894–1917) Manifesto for the Improvement of the State Order[45] (hereafter – the Manifesto of 1905) was promulgated. In implementing the promises made in the Manifesto of 1905, on 23 April 1906, the Fundamental Laws of the State [46] (hereafter – the Fundamental Sate Laws) were promulgated. With the promulgation of the Fundamental State Laws, the Russian Empire became a constitutional monarchy.

The Fundamental State Laws provided that two parliamentary chambers had to be convened – the State Council (*Gosudarstvennyj Sovet*) or the upper house and the State Duma (*Gosudarstvennaya Duma*) or the lower house. Half of the members of the State Council was appointed by the ruler-emperor, the other half was elected by

[40] Rīga. 1860–1917, pp. 85–87.
[41] Gorodovoe polozhenie [Statute on Towns] (11.06.1892). PSZ, Vol. XII, No. 8708, 1892.
[42] *Švābe, A.* Latvijas vēsture [History of Latvia]. 1800–1914. Uppsala: Daugava, 1958, p. 547.
[43] Rīga. 1860–1917, p. 90.
[44] *Švābe, A.* Latvijas vēsture, p. 547.
[45] Manifest ob usovershenstvovanii gosudarstvennogo poryadka [Manifesto for the Improvement of State Order] (17.10.1905). PSZ, Vol. XXV, No. 26803, 1905.
[46] Osnovnye gosudarstvennye zakony [Fundamental Laws of the State] (23.04.1906). PSZ, Vol. XXVI, No. 27805, 1906.

organisations defined in the law, such as the clergy of the Russian Orthodox Church, Imperial Academy of Sciences, assemblies of nobles, etc. Only the State Duma was genuinely elected but, also in this case, elections of several stages were introduced (except the largest cities in the Russian Empire, including Riga), by taking into account the representation interests of social strata and classes, property qualifications, etc. Electoral rights were restricted. Women, officers in the army and the fleet, nomadic people, etc. had no electoral rights. Thus, the election of the State Duma of the Russian Empire was only conditionally democratic.

The Fundamental State Laws did not comprise the checks-and-balances principle of separation of powers. The Emperor alone had the right to propose revisions to the Fundamental State Laws, to appoint and dismiss the Chairman of the Ministerial Council, ministers and other officials in accordance with law, no law entered into force without the ruler's approval, etc.[47] The dominant position within the political system of the state was highlighted, in particular, the right to dismiss unconditionally the elected members of the State Council and the State Duma.[48] This was clearly demonstrated by Nikolai II, who several times dissolved the State Duma without grounds.[49] Aversion to the right of a single person to dissolve the legislator later proved to be significant in developing the institute of the President of the State in the *Satversme* of the Republic of Latvia.[50] Following major clashes of opinion "for" or "against" the right of the President, elected by the people, to dissolve the *Saeima* (the parliament), with a slight majority of vote in the third reading (67 votes "for", 70 votes "against"[51]), the Constitutional Assembly of the Republic of Latvia determined that "the President of the State shall be elected by the *Saeima* for the term of three years.[52] [and] The President of the State shall have the right to initiate dissolution of the *Saeima*. After this, a national referendum shall be held"[53]. Thus, the historical experience of the Latvian people has, until now, denied it the right to elect the President of the State itself.

According to the calculations made by Ādolfs Šilde, until the collapse of the Russian Empire (1917), more than 10 Latvians had been elected to the convocations of the State Duma. For example, Jānis Čakste[54], Francis Trasuns, Andrejs Priedkalns, et al. On 16 February 1912, A. Priedkalns submitted to the State Duma a project on Latvia's self-government. The self-government of Latvia would comprise the Latvian part of the Governorate of Livonia or Vidzeme, the Governorate of Courland (or the present-day Kurzeme and Zemgale) and the three Latvian districts of the Vitebsk Governorate (or the present-day Latgale). The State Duma dismissed this proposal.[55]

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47 See Art. 8, 9, 17, 44.

48 See Art. 62–63.

49 *Lazdiņš, J.* Konstitucionālisma pirmsākumi un nerealizētie valstiskumi Latvijā [The Origins of Constitutionalism and Unembodied Statehoods in Latvia]. Jurista Vārds, No. 23(774), 2013, p. 7

50 Latvijas Satversmes Sapulces stenogrammas [Transcripts of the Latvian Constitutional Assembly], No. 14, 1921, pp. 1349–1350; No. 15, p. 1371; No. 18; pp. 1707, 1720.

51 Latvijas Satversmes Sapulces stenogrammas [Transcripts of the Latvian Constitutional Assembly], No. 4, 1922, pp. 367, 379.

52 Currently, the *Saeima* elects the President of the State for the term of four years.

53 Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: https://likumi.lv/ta/id/57980-latvijas-republikas-satversme [last viewed 15.05.2023].

54 Later, the first President of the State of the Republic of Latvia.

55 *Šilde, Ā.* Pirmā republika. Esejas par Latvijas valsti [First Republic. Essays on the Latvian State]. Rīga: Elpa, 1993, pp. 56–64.

Thus, even before the Republic of Latvia was proclaimed, some Latvians attended the "pre-school of parliamentarism"[56].

Public administration in the Russian Empire was founded on the principle of monarchy rather than the principle of democracy. Therefore, the political system of the Russian Empire, *inter alia*, the electoral rights was not suitable for the nascent Republic of Latvia. However, the same cannot be said about the experience in electoral rights. Experience in undemocratic electoral rights instilled in Latvians the awareness of the need for democratic elections.

3. Consolidation of the principle of democracy in the electoral law of the State of Latvia

The first noteworthy demands for democratic elections of parish, district, governorate officials and convening of All-Russia Constitutional Assembly were heard during the revolution of 1905.[57] However, the revolution was suppressed, and the Russian Empire did not become a democratic state. The political situation within the Russian Empire changed simultaneously with the state's military failures in the fronts of World War I. In 1915–1916, Fēlikss Cielēns and Dr. Pēteris Zālīte drafted two projects of Latvia's autonomy, which, at the same time, could be considered to be the draft constitutions of Latvia's autonomy. Both projects saw Latvia as an autonomous subject within the Russian Empire with very extensive rights of self-governance – its own parliament (the Latvian *Saeima*), government (the Council of Ministers), law, a system of courts adapted to local needs, etc.[58]

It was stated in Article 3 of F. Cielēns' project of Latvia's autonomy that "that the territory of Latvia is united in the local parliament ("Latvian *Saeima*"), based on a unicameral system, elected for the term of two years in the procedure of general, equal, direct, proportional and secret elections. A note. All men and women who have reached the age of 21 have active and passive electoral rights."[59] P. Zālīte's, project, alongside "equal rights" of both genders, envisaged also the equality of nations and beliefs, as well as safeguards for fundamental human rights. In the author's view, special attention should be paid to Article 2 in P. Zālīte's project, which envisaged introduction of the institution of the President, elected by the people: "The President of Latvia shall be elected by all inhabitants of Latvia, who are 25 years old, on the basis of general, direct, secret and equal electoral rights".[60] Thus, P. Zālīte had greater trust in the people than the majority of "the fathers of the *Satversme*", in elaborating the institution of the President in the *Satversme* of the Republic of Latvia.[61]

Leaving aside the procedure for electing the President of the State, it can be concluded that, already before the democratic February Revolution of 1917 in the Russian Empire, the legal thought of the Latvian people was mature enough to embody the principle of democracy in election law, abandoning division of people into classes, social strata, as well as gender inequality.

"Breakout" from the autonomy projects happened after the October Revolution of 1917, when Vladimir Ulyanov (Lenin) and other Bolsheviks came into power.

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[56] Ibid., p. 63.

[57] *Švābe, A.* Latvijas vēsture, pp. 595, 611–612.

[58] *Šilde, Ā.* Latvijas vēsture [History of Latvia]. 1914–1940. Stockholm: Daugava, 1976, pp. 64–69.

[59] Ibid., p. 65.

[60] Ibid., p. 68.

[61] *Lazdiņš, J.* Valsts Prezidenta institūta tapšana Latvijā [Creation of the Institute of the President of the State in Latvia]. Jurista Vārds, No. 46, 13.11.2012, pp. 8–14.

This changed the political situation not only in the former Russia[62] but also in Europe. In November of the same year, the Latvian Provisional National Council (hereafter – LPNC) was established with the aim of uniting Latvians in fight for free Latvia. A historical decision was adopted at the sitting of LPNC on 30 January 1918. Later, Ādolfs Šilde called it the announcement of Latvia's independence, i.e.: LPNC, on the basis of the people's right to self-determination, recognised and proclaimed by all democracies of the world, recognised that Latvia should be an independent democratic republic, uniting Kurzeme, Vidzeme, and Latgale.[63] There was another political force that claimed the honour of proclaiming the Republic of Latvia – the Democratic Block (hereafter – DB). To put an end to disputes between LPNC and DB, a new political force was established – the People's Council.

On 18 November 1918, the People's Council, on the basis of "The Political Platform of the Latvian People's Council" (hereafter – the Political Platform), proclaimed the Republic of Latvia.[64] The fact of establishing the State of Latvia was publicised in the appeal (act of proclamation) "To the Citizens of Latvia!"[65]. "The Political Platform" and the appeal "To the Citizens of Latvia!" turned into the First Provisional *Satversme* of the Republic of Latvia.

Para 1 of Article II of "The Political Platform" provided that Latvia was "Republic on democratic foundations". The same principle, in a slightly different wording, was written also in Article 1 of the appeal (act of proclamation) "To the Citizens of Latvia!":

"Latvia – united within ethnographic borders (Kurzeme, Vidzeme and Latgale) – is a self-standing, independent democratically-republican state".[66]

The principle of democratic republic permeates the constitutional system of the Republic of Latvia till the very present. The successive legal acts also comprise this principle:

1) Article 1 of "Declaration on the State of Latvia" of 27 May 1920 provided that "Latvia is a self-standing and independent republic with a democratic state order";[67]
2) Article 1 of "The *Satversme* of the Republic of Latvia" of 15 February 1922 provides that "Latvia is an independent democratic republic".

This means that the understanding of "a democratic republic" has been set as the foundation of the Latvian political system or that "a democratic republic" should be deemed to be the basic norm of the state political system. Free and equal electoral rights with respect to state and local government offices, in turn, is the foundations of a democracy governed by the rule of law.

Pursuant to the First Provisional *Satversme*, the People's Council proclaimed itself as the first provisional legislator, until convening of the Constitutional Assembly. The People's Council, as the bearer of the supreme state power, appointed the Latvian

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[62] The term "former Russia" is used to denote the Russian Empire and the Republic of Russia, proclaimed on 1 September 1917.

[63] *Šilde, Ā.* Latvijas vēsture, p. 218.

[64] Tautas Padomes Politiskā platforma [The Political Platform of the People's Council] (18.11.1918). Pagaidu Valdības Vēstnesis, No. 1, 14./01.12.1918.

[65] Latvijas pilsoņiem! [To the Citizens of Latvia!] (18.11.1918). Pagaidu Valdības Vēstnesis, No. 1, 14./01.12.1918.

[66] *Lazdiņš, J.* Rechtspolitische Besonderheiten bei der Entstehung des lettischen Staates und seiner Verfassung [Legal-political peculiarities in the formation of the Latvian state and its constitution]. Journal of the University of Latvia. Law, No. 7, 2014, pp. 9–20.

[67] Deklarācija par Latvijas valsti [Declaration on the State of Latvia] (27.05.1920). Valdības Vēstnesis, No. 118. 28.05.1920.

Provisional Government to ensure public administration. The First Provisional *Satversme* did not specify other legal relations between the People's Council and the Provisional Government. Therefore, this regulation evolved in practice as custom. K. Dišlers describes this practice in greater detail in his memoir:

"In practice, the procedure was accepted that the People's Council elected the Prime Minister directly, whereas other ministers were selected and proposed for approval by the Prime Minister. Although nothing is said [in the Political Platform] about the accountability of the provisional government before the People's Council, in practice, this accountability was immediately recognised and applied, thus, already during the first stage in the development of our state order, parliamentarism was established".[68] Thus, during the term of validity of the First Provisional *Satversme*, Latvia started evolving into a state of parliamentary democracy.

In difference to "The Political Platform", "The Provisional Regulation on the Order of the Latvian State", adopted on 1 June 1920[69] already defined clearly the relations between the Constitutional Assembly and the Cabinet of Ministers, on the foundations of parliamentarism:

"The Cabinet of Ministers shall be accountable for its actions before the Constitutional Assembly, and it must step down if it has lost the confidence of the Constitutional Assembly"[70].

"The Political Platform" and "The Provisional Regulation on the Order of the Latvian State" promised also such civic liberties as inviolability of persons and homes, freedoms of the press, speech, assembly and association, etc., as well as extensive cultural rights of foreigners – national minorities and rights to participate in the political life of the State as citizens.[71]

The right, guaranteed in "The Political Platform", to persons of both genders to elect, without differences as to the classes and social strata,[72] Members of the Constitutional Assembly is of historical importance: "Election of the Members of the Constitutional Assembly shall take place by both genders participating on the basis of general, equal, direct, secret and proportional electoral rights"[73]. Thus, "a clear course towards gender equality"[74] was outlined. The same principle of democratic equality was guaranteed also by the subsequent laws and regulations on national and local government elections: "The Provisional Law on the *Satversme* of Latvian Civil Parishes"[75] of 4 December 1918, "Provisional Regulation on the *Satversme*

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[68] *Dišlers, K.* Latvijas Republikas Satversmes attīstība [Development of the Constitution of the Republic of Latvia]. In: Latvijas Republika desmit pastāvēšanas gados [The Republic of Latvia in 10 years]. Rīgā: Grāmatniecības akciju sabiedrība Golts un Jurjans, 1928, pp. 73–74.

[69] "Deklarācija par Latvijas valsti" un "Latvijas valsts iekārtas pagaidu noteikumi" tiek uzskatīti par Latvijas Republikas Otro pagaidu satversmi [The Second Provisional *Satversme* of the Latvia consisted of "Declaration on the State of Latvia" and "Provisional Regulation on the Order of the Latvian State of 1 June 1920]. See *Dišlers, K.* Ievads Latvijas valststiesību zinātnē, p. 85.

[70] Latvijas valsts iekārtas pagaidu noteikumi [Provisional Regulation on the Order of the Latvian State] (01.06.1920). Likumu un valdības rīkojumu krājums, 31.08.1920, No. 4, doc. No. 183, Art. 8.

[71] Politiskā platforma, Art. IV. 1)–3), V. 1)–3); Latvijas valsts iekārtas pagaidu noteikumi, Art. 9.

[72] The term "to elect" also means the right to be elected.

[73] Politiskā platformā, Art. I. 2).

[74] *Zemītis, G.* Drošības aspekti Latvijas vēsturē. No vissenākiem laikiem līdz mūsu dienām [Security Aspects in the History of Latvia. From Ancient Times to Our Days]. Rīga: Latvijas Universitāte, 2023, p. 310.

[75] Latvijas pagastu satversmes pagaidu likums [The Provisional Law on the *Satversme* of Latvian Civil Parishes] (04.12.1918). Latvijas Pagaidu Valdības Likumu un Rihkojumu Krahjums. 15.07.1919, [No.] 1, doc. No. 7, Art. A) 8).

of Latgale Civil Parishes"[76] of 16 July 1919, "Provisional Regulation on Electing Town Councillors"[77]of 18 August 1919, "The Law on Electing the Latvian Constitutional Assembly"[78] , "On Hamlets"[79] of 15 November 1920, law of 1 March 1922 "On Electing the Civil Parish Council"[80] , "Law on the *Saeima* Election"[81] of 9 June 1922, as well as "Law on Electing Civil Parish Councils"[82] of 1 March 1922.

The elections of district councils and boards had a certain particularity because they were not elected directly. "The district council shall consist of 15 to 24 members who are elected by the delegates from the civil parish councils […] from among themselves on the basis of proportional elections […]."[83]

Among the legal acts enumerated above, "Provisional Regulation on the *Satversme* of Latgale Civil Parishes" should be singled out. Until the State of Latvia was proclaimed, in Latgale, as three districts of the Vitebsk Governorate, former Russian law was in force. In this respect, professor Valdis Blūzma's finding that with the coming into force of "Provisional Regulation on the *Satversme* of Latgale Civil Parishes" "the same local government structure as in the rest of Latvia was introduced in Latgale"[84] is essential.

The legal acts of inter-war Latvia set out not only the electoral rights but also restriction on these rights.

The law adopted by the People's Council on 5 December 1919 "Law on Leaving into Force the Former Laws of Russia in Latvia" provided that all former laws of Russia, adopted prior to 24 October 1917, O.S., remained in force, "insofar they have not been revoked by new laws and are not contrary to the Latvian state order and the [Political] Platform of the People's Council".[85] In former Russia, majority was attained at the age of 21. This meant that persons of both genders who have reached the age of 21 should enjoy electoral rights.

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[76] Latgales pagastu satversmes pagaidu noteikumi [Provisional Regulation on the *Satversme* of Latgale Civil Parishes] (16.07.1919). Papildinājums pie Likumu un Waldibas Rihkojumu Krahjuma. Rīgā: Teesleetu ministrijas kodifikazijas isdevums, 1921, doc. No. 66, Art. A. 8.

[77] Pagaidu noteikumi par pilsētu domnieku vēlēšanām [Provisional Regulation on Electing Town Councillors] (18.08.1919). Latvijas Pagaidu Valdības Likumu un Rihkojumu Krahjums. 27.10.1919. 27, [No.] 10, doc. No. 125, Art. 1.

[78] Latvijas Satversmes Sapulces vēlēšanu likums [The Law on Electing the Latvian Constitutional Assembly] (19.08.1919). Latvijas Pagaidu Valdības Likumu un Rihkojumu Krahjums. 27.09.1919, [No. 9], doc. No. 124, Art. 2.

[79] Par miestiem [On Hamlets] (15.11.1920). Likumu un waldības rihkojumu krahjums, 29.12.1920, No. 14, doc. No. 243.

[80] Par pagasta padomes vēlēšanām [On Electing the Civil Parish Council] (01.03.1920). Likumu un valdības rīkojumu krājums, 22.03.1922, No. 4, doc. No. 57.

[81] Likums par Saeimas vēlēšanām [Law on the *Saeima* Election] (09.06.1922). Valdības Vēstnesis, No. 141, 30.06.1922,

[82] Likumu par pagasta padomes vēlēšanām [Law on Electing the Civil Parish Council] (01.03.1922). Likumu un valdības rīkojumu krājums, No. 4, 22.03.1922, doc. No. 57.

[83] Latgales pagastu satversmes pagaidu noteikumus, Art. 81; Pagaidu noteikumi par apriņķu padomēm un valdēm [Provisional Regulation on District Councils and Boards] (20.09.1919). Papildinājums pie Likumu un Waldibas Rihkojumu Krahjuma. Rīgā: Teesleetu ministrijas kodifikazijas isdevums, 1921, doc. No. 14, Art. 49.

[84] *Blūzma, V.* Latvijas Republikas valsts dibināšana un nacionālās tiesību sistēmas veidošana [Establishment of the State of the Republic of Latvia and Development of the National Legal System] (1918–1922). In: Latvijas tiesību vēsture [History of Latvian law] (1914–1922). Rīga: Fonds Latvijas Vēsture, 2000, p. 184.

[85] Likums par agrāko Krievijas likumu spēkā atstāšanu Latvijā [Law on Leaving the Former Laws of Russian in Force in Latvia] (05.12.1919). Likumu un valdības rīkojumu krājums, 1919, No. 13, doc. No. 154.

At the time when the first law of the Republic of Latvia on local governments – "The Provisional Law on the *Satversme* of Latvian Civil Parishes" – was discussed at the People's Council, opinion clashed regarding the age as of which citizens should be granted the electoral rights. For example, Jānis Eikerts appealed "not to turn left", i.e., to not follow the example of the Soviet Russia by granting the electoral right from the age of 18, as nothing good had come of it, but rather "to turn right", i.e., to recognise the right to vote from the age of 21 and the right to be elected as an official from the age of 25.[86] The majority of members in the People's Council voted for granting the electoral rights from the age of 20 as this practice already had evolved in several Latvian cities.[87] In difference to "The Provisional Law on the *Satversme* of Latvian Civil Parishes", "Provisional Regulation on the *Satversme* of Latgale Civil Parishes" retained the majority age of former Russia.[88] Discussions about the age, from which the electoral rights should be granted, continued while other election laws were drafted. The exchange of opinions led to the conclusion that electoral rights should be granted to citizens of both genders from the age of 21.[89] Thus, in this matter, return to the former Russian law was seen. To eliminate contradictions within the legal system, "Law on Electing the Civil Parish Council" of 1 March 1922 provided for electoral rights from the age of 21 also in civil parishes.[90] However, one exception had to be made.

Men from the age of 18 were conscripted into the Latvian army and many of them had participated in the freedom fights for the State of Latvia. It would be unfair if these men were denied the right to elect representatives to the Constitutional Assembly. Therefore, on 15 March 1920, "Additions to the Law on Electing the Latvian Constitutional Assembly" were introduced, providing that "[a]ll soldiers, who are in active service and who, by 1 March 1920, have become eighteen years old, shall enjoy the electoral rights with respect to the Latvian Constitutional Assembly".[91]

A person who, in the procedure set out in law, had been recognised as being feeble-minded (mentally ill), insane, deaf-and-dumb, as well as other persons placed under guardianship did not enjoy the right to vote.[92] Among the restrictions on electoral rights, the severity, in which the legislator had turned against a person who had lost the electoral rights on the basis of a court's judgement in a criminal case, is surprising. Depending on the seriousness of the crime, such a person could be denied the right to vote for 3 to 10 years after serving the sentence.[93] The legislator's severity could be

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86 Latvijas Tautas Padome. I puse [stenogrammas] [The People's Council of Latvia. I Half [transcripts]]. Rīga: Satversmes Sapulces izdevums, 1920, pp. 34–41.

87 Ibid., pp. 173–174. See also Latvijas pagastu satversmes pagaidu likuma, II. A) 8).

88 Latgales pagastu satversmes pagaidu noteikumi, A. 8.

89 See, for example, discussions on city council elections. Latvijas Tautas Padome [stenogrammas]. I puse, pp. 172–183.

90 Likums par pagasta padomes vēlēšanām, Art. 3.

91 Latvijas Tautas Padome. II puse [The People's Council of Latvia. II Half]. Rīga: Satversmes Sapulces izdevums, 1920, pp. 887–888; Papildinājumi pie Satversmes Sapulces vēlēšanu likuma [Additions to the Law on Electing the Latvian Constitutional Assembly]. Likumu un valdības rīkojumu krājums, 30.04.1920, No. 2, doc. No. 178.

92 Latvijas pagastu satversmes pagaidu likums, Art. A) 8); Latgales pagastu satversmes pagaidu noteikumi, Art. A. 8; Likums par pagasta padomes vēlēšanām, Art. 4; Pagaidu noteikumi par pilsētu domnieku vēlēšanām, Art. 2; Latvijas Satversmes Sapulces vēlēšanu likums, Art. 2; Likums par Saeimas vēlēšanām, Art. 2, etc.

93 Latvijas pagastu satversmes pagaidu likums, Art. A) 8); Latgales pagastu satversmes pagaidu noteikumi, Art. A. 8; Pagaidu noteikumi par pilsētu domnieku vēlēšanām, Art. 2–3; Latvijas Satversmes Sapulces vēlēšanu likums, Art. 3; Likums par Saeimas vēlēšanām, Art. 3, etc.

explained by the historical experience. Similar restrictions had been set with respect to electing the State Duma of the Russian Empire.[94]

On 29 June 1920, the Constitutional Assembly passed the law "On Closing Noble Corporations".[95] The property of the Knighthood Corporations of Vidzeme, Courland and Piltene was transferred into the State's ownership. The Cabinet Regulation "On Closing the Noble Orphan Courts", issued on 16 November1920"[96] and the law of 10 March 1922 "On Liquidation of the Credit Union of Vidzeme Nobles and Liquidation of Kurzeme Credit Society"[97] followed. With the coming into force of these laws, the division of people into classes was abolished in full.

Summary

Embodying the principle of democracy in the electoral law of the Latvian people begad after the abolition of serfdom in the Baltic Governorates of the Russian Empire at the beginning of the 19th century. A Latvian, as a member of the civil parish community, acquired the right to elected and to be elected an official of the civil parish. Although the 19th century laws on peasants included restrictions on democratic electoral rights, in the spirit of the time, the civil parish society was democratically organised. Participation in organisation of the civil parish life, based on the outcome of elections of the officials, for the majority of the Latvian people became the sole "school of statehood" until the proclamation of the Republic of Latvia.

Until the collapse of the Russian Empire, Latvians amassed experience in electoral rights also in the elections of city councils and the State Duma. Viewed from the contemporary perspective, none of the elections held in the Russian Empire could be deemed to be democratic, because law-based inequality of ranks, social strata and genders existed. The election law on cities was particularly undemocratic in this respect. However, even undemocratic elections gave election experience and awareness of the need for democratic elections.

The demand for democratic elections was advanced already at the very beginning of the 20th century. This shows that, even prior to the democratic February Revolution of 1917 in the Russian Empire, the Latvian people were mature enough to embody in the election law the principle of democracy, complying with the civil society. The First Provisional *Satversme* of the Republic of Latvia, as well as subsequent laws on election the parliament of the state and on the local government elections documented the will of the Latvian people to live in a parliamentary republic with an election system, compliant with democracy, abolishing the division of people into ranks, social strata, as well as gender inequality.

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[94] See Polozhenie o vyborah" v" Gosudarstvennuyu Dumu [Regulation on Elections of the State Duma]. Polnyj svod" zakonov Rossijkoj imperii. V" 2-h" knigah". Kniga 1. Tomy. S.-Peterburg": izdanie knizhnogo magazina \"Zakonovedenie\", Art. 10, 1911.

[95] Par muižnieku korporāciju slēgšanu [On Closing Noble Corporations] (29.06.1920). Likumu un valdības rīkojumu krājums, 31.08.1920, No. 4, doc. No. 187.

[96] Par muižnieku bāriņu tiesu slēgšanu [On Closing Noble Orphan Courts] (16.11.1920). Likumu un valdības rīkojumu krājums, 29.12.1920, No. 14, doc. No. 248.

[97] Par Vidzemes muižnieku kredītsavienības un Kurzemes kredītbiedrības likvidāciju [On Liquidation of the Credit Union of Vidzeme Nobles and Kurzeme Credit Society] (10.03.1922). Likumu un valdības rīkojumu krājums, 22.03.1922, No. 4, doc. No. 61.

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Władysław Tarnawski and the Critical Reactions of the National Democratic Party in Lviv to the Changes of the March Constitution (1926–1935)

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The article considers the problem of reaction of the greatest Polish opposition party to the post-1926 "Sanation", namely, the right-wing National Democrat attitudes to the ideas of changes of the Polish Constitution of 1921. The author focuses on the King John Casimir University in Lviv milieu (mostly professors, but also graduates and those allied with these circles – lawyers and journalists). Among many advocates protesting against ruling party's reforms of the Polish law was Władysław Tarnawski – the professor of English Philology at the University and one of the leaders of Lviv's right wing. An analysis of the discourse on Polish law carried out by opposition parties against the post-May government allows to grasp the richness of Polish parliamentary life in the authoritarian period. Despite the numerous studies in Polish historiography dealing with the milieu of the National Democrats between 1918 and 1939, the Lviv branch of this party has been understudied.

Keywords: Polish Constitution of 17 March 1921, Lviv right-wing, Władysław Tarnawski, National Democrats, Józef Piłsudski, the Sanation movement.

Contents

Introduction

The March Constitution of 1921 has already engendered plenty of relevant literature on the subject, and Polish law historians have devoted a lot of attention to it, which comes as no surprise. The first fundamental statute after Poland had

regained independence in 1918 alluded to the famous May Constitution of 1791, and, furthermore, constituted a crowning achievement of legislative work in a difficult formative period of the Polish state. Although it soon came in for a lot of criticism, and after the May Coup, when Józef Piłsudski's supporters seized power in 1926, it was clear it required changes, its principles still remain a permanent element of the Polish political system.[1]

The current article explores the reactions of the Lviv right-wing circles to the changes in the constitution made by the government after 1926. This topic has so far been omitted by researchers, which seems quite puzzling, as the history of the National Democratic Party in Poland has been pretty well researched; yet any examples of the activity of politicians, theoreticians, leaders and ordinary members alike have usually been cited based on analyses of the press of Kraków, Poznań, Warsaw and Vilnius. Because of the limited access to Polish-language newspapers in Lviv (which still remain largely non-digitalized, available mainly at libraries and archives of Lviv, and for decades hardly ever used in research), the voice of one of the major centres of opposition against the Sanation rule has been completely marginalized to date.[2] However, as Adam Redzik has proved in his works on the lawyers from King John Casimir University in Lviv, most of them had been supporters of the National Democratic Party, and such figures as Stanisław Głąbiński, Edward Dubanowicz and Stanisław Grabski were among the elite of Polish lawyers

[1] See, e.g.: *Starzyński, S.* Konstytucja Rzeczypospolitej Polskiej z dnia 17. Marca 1921 r. [Constitution of the Republic of Poland of 17 March 1921]. Przegląd Prawa i Administracji, Vol. 46, 1921, pp. 94–115; *Jaworski, W. L.* Uwagi prawnicze o projekcie Konstytucji [Legal notes on the draft Constitution]. Kraków: Krakowska Spółka Wydawnicza, 1921; *Abraham, W.* et al. (eds). Nasza konstytucja. [Our constitution. Lecture series]. Cykl odczytów urządzonych staraniem Dyrekcji Szkoły Nauk Politycznych w Krakowie od 12 do 25 maja 1921 r. Kraków: nakładem autorów, 1921; *Peratiatkowicz, A*. Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland]. Poznań: Fiszer i Majewski: 1921; *Komarnicki, W.* Polskie prawo polityczne (Geneza i system) [Polish political law (Genesis and system)]. Warszawa: Księgarnia F. Hoesicka 1922; *Starzyński, S.* Konstytucja Państwa Polskiego [Constitution of the Polish State]. Lwów: Towarzystwo Naukowe we Lwowie, 1921; *Malec, D.* Zagadnienia administracji w Konstytucji marcowej [Issues of administration in the March Constitution]. Uwagi z okazji 90. rocznicy uchwalenia Konstytucji z 17 marca 1921 r. Przegląd Sejmowy, Vol. 19, issue 1, 2011, pp. 11–26; *Pietrzak, M.* Konstytucja z 17 marca 1921 r. z perspektywy 80 lat [The Constitution of 17 March 1921 viewed from the perspective of 80 years onward]. Przegląd Sejmowy. Vol. 9, issue 2, 2001, pp. 9–20; *Sarnecki, P.* Konstytucja marcowa a rozwój konstytucjonalizmu polskiego [The March Constitution and the development of Polish constitutionalism]. Przegląd Sejmowy. Vol. 9, issue 2, 2001, pp. 21–39; *Kraczkowski, R.* Prawa obywatelskie w Konstytucji marcowej [Citizens' rights in the March Constitution]. Studia Iuridica, issue 24, 1992, pp. 49–60; *Kulesza, W. T.* Konstytucja z 17 marca 1921 r. na tle ówczesnych konstytucji europejskich (1919–1922) [The Constitution of 17 March 1921 against the background of the European constitutions at the time (1919–1922)]. Zagadnienia Sądownictwa Konstytucyjnego, issue 1, 2013, pp. 19–32; *Malec, D.* Koncepcja administracji oraz jej kontroli w Konstytucji marcowej z 1921 r. [The concept of administration and its control in the March Constitution of 1921]. Zagadnienia Sądownictwa Konstytucyjnego, issue 1, 2013, pp. 7–17; *Brzozowski, W.* Problematyka wyznaniowa w Konstytucji marcowej [Religious issues in the March Constitution]. Zagadnienia Sądownictwa Konstytucyjnego, issue 1, 2013, pp. 51–63; *Czernicki, P.* et al. (eds). Konstytucje polskie dwudziestolecia międzywojennego: doświadczenia, inspiracje, instytucje [Polish constitutions of the interwar period: experiences, inspirations, institutions]. Warszawa: Uczelnia Techniczno-Handlowa im. Heleny Chodkowskiej w Warszawie, 2014.

[2] Cf. *Dawidowicz, A.* et al. (ed.). Prasa Narodowej Demokracji 1886–1939 [Press of National Democrats 1886–1939]. Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2010; *Maguś, J.* „Słowo Polskie" w latach 1918–1928. Organ prasowy Narodowej Demokracji, Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2019.

in the Second Polish Republic, whose clear political views were widely known.[3] The current paper, however, does not concentrate on lawyers, but above all – on a professor of English Philology at Lviv University, Władysław Tarnawski, and his attitude to the changes in the Polish constitution. This stems from the fact that in the period under discussion, when, following reorganization in Polish politics, the National Party was established in 1928, Tarnawski became the head of the Lviv branch (and vice-president between 1932 and 1935). What is more, he was one of the editors of the "Lwowski Kurier Poranny" (later: "Kurier Poranny"), and in 1934 he even temporarily headed the daily newspaper of the Lviv right wing as editor-in-chief, thus having influence on the choice of collaborators and the content. Despite his specialization (history of English literature, particularly Shakespeare), Tarnawski wrote a lot of articles on current political issues, among which the matters of the Constitution played a significant role. The achievements of the English studies specialist and politician from Lviv in that respect, which had actually cost him losing the university chair in 1933 due to the decision of the Sanation movement authorities, have remained completely unknown and are definitely worth remembering.[4] Tarnawski is a perfect example of the fact that between the wars it was not only lawyers, economists, sociologists and historians but also the representatives of various fields of learning that were involved in political activity. Sometimes it is hard to separate their interpretation of some phenomena and their political beliefs. Tarnawski as a philologist is one of many representatives of the humanities actively creating Polish politics of the interwar period and voicing his opinions on matters far beyond the field of his specialisation.[5]

1. The circumstances of enacting the Constitution and its downfall

The May coup d'état of 1926 and the seizure of power by a new political group connected with Marshal Józef Piłsudski started a new process in Poland – undermining and finally changing the March 1921 Constitution. A compromise achieved only five years earlier became inconvenient for the ruling party, leading Poland from democracy into authoritarianism. Surprisingly, even the opposition realized that the apparently ideal solution in a new political reality had become far

[3] *Redzik, A.* (ed.). Academia Militans. Uniwersytet Jana Kazimierza we Lwowie, Kraków: Wydawnictwo Wysoki Zamek, 2015; *Bukowska-Marczak, E.* Przyjaciele, koledzy, wrogowie? Relacje pomiędzy polskimi, żydowskimi i ukraińskimi studentami Uniwersytetu Jana Kazimierza we Lwowie w okresie międzywojennym (1918–1939) [Friends, colleagues, enemies? Relations between Polish, Jewish and Ukrainian students of the Jan Kazimierz University in Lviv in the interwar period (1918–1939)]. Warszawa: Wydawnictwo Neriton, 2019.

[4] *Gibińska-Marzec, M.* Tarnawski Władysław. Polski słownik biograficzny, Vol. 52/53, issue 214, 2019, pp. 357–359.

[5] See *Górny, M.* Kreślarze ojczyzn [Draughtsmen of homelands]. Geografowie i granice międzywojennej Europy, Warszawa: Wydawnictwo Neriton 2017; *Pudłocki, T.* English and German studies at the Jagiellonian University between the two World Wars: The ideal of a scholar and challenges of reality. Prace Historyczne. Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Vol. 145, issue 2, 2018, *Stinia, M., Pudłocki, T.* (eds). W kręgu historii nauki i oświaty [In the history of science and education]. Uniwersyteckie *środowiska* filologów krakowskich i lwowskich 1850–1939, Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2018. *Pudłocki, T.* Serving Science versus Serving the Country: University Professors of Western Neophilologies in Poland, 1918–1923. In: *Pudłocki, T.* et al. (eds). Postwar Continuity and New Challenges in Central Europe, 1918–1923. The War That Never Ended, New York – London: Routledge, 2022, pp. 398–420.

from satisfactory.[6] Władysław Tarnawski, university professor of English Literature in Lviv and the head of the local National Democrats wrote in the popular right-wing daily "Lwowski Kurier Poranny/Lviv Morning Courier", complaining about the multi-party system:

Unfair legal relations are the outcome of a large number of parties. It is the amount that had to be created in Poland by the five-point electoral law. Therefore, the same rights are given to the celebrity of Polish literature, Aleksander Świętochowski and Ivan the Stupid, a twenty-year-old illiterate from a distant Belarusian village. What is more, Ivan's "precious voice" is protected by the same law of proportionality.[7]

Tarnawski underlines that the French system, artificially introduced in Poland, saw his fellow countrymen totally unprepared to co-rule in such a nationally complicated country as Poland of 1918–1939. While the Western powers had grown up to democracy over the centuries, the situation in Central and Eastern Europe was different. The statehood's existence was halted decades earlier and resumed only at the end of the Great War. Therefore, not only the national minorities, but some, especially leftist, Poles were longing for the strong power of a charismatic leader. It was the outcome of having been brought up in huge empires such as Russia, Austria-Hungary and Germany, where the rulers had controlled so many aspects of life that the people in new complicated post-1918 realities were not mentally ready for democratic standards. Tarnawski sees the only solution in a two-party system like in Great Britain, because neither the authoritarianism nor the multi-party system was a proper choice for him.

Inevitably, the ideas and visions concerning the future shape of Poland were multiplying as the chances for its rebirth increased, especially in October and early November of 1918. It was clear to everyone – apart from the Revolutionary Left – that the system of independent Poland should be adopted by the *Sejm*, a body with democratic legitimacy and a mandate bestowed by all citizens. The announcement that a democratic electoral law would be drawn up without delay and that the *Sejm* would be convened on its basis was part of the proclamation of the Regency Council of 7 October 1918. In the meantime, in many parts of the Polish lands competitive centres of power on Polish soil emerged. This chaos was naturally cut short when Józef Piłsudski arrived in Warsaw from Magdeburg on 10 November 1918. Immediately after that, all the centres including the Regency Council were subordinated to him. Even if the territorial shape of the country was still an object of dispute for many months to come, on 22 November 1918 Piłsudski issued a Decree on the Highest Representative Power of the Republic of Poland. Piłsudski took the lead as the Provisional Chief of State, who approved legislative projects previously drawn up and adopted by the Council of Ministers. What is more, a few days later the Decree on the Legislative Sejm Election Law was issued and scheduled for 21 January 1919.

Despite the fact that the emerging Polish state did not yet have borders but rather fronts on which battles were being waged, the newly independent Republic of Poland had its democratically elected Legislative *Sejm*. It was just a few days after the international recognition of Poland by the USA as well as Greece, and inviting the Polish delegation to join the Paris Peace Conference. The government headed

[6] Literature on the Polish Second Republic is extensive. Among many publications, the particularly recommended articles are included in special issue of: Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Historyczne, Vol. 147, issue 4, 2020, Oblicza Polski niepodległej 1918–1939.

[7] *W. T.* Parte i partyjniactwo [Party and partisanship]. Lwowski Kurier Poranny, Vol. 2, issue 276, 1929, p. 1.

by Ignacy Jan Paderewski, and, hence, the Polish state, was recognized by the major Allied Powers *de iure* in the so-called "Little" Treaty of Versailles of June 1919.[8]

The election brought success to the National Democrats and its supporting powers, while weakening the Left in favour of the Centre. Still, the parliamentary situation was very complicated. Nevertheless, there was a certain leaning towards the Centre-Right in the presence of weak Conservatives and national minorities.[9]

It was clear to everyone that drafting a constitution was not an easy task, that it took a lot of time, and that its provisions could not be adopted hurriedly. Although the first drafts of the constitution already existed, the military, economic, social and international circumstances did not encourage a calm reflection on the future Polish political system. The solution was found in the resolution of 20 February 1919. The so-called "small constitution" reinstating Józef Piłsudski in the post of Chief of State – defined in a very concise (but not entirely precise) manner the basic competences of the leading state authorities. Even if Piłsudski described this act as a "Short Lady", in practice, however, it turned out that he retained a far-reaching independence in the implementation of Eastern policy and effectively influenced certain decisions in the *Sejm* with the help of friendly parliamentarians.[10]

The adoption of the "small constitution" gave Polish politicians some time for reflection and an opportunity to choose between ideas concerning Poland's future political system proposed by various parties. The discussions lasted much longer than expected. Finally, the agreement was found by an extremely delicate position of the state in March 1921. The upcoming plebiscite in Upper Silesia, which was to be held on 20 March 1921, was to determine the affiliation of that region either to Germany or to Poland. One of the arguments in the campaign conducted in favour of the region remaining in Germany was the accusation that Poland was a "seasonal" country. The adoption of the constitution, just as the conclusion of negotiations with the Bolsheviks and the signing of a peace treaty in Riga on 18 March 1921, undoubtedly undermined this accusation. In this atmosphere, all parliamentary factions compromised and the constitution was quickly signed.[11]

The constitution adopted in 17 March 1921, consisted of 126 articles grouped into seven sections: I. The Republic (Articles 1–2); II. Legislative power (Articles 3–38); III Executive power (Articles 39–73); IV Judiciary (Articles 74–86); V. General duties and rights of citizens (Articles 87–124); VI. General provisions (Article 125); and VII. Transitory provisions (Article 126). The preamble contains references to the Polish-Lithuanian Commonwealth, which points to the continuity of Polish statehood interrupted by a century and a half of servitude. What is more, there is a direct reference to "the glorious tradition of the memorable Constitution of the Third of May, 1791."[12]

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[8] See more in: *Godek, S.* O odrodzeniu Rzeczypospolitej [On the rebirth of the Republic]. Warszawa: Wydawnictwo Sejmowe, 2018.

[9] *Mierzwa, J.* Konstytucja marcowa 1921 roku [Constitution of March 1921]. Warszawa: Wydawnictwo Sejmowe, 2021, pp. 30–32.

[10] See more in: Projekty konstytucyjne Rzeczypospolitej Polskiej [Constitutional projects of the Republic of Poland]. Warszawa: Kancelaria Cywilna Naczelnika Państwa, 1920; *Mierzwa, J.*, op. cit., pp. 45–50.

[11] See more in: *Krukowski, S.* Geneza konstytucji z 17 marca 1921 r. [Genesis of the Constitution of 17 March 1921]. Warszawa: Ludowa Spółdzielnia Wydawnicza, 1977; *Tusiński, P. A.* Sejm Ustawodawczy Rzeczypospolitej Polskiej 1919–1922 [Legislative *Sejm* of the Republic of Poland 1919–1922]. Warszawa: Wydawnictwo Sejmowe, 2019; *Mierzwa, J.*, op. cit., pp. 109–114.

[12] *Mierzwa, J.*, op. cit., p. 125.

The March Constitution introduced the principle of sovereignty of the nation. The nation exercised its sovereignty indirectly – through elected bodies of the lower and upper chambers of the Parliament. Lastly, in accordance with Montesquieu's principle of the separation of powers into three branches, the *Sejm* and the Senate were to serve as the legislative branch, the President and Council of Ministers – as the executive branch, and independent courts – as the judiciary branch. The division was understood by the authors of the constitution as the organizational separation of competences, which did not exclude, e.g., granting certain legislative prerogatives to the executive and executive powers to the legislature. The highest authority was the parliament. Moreover, the Nationalist Right put a great deal of effort into maximally curtailing the powers of the head of state.

The Constitution, based on the Constitution of the Third French Republic, was regarded as very democratic. *Inter alia*, it expressly ruled out discrimination on racial or religious grounds, even if the position of the Catholic Church was extremely eminent. It also abolished all the royal titles and state privileges, and banned the use of blazons. In the course of the work on the constitution, there was no disagreement at all regarding the granting of voting rights to women.

The March Constitution introduced the principle of sovereignty of the nation. With time, opinions about the March Constitution were becoming increasingly critical – mainly on the account of experiences associated with its application. As a result of very weak presidential prerogatives, Marshal Piłsudski did not participate in the election of 1922. The victory of Gabriel Narutowicz over the nationalist candidate caused the explosion of right-wing frustration and aggression on the streets, and finally the assassination of the President by an artist who was mentally unbalanced, but nonetheless associated with the nationalists. An efficient functioning of the system depended on the formation of a stable government majority in the *Sejm*. It proved to be hard to achieve before 1926[13].

Given the flaws of the constitution, the parliamentary debate was rife with constitutional amendment proposals. The Centre-Right demanded that some of the powers of the *Sejm* be transferred to the Senate and that the President be equipped with the right of veto and the power to dissolve parliament. The need to amend the constitution, strengthen the executive branch and weaken the legislative one was among the demands advanced by Marshal Piłsudski, who had been sidelined in political life. They were part of a broader programme of moral renewal and a battle against party politics and "Sejmocracy".

Several weeks after the May 1926 coup d'état led by Józef Piłsudski, the *Sejm* adopted a draft amendment to the constitution. Under it, the prerogatives of the President were strengthened, and some of the *Sejm*'s ones – weakened. From the formal point of view, the March Constitution remained in force until the adoption of the April Constitution in 1935. In reality, since 1926, Poles had to deal with what was described by political system historians as a para-constitutional system. The actual management of the state affairs was in the hands of Józef Piłsudski, who only periodically held the post of Prime Minister. Therefore, the name of the whole political movement, the Sanation – which was meant to designate restoration to health – became a symbol of undemocratic tendencies after 1926.

[13] For the political situation in Poland until the May Coup, see more in: *Ajnankiel, A.* Od rządów ludowych do przewrotu majowego. Zarys dziejów politycznych Polski 1918–1926 [From People's Rule to the May Coup. An outline of the political history of Poland 1918–1926]. Warszawa: Wydawnictwo Wiedza Powszechna, 1977.

2. Lviv lawyers and economists and the changes of the constitution 1926–1934

Following 1926, the Polish Right formed the major opposition against the rule of the supporters of Józef Piłsudski. Like in many other regions of Poland, in Lviv reigned open criticism of various ideas of the ruling party, including the draft of changes in the constitution. Obviously, the first to express their negative opinion were local lawyers and economists, emphasizing that the government, in the first place, did its best to keep the power, instead of striving to improve the quality of Polish legislation.

Władysław Świrski, editor-in-chief of the "Lwowski Kurier Poranny" and a renowned economist, repeatedly pointed out the Sanation government's designs on changing the constitution. He believed, however, that the ruling camp – disgraced due to many scandals – did not have a moral mandate to create a draft of the fundamental statute, i.e., in fact a new political system.[14] In his article *Why the raptures over parliamentary responsibility*, Świrski pointed out that although on the grounds of the current constitution the *Sejm* had a full right to bring the government to parliamentary justice, i.e., express vote of no confidence towards it, it did not exercise that right. The question of changing the government was fully entrusted with the president, although by 1930 the opposition had had an opportunity to force such a law through. Świrski emphasized that it was not possible to agree with that interpretation and renounce the prerogatives of the legislative. The scandal connected with the minister of finance Gabriel Czechowicz, who had drastically broken into the budget and got away with it as a result of political pressure, made ministers lean towards evading constitutional responsibility.[15]

Świrski alluded to one of the major scandals in the history of the Second Polish Republic. On the grounds of the March Constitution, unplanned government expenses required the *Sejm* to pass laws on extending extra loans. In practice, the government would apply for such loans after the fact, due to the impossibility to instantaneously summon the *Sejm* in order to make suitable resolutions. After the coup d'état, the political power gathered in the hands of Piłsudski put him above the law, an example of which was the aforementioned Czechowicz scandal.

On 20 February 1929, a motion was put forward, signed by the members of the parliamentary grouping "Wyzwolenie" of the Polish Socialist Party and the Peasant Party to arraign the minister of treasury Czechowicz on the charges of breaking the law on treasury of 22 March 1927 and exceeding the loan by 500 million zlotys to reach goals not provided for by the budget and not covered by the loan, as well as taking out loans not covered by the budget without having applied for their approval in the *Sejm*. It was an open secret that Prime Minister Józef Piłsudski had demanded financial means for the ruling party's election campaign in 1928. Although the minister was put before the State Tribunal, which – fearing Piłsudski – re-sent the matter to the *Sejm* (which was not able to voice an opinion in that matter, though, on account of the Sanation government policy of provoking artificial government crises and adjourning the sessions of the *Sejm* by the president). The nationalists did not condone that kind of interpretation and shifting responsibility; they harboured no illusions and knew that the political decisions were strongly bending the legislation

[14] *Ś[wirski], [W].* Legitymacja [Legitimacy]. Lwowski Kurier Poranny, Vol. 2, issue 561, 1929, p. 1.

[15] *Ś[wirski], [W].* Skąd te zachwyty dla odpowiedzialności parlamentarnej Where does this admiration for parliamentary accountability come from]. Lwowski Kurier Poranny, Vol. 2, issue 379, 1929, p. 1.

in Poland.[16] Eventually, following the 1930 elections, the *Sejm* in its new composition, subordinated to the Sanation, adopted the budget overruns, thus putting an end to the whole affair.[17] Throughout, the right-wing press constantly cited the constitution, showing to what extent the government was exceeding its authority; so did the Lviv journalists.

Świrski called for a reform of the electoral law, believing it to be faulty, and in the case of electing senators, even harmful for Polish state of possessions. He emphasized that the Right did not seek changing the principle of the universality of parliamentary elections but aimed to introduce the principle of representativeness in the upper house of the Polish parliament – so that the organ controlling the work of the lower house could actually represent the interests of Poland, instead of those social groups that violated Polish *raison d'état*.[18]

The work on enacting a new constitution took longer than expected. The debates in late autumn and winter of 1933 were particularly heated, the more so as it had turned out that even within the ruling party there was a serious split, which made it difficult to force the legislation through.[19] It was said jokingly in August 1934 that the Sanation was taking its time to prepare the constitution, as the decisive factor had decided to linger. That was the hidden criticism of the fact that nothing could happen in Poland without Marshal Piłsudski's decision.[20] A lot of sources wrote that actually the new constitution would be dictated by the Marshal, despite the censorship which did not spare the opposition.[21]. The draft submitted for discussion was called by Świrski "a failed compilation", which did not arouse much interest in society. He stressed that people were tired of new ideas, all of which had a few elements in common: they were ever-changing, surprising with their solutions which had little to do with lawfulness, and showing that the Sanation did all it could to stay in power.[22]

After the opening of Parliament in the autumn of 1934, a heated debate ensued over the draft of the constitution. Nationalist press all over Poland tore the ruling party's idea to pieces and so did "Kurier Lwowski" which, informing the readers of the proceedings, scrupulously pointed out any gaps in the draft and warned about the hazard of enacting the Sanation bill.[23]

When it turned out that the *Sejm* passed the draft of the new constitution and the document was sent to the Senate, the latter attempted to stop changing the law. A determined criticism came on 16 January 1935 from Stanisław Głąbiński, a former professor of law at Lviv University, a long-term MP both under Austrian

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[16] *Pieracki, J.* Po decyzji Trybunału Stanu [Pursuant to the decision of the State Tribunal]. Lwowski Kurier Poranny, Vol. 2, issue 380, 1929, pp. 1–2; *Ś[wirski], [W].* Wobec obiegających pogłosek [With the rumors circulating]. Lwowski Kurier Poranny, Vol. 2, issue 382, 1929, p. 1.

[17] For more, see: *Landau, Z., Skrzeszewska, B.* Sprawa Gabriela Czechowicza przed Trybunałem Stanu – wybór dokumentów [The case of Gabriel Czechowicz before the State Tribunal – selected documents]. Warszawa: Wydawnictwo, PWN, 1961.

[18] *Ś[wirski], [W.]* Absolutyzm czy reforma parlamentu [Absolutism or parliamentary reform]. Lwowski Kurier Poranny, Vol. 2, issue 395, 1929, p. 1.

[19] See, e.g.: Kurier Lwowski, Vol. 6, issue 304, 1933, p. 1; issue 313, p. 1; issue 323, p. 1; issue 340, p. 1; issue 342, p. 1; issue 348, p. 1; issue 350, p. 1; issue 356, p. 2; Vol. 7, issue 10, 1934, p. 1; issue 11, p. 1.

[20] Cisza w gmachu sejmowym [Silence in the parliament building]. Kurier Lwowski Vol. 7, issue 219, 1934, p. 1.

[21] Min[inister] Piłsudski podyktuje swoje „tezy" po ukończeniu debaty konstytucyjnej w komisji sejmowej [Minister Piłsudski will dictate his "theses" after the conclusion of the constitutional debate in the parliamentary committee]. Kurier Lwowski, Vol. 6, issue 362, 1933, p. 1.

[22] *Ś[wirski], [W]* Nieudała kompilacja [Compilation failed]. Kurier Lwowski Vol. 6, issue 354, 1933, p. 2.

[23] See e.g.: Kurier Lwowski, Vol. 7, issue 345, 1934, p. 1, 3; issue 352, p. 1; issue 353, p. 1.

rule and during the Second Polish Republic, as well as an unquestioned leader of Lviv nationalists, enjoying authority all over Poland. He stressed that nationalists were aware of the faults of the March Constitution and by no means advocated it should be kept. Nevertheless, the Sanation's proposition completely ignored the role of Polish people in Poland's regaining independence (which had been clearly stated in the previous constitution). Głąbiński had no doubt that, as it was, the new law violated judicial independence and put the president (now responsible only to God and history) above the law. He was backed up, among others, by Warsaw senator Joachim Bartoszewicz, who indicated that despite declaring the mediatory nature of the post of president, the new draft was introducing a system of "irresponsible dictatorship". Those comments did not help much and the Senate – also dominated by the ruling camp supporters – voted the bill through with minor amendments, sending it back to the *Sejm*.[24] In the last weeks before passing the new constitution, nationalist press warned that the so-called "constitution" (the word denoting the ruling camp's draft was often put in quotation marks) would not – despite declarations – appease ethnic discords in Poland but, as a result of introducing new electoral law, could even exacerbate them. Paradoxically, some arguments put forward by nationalists were provided by Jews, whom they fought; Jewish people also saw in the new draft a hazard of undermining their citizens' rights.[25]

3. Władysław Tarnawski and the question of the change of the constitution

Among the many opinions on the issue of violation of the March Constitution, an interesting one is that of Professor Władysław Tarnawski. Careful reading of the diaries of the Lviv rightists reveals that in terms of writing about the Polish legal system, Tarnawski could well compare with lawyers like Dr. Jan Pieracki, Prof. Stanisław Głąbiński, Prof. Stanisław Grabski and economist Władysław Świrski. That might have stemmed from the fact that his father, Dr. Leonard Tarnawski, had long been president of the Law Society in Przemyśl (not far from Lviv) and he himself, although not a qualified lawyer, grew up under the wings of his father, one of the most eminent Polish lawyers at the turn of the 19th and 20th centuries.

According to Tarnawski, party fragmentation – typical of the Polish constitutional system – leads to people's confusion as to who to vote for; a multitude of political parties only fuels ambitions of individuals who often lack clear views or a predisposition to governing. Even though he did not support the political system based on the provisions of the March Constitution, he spoke against introducing dictatorship. "I don't think a remedy for frostbite is jumping into boiling water".[26] He thought that longing for dictatorship was a sign of quietism: getting rid of one's responsibility for the state and the nation just to live in peace and quiet, and focus

[24] Tylko głosami BB uchwalił Sejm konstytucję [The *Sejm* passed the constitution only with the votes of the BB]. Kurier Lwowski, Vol. 8, 1935, issue 17, p. 1; Elaborat konstytucyjny Senatu [Constitutional essay of the Senate]. Kurier Lwowski, Vol. 8, issue 18, 1935, p. 3; W jaki sposób BB przeprowadzi konstytucje przez Sejm? [How will BB get the Constitution through the *Sejm*?]. Kurier Lwowski, Vol. 8, issue 20, 1935, p. 1.

[25] Przed uchwaleniem nowej „konstytucji" [Before the adoption of the new "constitution"]. Kurier Lwowski, Vol. 8, issue 67, 1935, p. 3.

[26] *T[arnawski], W*. Dyktatura [Dictatorship]. Lwowski Kurier Poranny, Vol. 2, issue 278, 1929, p. 4.

on collecting material goods and living it up[27]. The only reason why the ruling camp ("which had just taken a mask off its face and was demanding the right to manage public finances without control, demanding to have a free hand in managing all important issues") had not introduced totalitarianism yet, was diplomatic issues.[28] Tarnawski reminded his readers that a change in the constitution (according to Art. 125 of the March Constitution) required two-thirds of the votes, both in the *Sejm* and the Senate. Hence, all appeals for "flexibility", like in the case of Kraków conservatives in the "Czas" daily, were believed by him to be nonsensical and violating the existing law.[29] Moreover, the scholar emphasized that since the May Coup and introduction of the August Amendment in 1926, the government had taken its time changing the constitution, which proved that it did not feel too secure. There was a lot of campaigning in favour of the reform, constant talk about the work on the drafts of the constitution, and fulminating against the opposition as a force blocking the changes, but in fact the Sanation had focused on filling the major posts with their own people and gaining majority in the *Sejm* and the Senate.[30]

Tarnawski, like a lot of Polish National Democrats, saw the reason for the crisis of democratic rule in the centralization of power – hopefully, not under a left-wing banner. He indicated what were, in his opinion, the advantages of Italian fascism: autarky, discipline, public works, fighting unemployment, focus on citizen's duties toward the state. As he explained, "[fascism] has been sanctioned by dynasty, then it is based on a tight, large organization enlivened by premeditated common principles".[31] According to him, nothing like that could be written about the Sanation – which had aimed for power at any cost, was a force "morally depraved to the core",[32] lacking responsible, intelligent and ideological people, rife with opportunists.[33] The professor emphasized that shared ambitions, interests or appetites would not work much, as introducing a personality cult without an "ideological bond" would be a classic perversion of the system. He developed that thought in many other texts, too, citing plenty of examples from the histories of different countries.[34]

The scholar believed that Polish people displayed opposing qualities typical of the east and west of the continent:

On the one hand, worship of despots, on the other, – awareness that society is made up of individuals, whose will shapes the fate of the whole. On the one hand, respect for brutal physical strength, on the other, – belief in the power of the spirit. On the one hand, contempt for any standards restricting the will of the leaders, on

[27] Ibid.; *Tarnawski, W.* Czterdzieści cztery [Fourty four]. Lwowski Kurier Poranny, Vol. 2, issue 326, 1929, p. 1; *Tarnawski, W.* Wyspiański jako prorok [Wyspiański as a prophet]. Lwowski Kurier Poranny, Vol. 3, issue 43, 1930, p. 1; *Tarnawski, W.* Egzamin z etyki [Examination in ethics]. Kurier Lwowski, Vol. 4, issue 1, 1931, p. 1.

[28] *Tarnawski, W.* Dyktatura czy Prima Aprilis [Dictatorship or April Fool's Day]. Lwowski Kurier Poranny, Vol. 3, issue 92, 1930, p. 1.

[29] *Tarnawski, W.* Rady podstarzałej damulki [The advice of an elderly lady]. Kurier Lwowski, Vol. 6, issue 335, 1933, p. 2.

[30] *Tarnawski, W*. Przez Londyn [Through London]. Kurier Lwowski. Vol. 6, issue 360, 1933, p. 2.

[31] *Tarnawski, W.* Dyktatura…, p. 1.

[32] *Tarnawski, W*. Trzy siły [Three forces]. Lwowski Kurier Poranny, Vol. 3, issue 102, 1930, p. 1.

[33] *Tarnawski, W.* Rada ekspresów [Express Council]. Lwowski Kurier Poranny, Vol 3, issue 135, 1930, p. 1. See also: *Tarnawski, W.* Z makulatury wyborczej [From electoral paper]. Lwowski Kurier Poranny, Vol. 3, issue 319, 1930, p. 1; *Tarnawski, W.* Cesarz Wespazjan a nasze czasy [Emperor Vespasian and our times]. Lwowski Kurier Poranny, Vol. 4, issue 209, 1931, p. 1; *Tarnawski, W.* Przed możliwą zmianą warty [Before a possible changing of the guard]. Lwowski Kurier Poranny, Vol. 5, issue 104, 1932, p. 1.

[34] *Tarnawski, W.* Jeszcze coś niecoś z historii [Something else from history]. Lwowski Kurier Poranny, Vol. 2, issue 279, 1929, p. 1.

the other (straight from the Roman school), – the sense of law which is the ultimate achievement of Aryan intelligence. On the one hand, a passion for meandering, lies, deceit, perfidy, on the other, – truth and clearly formulated principles.[35]

Yet Tarnawski saw a chance for Poland in the democratic system, even if it was not perfect. Looking at France, he stressed that frequent changes of governments and heated parliamentary debates had not stopped that state from stabilizing its currency and becoming the first world power. He believed then that those who complained about the parliamentary system in Poland, crises, and weak power of the president, ought to follow the example of Poland's ally and focus on real problems instead of artificial ones.[36]

Tarnawski did not agree with the view that politics had always been a corrupting phenomenon. It was not when it was practiced by moral individuals, ideological and certain of their rightness. He was sure that, with development of democracy, the politicians would be recruited from those with firm convictions, who would do anything in order to clean governments of depraved and corrupt individuals. Perhaps that's why when in December 1929 there was a governmental crisis, Tarnawski defended the President Ignacy Mościcki, even if he did that somewhat teasingly:

> *Society believes that Mr. President had nothing to do with the many violations of law and wilful, uncontrolled management of public finances. […] Despite what the Sanation press has been writing for months about the weakness and restrictions of the executive, it should be stated that no member of the opposition has challenged Mr. President's powers with a slightest allusion. No-one has expressed even a trace of distrust towards him. Society remembers that Mr. President has taken an oath on the constitution and knows he will remain faithful to that oath and that he is aware of his responsibility – not only for the nation but also for his own conscience and history.*[37]

The text was by no means a praise of the administration of Ignacy Mościcki, who was known for his leanings towards Piłsudski. Those words stemmed from the conviction that any man, and a politician in particular, should feel responsible for his own actions. President, as the first person in the state, ought to set an example in this respect. Furthermore, if in the Supreme Court after the Brest elections there were around 4/5 uninvestigated election protests, MPs and senators from those districts, who were to elect president in the future, must have had debatable mandates to do it.[38] The author also disliked the idea of granting special powers to the president, though he did understand the mechanism which had influenced it in those circumstances. He sneered, "it seemed that the miracle over the polls in the autumn of 1930 gave the Sanation a precise machine for a sure and easy implementation of their will in the state",[39] and yet it turned out that the opposition did not yield to suppression and continued to attack the successive actions of the government.

In his suggestions of changes, Tarnawski repeatedly referred to Polish history and literature. He believed one of the best signposts to transform the state was

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[35] *Tarnawski, W.* Pod powierzchnią [Under the surface]. Lwowski Kurier Poranny, Vol. 2, issue 589, 1929, p. 1.

[36] *Tarnawski, W.* Lekcja poglądowa [Review lesson]. Kurier Lwowski, Vol. 5, issue 56, 1932, pp. 1–2.

[37] *Tarnawski, W.* W chwilach oczekiwania [In moments of anticipation]. Lwowski Kurier Poranny, Vol. 2, issue 595, 1929, p. 1.

[38] *Tarnawski, W.* O godność i powagę przyszłego prezydenta [Concerning the dignity and seriousness of the future president]. Kurier Lwowski, Vol. 6, issue 40, 1933, p. 1.

[39] *Tarnawski, W.* Pełnomocnictwa [Mandate]. Kurier Lwowski, Vol. 6, issue 75, 1933, p. 1.

the Constitution of 3 May 1791. As he emphasized, it had rehabilitated the Poles in the eyes of the world to such an extent that a renowned political writer of that time, Edmund Burke, apparently described it as "a fruit of civic spirit drawing extensively not on the doctrine but on life, avoiding bloody coups and violent shake-ups yet marching ahead".[40] He therefore suggested not to copy other models, but instead to look at the country's own past and draw the right conclusions from current situations.[41] Hence, Tarnawski, too, referring to the public discourse on the necessity to change the March Constitution (strongly supported not only by the Sanation but also by the National Democrats), was an advocate of reforms. He spoke in favour of enacting a new constitution, stressing that the political system in force in Poland had introduced chaos and only ostensible justice.[42] The author emphasized, however, that one common conclusion results from the history. Any legal solutions introduced rapidly have proven to be impermanent. He suggested referring to Polish traditions and not thinking only in terms of party policy. He was afraid that the change of the constitution was but a pretext for the Sanation to eliminate the parliament from the process of passing the budget and assessing politicians' state activity.[43] Moreover, in the course of time more and more politicians from the Nonpartisan Bloc for Cooperation with the Government (Polish: BBWR) were talking about the necessity to strengthen the power of the president and elect him through plebiscite, do away with parliamentary privilege and introduce presidential nominees into the Senate.

Tarnawski was absolutely against the head of state being elected by the whole of the people authorized to participate in government, because that would ultimately lead to the country getting paralyzed by military groups from rival political parties. He expressed his disbelief in such elections being free in a country governed by the Sanation. Moreover, excessive strengthening of presidential power would lead to the situation in which the will of an individual, in fact removable only as a result of death, would constitute the law. For him, that solution was unacceptable.[44] Tarnawski harboured no illusions about what such provisions could lead to: "[…] within the grouping of the Sanation Myrmidons there are still illusions that Poland will allow a system of eternal ossification of power in the hands of those who had seized it in May 1926 to be imposed on her".[45] He warned, however, that, although the March Constitution was not perfect, people calling for its invalidation ought not to be trusted, as they continually changed their minds and lacked backbones.[46] He wrote this both before the Brest elections and after they were finished. The author did realize then that strengthening the power of the president would result in restricting

[40] *Tarnawski, W.* W dzień święta narodowego [On the day of the national holiday]. Lwowski Kurier Poranny, Vol. 2, issue 298, 1929, p. 1.

[41] Ibid.; *Tarnawski, W.* Ku dawnym ideałom [To the old ideals]. Kurier Lwowski, Vol. 4, issue 51, 1931, p. 1.

[42] *Tarnawski, W.* Parte i partyjniactwo [Party and partisanship]. Lwowski Kurier Poranny, Vol. 2, issue 276, 1929, p. 1.

[43] *Tarnawski, W.* Jakie bywają konstytucje? [What are the constitutions like?]. Lwowski Kurier Poranny, Vol. 2, issue 556, 1929, p. 1; *Tarnawski, W.* Prasie sanacyjnej do sztambuchu Sanation press into the album]. Lwowski Kurier Poranny, Vol. 2, issue 5651929, p. 1.

[44] *Tarnawski, W.* Jak to sobie wyobraża p. Kościałkowski [As Mr Kościalkowski imagines it]. Lwowski Kurier Poranny, Vol. 2, issue 562, 1929, p. 1; *Tarnawski, W.* Ku dawnym ideałom [To the old ideals]. Kurier Lwowski, Vol. 4, issue 51, 1931, p. 1; *Tarnawski, W.* Patrzą w przyszłość [They look to the future]. Kurier Lwowski, Vol. 5, issue 8, 1932, p. 1.

[45] *Tarnawski, W.* Niepoprawni [Incorrect]. Lwowski Kurier Poranny, Vol. 3, issue 16, 1930, p. 1.

[46] *Tarnawski, W.* Z makulatury wyborczej [From electoral paper]. Lwowski Kurier Poranny, Vol. 3, issue 319, 1930, pp. 1–2.

the role of the *Sejm* and the Senate to the minimum, the more so as their role had diminished anyway after Piłsudski's supporters had gained power. Besides, he thought that Walery Sławek, who headed the works on the new constitution, was not a man deserving of that role and the pressure he exerted even on the Sanation MPs was against the law.[47]

As a former secondary school teacher in his home town of Przemyśl, Tarnawski indicated that regulations about free and universal access to primary education had been erased from the draft of the new constitution passed by the *Sejm* on 6 January 1934. He considered it to be a disaster for village people, to whom access to education was largely blocked. Writing a few months later, he pointed out that the bill had not undergone further stages of the legislative process, thus in Poland the constitution of 17 March 1921 was still in force, its text of 2 August 1926, when it was amended. He expressed his hope that the Sanation's idea would never enter into force, as even the example of primary education showed that its ideas were not beneficial to the nation, only to a small group in possession of money and influence.[48]

Summary

When in the summer of 1929 rumours appeared that an agreement between the National Democrats and the Sanation movement might soon be concluded, Władysław Tarnawski, who was staying in Warsaw at the time, derided such speculations. He emphasized that the rumours proved the power of the nationalist camp, which, however, would not be content with any scraps of power in order to turn Poland into a nation state but instead would wait for a suitable moment to take over the power entirely. He stressed that nationalists were not in a hurry to take over the power, and anyone who had ever attempted to compromise with the ruling party, ended up cheated by it. The specialist in English from Lviv had no doubt that after three years of destroying Polish economy, social relations, and living beyond the means, there would come a point when the scales fell from the citizens' eyes and they understood that constant violation of the law in the name of particularistic interests was equal to the moral power of Piłsudski's followers.[49] That the Sanation could not be trusted about absolutely anything, Tarnawski had warned repeatedly.[50]

Why is it worth quoting Polish nationalists years later? After all, in Poland under the Sanation rule they had no chance to gain power, as the successive parliamentary elections in 1928, 1930, 1935 and 1938 took place in situations characterized by breaking law using force, manipulating election law, arresting members of Parliament, or in 1935, adopting a new Constitution and majority elections statute, which secured

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[47] *Tarnawski, W.* Z powodu plotek [Because of the rumors]. Lwowski Kurier Poranny, Vol. 3, issue 355, 1930, p. 1; *Tarnawski, W.* Jeszcze Senat p. Sławka [Still the Senate of Mr. Sławek]. Kurier Lwowski, Vol. 6, issue 224, 1933, p. 2; *Tarnawski, W.* Kuchmistrze z mieszkania p. Sławka [Chefs from Mr. Sławek's dwellings]. Kurier Lwowski, Vol. 6, issue 272, 1933, p. 2; *Tarnawski, W.* Sesja sejmowa i wybory samorządowe [*Sejm* session and local government elections]. Kurier Lwowski, Vol. 6, issue 305, 1933, p. 2; *Tarnawski W.* O banknocie dwudziestozłotowym i o innych rzeczach [About the twenty-zloty bill and other things]. Kurier Lwowski, Vol. 6, issue 312, 1933, p. 2; *Tarnawski, W.* Rady podstarzałej damulki [The advice of an elderly lady]. Kurier Lwowski, Vol. 6, issue 335, 1933, p. 2; *Tarnawski, W.* Przez Londyn [Through London]. Kurier Lwowski, Vol. 6, issue 360, 1933, p. 2.

[48] *Tarnawski, W.* Fatalny pomysł [A fatal idea]. Kurier Lwowski, Vol. 7: issue 288, 1934, p. 3.

[49] *Tarnawski, W.* Tak dobrze nie ma [It's not that good]. Lwowski Kurier Poranny, Vol. 2, issue 385, 1929, p. 1.

[50] *Tarnawski, W.* Gruszki na wierzbie [Pears on the willow]. Lwowski Kurier Poranny, Vol. 2, issue 548, 1929, p. 1.

the victory of the Sanation movement. And yet, despite the strength of the peasant and Sanation parties, as well as the significance of national minorities in the political reality of the Second Polish Republic, it was only the nationalists that spoke so definitely and uncompromisingly against the rule of the camp of Marshal Piłsudski. They also suffered many consequences of their attitude, a good example of which was the main protagonist of the discussion here, Władysław Tarnawski. Being a Lviv head of the party, he lost his chance to be elected to *Sejm* in 1930, and ultimately also resigned from all party activities in 1935. Moreover, as one of the main critics of the Sanation, he was deposed from his professorship and sent to early retirement. He is a good example of an intellectual deeply engaged into politics and paying a high price for publicly expressing his political beliefs. Many of his colleagues were forced to leave universities and public offices as a consequence of opposing Marshal Piłsudski and his followers. What is more, getting rid of the people was combined with the cutting the financial fundaments of the opposition press. 1935 was also the final year of the existence of "Kurier Lwowski".

From the local perspective of Lviv, the National Democratic Party was not as influential and esteemed a power as it was, e.g., in Poznań and Wielkopolska region. Yet, 1926–1935 constitutes an interesting period in Polish parliamentary system – a transitional one. Before introducing a new Constitution of 1935, the Sanation, still having a parliamentary majority on the one hand, permitted the opposition to express its opinions and words of criticism, while on the other hand, was fighting with it more and more openly. The Sanation, even if powerful and with the parliamentary majority, was afraid that the public debate over crucial political issues would jeopardize its efforts to gain full power. The party leaders were aware that the members of the National Democratic Party had huge influence over the Polish intelligentsia – the Lviv debate shows that their fears were not unfounded. The press was the most important medium to share the ideas and publish open criticism – to prove that the leading political power was violating democratic standards and – despite of the name – had nothing to do with healing the Polish society.

It also seems that the analysis of the discourse on the law carried out by opposition parties about the post-May government allows to capture the richness of the Polish parliamentary life in the authoritarian period. It comprised wide circles of society and apart from the best-qualified elite, like lawyers, economists and sociologists, it also included representatives of other professions. The very fact that, despite announcing the change of the March Constitution already in 1926, the work on the new draft took as many as nine years, speaks volumes about the strength of the Polish opposition, which – though regularly suppressed and destroyed, – still had a considerable influence on Polish society.

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The Protection of Fundamental Rights by the Constitutional Court in the Republic of Latvia. Perspectives, Opportunities and Limits of an Introduction of the Model in Italy

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The contribution aims to analyse the constitutional complaint in the Republic of Latvia, a particular type of appeal to the Constitutional Court that can be filed by an individual directly, without any intermediation, if a legal norm that conflicts with a hierarchically superordinate source has caused a violation of one of his or her fundamental rights provided for in the Constitution the Republic of Latvia of 15 February 1992 (*Satversme*). The objective will be to explore, also through the examination of constitutional jurisprudence, the adequacy of this technique of protecting fundamental rights in the Republic of Latvia, the possible development of the legal system through the referral to the Latvian Constitutional Court of issues that should have been dealt with by the legislature, and its exportability in the Italian legal system. With regard to this last profile, we will proceed to examine the obstacles to the introduction of some form of direct access to the Constitutional Court, represented not already by Article 134 of the Constitution (which, notoriously, provides for the jurisdiction of the constitutional court "over disputes relating to the constitutional legitimacy of laws and acts, having the force of law, of the State and the Regions"), but by Constitutional Law no. 1 of 1948 and Law No. 87 of 1953, which structure the control of constitutionality exclusively on incidental access ("in the course of a judgment") and by the model of protection of fundamental rights outlined by the Constitution, in which the function of protection is attributed to the ordinary judge and, in cases of exclusive jurisdiction, to the administrative judge. Finally, special attention will be paid to the constitutional jurisprudence on election laws, which, according to some, would have legitimized the introduction in the national system of a direct appeal "disguised" as an incidental appeal.

Keywords: fundamental rights, constitutional court, direct access, constitutional justice in the Republic of Latvia and in Italy.

Contents

Introduction

The guarantee of human rights is a fundamental principle of a democratic state and one of the indispensable elements of a rule of law. The primary responsibility for guaranteeing human rights and preventing, where possible, or eliminating any violations lies with the State.

The Constitution of the Republic of Latvia (*Latvijas Republikas Satversme*), adopted by the freely elected Constituent Assembly (*Satversmes sapulce*) on 15 February 1922 and entered into force on 7 November 1922, contains a catalogue of human rights and, at the same time, provides for a mechanism for guaranteeing and protecting human rights, prescribing concrete obligations and functions for constitutional institutions.[1]

Satversme dedicates Chapter VIII to Fundamental Human Rights and gives the State the task of recognizing and protecting them "in accordance with this Constitution, laws and international agreements binding upon Latvia."[2] Some of the most important fundamental rights expressly recognized and guaranteed by *Satversme* are: the equality of all human beings before the law and the tribunals; the right of defense; the right to life; the right to liberty and personal security; the right to the inviolability of privacy, home and correspondence; the right to freedom of movement; the right to freedom of thought, conscience and religion, etc.

The protection of fundamental human rights lies with the court of general jurisdiction and is based on the obligation of the State by the Constitution to ensure the guarantee of human rights. The judiciary has the task of ensuring that, in the administration of justice, the Constitution, laws and other normative acts of

[1] The contribution is inspired by the report on "Fundamental rights in the presence of the constitutional judge. Direct access to the Constitutional Court in the Republic of Latvia", held as part of the IV Edition of the annual International Seminar of Comparative Law "Paolo Carrozza" dedicated to "Constitutional jurisdictions in the XXI century: current issues and future perspectives", which took place on 16 March 2023, at the University "La Statale" of Milan. The study is the result of research conducted under the supervision of Prof. Anita Rodiņa, Judge of the Constitutional Court of the Republic of Latvia and guest of the Department of Political Science of the University of Naples Federico II, by virtue of the Erasmus Agreement signed in 2013.
A sincere gratitude is hereby expressed to Prof. Carlo Amatucci and Prof. Giovanni Cocozza for the comments on the first version of the writing, for which, of course, I assume all responsibility for any errors or omissions.
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 25.08.2023].

[2] See Article 89 of the *Satversme*.

the State are implemented, that the principle of legality is respected and that human rights and freedoms are protected.[3]

Satversme does not expressly provide for the obligation of the Constitutional Court to ensure respect for the rule of law and the protection of fundamental human rights, limiting itself to establishing that the Constitutional Court, as an institution that guarantees the supremacy of *Satversme* and constitutional justice, must supervise the constitutional order existing in the State and control the mechanism of guaranteeing human fundamental rights.[4]

In the legal system of the Republic of Latvia, the Constitutional Court Law introduced a type of instrument, known as a constitutional complaint, which allows individuals to apply directly to the Constitutional Court, when a legal norm, that does not conform to a hierarchically superior norm (for example, the *Satversme*, the Charter of Fundamental Rights of the European Union, international sources, etc.), violates a fundamental right which are established in the Constitution.

The contribution analyses the fundamental characteristics of this protection technique, to verify its adequacy and the possible advantages that can derive from the development of the legal system through the referral to the Constitutional Court of issues that should have been dealt with by the legislator. In doing so, some cases decided by the Constitutional Court on constitutional complaints submitted by individuals who have complained about the violation of their fundamental rights will be examined. These cases are considered very significant in demonstrating the potential of the remedy on the development of the legal system.

The final part of the contribution will focus on the opportunity and limits of its exportability in Italy, where the debate on the introduction of the constitutional complaint has never died down and, even, landed, a few years ago in the Constituent Assembly.

1. Citizens' complaint to the Constitutional Court for the protection of fundamental rights

In the Republic of Latvia, the function of ensuring that the legal system complies with *Satversme* and of ruling on constitutionally important questions lies exclusively with the Constitutional Court.[5]

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[3] See Judgement of the Constitutional Court of the Republic of Latvia of 23 October 2007 in case No. 2007-03-01, para. 26. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/01/2007-03-01_Spriedums_ENG.pdf#search= [last viewed 14.07.2023].

[4] See Article 85 of the *Satversme*.

[5] On the role of the Constitutional Court as "guardian of the Constitution", see *Prochazka, R.* Mission Accomplished. On Founding Constitutional Adjudication in Central Europe. Budapest-New York: Central European University Press, 2002, p. 33; *Schwartz, H.* The Struggle for Constitutional Justice in Post-Communist Europe. Chicago-London: The University of Chicago Press, 2000, p. 5.
See also Judgement of the Constitutional Court of the Republic of Latvia of 18 January 2010, in case No. 2009-11-01. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2009/05/2009-11-01_Spriedums_ENG.pdf [last viewed 14.07.2023]; Judgement of the Constitutional Court of the Republic of Latvia of 7 April 2009, in case No. 2008-35-01. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2008/09/2008-35-01_Spriedums_ENG.pdf [last viewed 14.07.2023].

The relatively recent institution, formally dating back to 1996,[6] explains why the Latvian Constitutional Court is included in doctrine among the "third generation" constitutional courts.[7]

Its activities were started on 9 December 1996, and the first sentence handed down only on 7 May 1997.[8]

The constitutional discipline is rather small, since the *Satversme* limits itself to listing the competences of the Constitutional Court, delegating ordinary law to further specification, to regulate the legal *status* of its members and the power to declare laws, other acts or parts thereof null and void (Article 85). The relevant proceedings are therefore governed by the Constitutional Court Law and the Rules of Procedure of the Constitutional Court. In particularly, the Constitutional Court reviews: 1) the conformity of laws with the *Satversme*; 2) the conformity of international agreements signed or entered into by Latvia (also until the confirmation of the relevant agreements in the *Saeima*) with the *Satversme*; 3) the conformity of other laws and regulations or parts thereof with the norms (acts) of higher legal force; 4) the conformity with the law of such an order with which a minister authorized by the cabinet, the president, the speaker of the *Saeima* and the prime minister, except for administrative acts with law; 5) the conformity with the law of such an order with a minister authorized by the cabinet has suspended a decision taken by a local government council; 6) the conformity of the Latvian national legal norms with those international agreements entered into by Latvia that are not in conflict with the *Satversme*.

The jurisdiction of the Constitutional Court of Latvia is very narrow, as it essentially rules on the conformity of legal acts with hierarchically superior rules.

The Latvian constitutional justice system regulates a particular form of direct appeal to the Constitutional Court that individuals can bring in cases where a legal rule that does not conform to a hierarchically superior norm violates the fundamental rights recognized by the *Satversme*.

In introducing this type of remedy, the *Satversme* was inspired by the Austrian Constitution of 1920, considered the first among the constitutional orders of the Germanic area to have adopted a system of direct access to the constitutional

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[6] The first constitutional legal act providing for the establishment of a Constitutional Court in the Republic of Latvia was the Declaration of the Supreme Council of the Soviet Socialist Republic of Latvia (LSSR), adopted on 4 May 1990, under the title "On the restoration of the independence of the Republic of Latvia". In para. 6, it was provided that in cases of "disputes concerning questions relating to the application of a legal act shall be resolved by the Constitutional Court of the Republic of Latvia". Later, the law of 15 December 1992 "On Judicial Power" stipulated that a Constitutional Supervision Chamber within the body of the Supreme Court of the Republic of Latvia, not a special institution. The law was never implemented. In 1993, after the 5th *Saeima* commenced work, the government began drafting the draft law on the Constitutional Court and submitted it to the *Saeima* in the spring of 1994. In June 1994, the *Saeima* approved amendments to the law "On Judicial Power", providing for the establishment of an independent Constitutional Court, whose activities would be regulated by the law "On the Constitutional Court". On 5 June 1994, the above law was adopted, together with amendments to Article 85 of the *Satversme*. In accordance with it, the Constitutional Court is an independent institution of the judiciary, operating within the jurisdiction established by the Constitution of the Republic of Latvia and the Constitutional Court Law.

[7] *Solyom, L.* The Rise and Decline of Constitutional Culture in Hungary. In: Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania, *Von Bogdandy, A., Sonnevend, P.* (eds). Oxford-Portland: Hart Publishing, 2015, p. 6.

[8] Judgement of the Constitutional Court of the Republic of Latvia of 8 May 1997 in case No. 04-01(97). Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/1997/03/04-0197_Spriedums_ENG.pdf#search= [last viewed 14.07.2023].

court. The Austrian Constitution provides for two forms of direct appeal. The first is governed by Article 144 and allows a direct appeal to the High Constitutional Court against an administrative measure that violates an individual right through the application of an unlawful rule. The second form of appeal, introduced in 1975 through a constitutional amendment and provided for in Articles 139 and 140, is permitted if the plaintiff complains of a direct injury to his or her right resulting from the unconstitutionality or illegality of a law or regulation, without these having been applied by a court. This is the institution of the constitutional complaint, which is based on Article 92 of the *Satversme*, according to which everyone has the right to defend his or her legitimate rights and interests before an impartial tribunal. In fact, if a rule of law, in addition to not conforming to a hierarchically superior norm, violates the fundamental rights guaranteed by the *Satversme*, the person suffering the injury can lodge a complaint with the Constitutional Court, as an organ of the judiciary before which each person can defend his rights and legitimate interests.[9]

The function and subject matter of the complaint are contained in Section 19.2 of the Constitutional Court Law, according to which: "[a] constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution are infringed upon by legal norms that do not comply with the norms of a higher legal force".

Through this instrument, any person can refer directly to the Constitutional Court, without recourse to any mediator, even if special conditions are present.[10]

First, there must have been a violation of fundamental rights. As there is no provision for popular action in the Republic of Latvia,[11] a person may lodge a complaint with the Constitutional Court only to protect a fundamental right that has been violated and upon proof of its injury.[12] The use of this tool is precluded to protect public interests or widespread interests.[13] The violation of fundamental rights

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[9] See *Gamper, A.* The Constitutional Court of Austria. Modern Profiles of an Archetype of Constitutional Review. In: Constitutional Courts. A Comparative Study, *Harding, A., Leyland, P.* (eds). London: Wildy, 2009, 44 ss. Direct constitutional appeal for the protection of fundamental rights is also an instrument in use in other jurisdictions. For an analysis of the direct constitutional appeal in Germany (*Verfassungbeschwerde*), that is provided for in in Article 93 of the *Grundgesetz* and Article 90 of the Federal Constitutional Court Act of 1951, see *Haberle, P.* La *Verfassungsbeschwerde* nel sistema della giustizia costituzionale tedesca [The *Verfassungsbeschwerde* in the German constitutional justice system]. Milano: Giuffrè, 2000; *Hartwig, M.* Il ricorso costituzionale individuale alla Corte Costituzionale tedesca [Individual constitutional appeal to the German Constitutional Court]. In: Patrimonio costituzionale europeo e tutela dei diritti fondamentali. Il ricorso diretto di costituzionalità [European constitutional heritage and protection of fundamental rights. The direct appeal of constitutionality], *Tarchi, R.* (ed.). Torino: Giappichelli, 2012. For a description of the direct constitutional appeal (*recursos de amparo constitucional*), that finds its constitutional basis in Articles 53.2, 161 and 162.1 of the 1978 Constitución Española, see *Groppi, T.* Il ricorso di amparo costituzionale in Spagna: caratteri, problemi e prospettive [The appeal of constitutional amparo in Spain: characters, problems and perspectives]. Giurisprudenza costituzionale, Vol. 6, 1997, p. 4345; *Romboli, R., Tarchi, R.* La giustizia costituzionale in Spagna [Constitutional justice in Spain]. In: Esperienze di giustizia costituzionale [Experiences of constitutional justice], *Luther, J., Romboli, R., Tarchi, R.* (eds). Vol. II, Torino: Giappichelli, 2000, p. 356.

[10] *Lautenbach, G.* The Concept of the Rule of Law and the European Court of Human Rights. Oxford: Oxford University Press, 2013, p. 137.

[11] Judgement of the Constitutional Court of the Republic of Latvia of 22 February 2002 in case No. 2001-06-03, para 2.4. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2001/07/2001-06-03_Spriedums_ENG.pdf [last viewed 14.07.2023].

[12] *Rodiņa, A.* Constitutional Court as a guardian of the Latvian legal system. Strani pravni život, Vol. 4, 2021, p. 586; *Rodiņa, A.* Konstitucionālās sūdzības teorija un prakse Latvijā. Rīga: Latvijas Vēstnesis, 2009, p. 154.

[13] *Osipova, S.* Tiesiska valsts vai "tiesnešu valsts". Jurista Vārds, Vol. 27, 2016, p. 12.

constitutes, according to legal literature, the "cornerstone"[14] of the constitutional complaint: an individual cannot resort to this tool if he cannot prove that his fundamental right has been infringed.[15]

Secondly, an individual can lodge a complaint with the Constitutional Court only if he has exhausted all other legal measures. The constitutional complaint is, in fact, a subsidiary legal measure. Subsidiarity is one of the admissibility criteria prescribed by Section 19.2 of the Constitutional Court Law, which gives every person the right to lodge a constitutional complaint only after making use of all other options.

Finally, it can only be experienced in a predetermined time frame. The setting of a time limit ensures that the case is resolved within a reasonable time and protects the confidence of the opposing party on the stability of the effects of a judicial decision.[16] The identification of the period within which the complaint can be lodged depends on the possibility of having recourse to the other remedies provided by law for the protection of fundamental rights. If the person has already used other legal remedies, then the constitutional complaint can be filed within six months of the issuance of the judgment of the last court seized. Otherwise, if there are no other legal remedies, then the deadline for lodging a complaint is six months from the moment the violation of fundamental rights occurred (Section 19.2, paragraph 4, of the Constitutional Court Law).

2. The effects of the Constitutional Court's judgments and the possible outcomes of complaint proceedings

Proceedings before the Constitutional Court may end in a decision or judgment. The latter is a final judgment on the merits of the case or dispute; any other judgments adopted during the proceedings are decisions.

The judgments have legal effect *erga omnes*, i.e., they are mandatory for all state and local government authorities (including courts) and officials, as well as for natural and legal persons; they are final, being precluded any appeal or review by state institutions, international institutions and the Constitutional Court itself;[17] finally, they enter into force at the time they are delivered.

Article 85 of the *Satversme* merely establishes the jurisdiction of the Constitutional Court to declare the law and other acts equivalent to it unlawful, without, however, specifying when the provision declared unconstitutional ceases to produce legal effects. This profile is governed by Section 32 of the Constitutional Court Law, according to which a legal rule declared not to comply with the hierarchically superordinate rule is considered no longer in force from the day of publication of the judgment of the Constitutional Court (*ex nunc*), unless the latter has established otherwise.

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[14] *Rodiņa, A.* Konstitucionālās sūdzības teorija, p. 154.

[15] Judgement of the Constitutional Court of the Republic of Latvia of 22 February 2002 in case No. 2001-06-03. Available: http://www.satv.tiesa.gov.lv/wp-content/ uploads/2001/07/2001-06-03_Spriedums_ENG.pdf [last viewed 14.07.2023].

[16] *Rodiņa, A.* Konstitucionālās sūdzības teorija, p. 199.

[17] In fact, the constitutionality judgment is concerned with a specific case at a specific historical moment and cannot take into consideration any future changes. This implies that the constitutionality of a legal norm that has already been scrutinized by the Constitutional Court can be reviewed only if the social reality and context of legal relations have changed. See Judgement of the Constitutional Court of the Republic of Latvia of 10 February 2017 in case No. 2016-06-01. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2016/04/2016-06-01_Judgment_ENG.pdf [last viewed 14.07.2023].

The provision, on the one hand, lays down the general rule that the cessation of the effects of the rule declared constitutionally unlawful coincides with the publication of the judgment deciding the appeal,[18] on the other hand, it provides for an exception constituted by the wide discretion granted to the Constitutional Court in modulating the temporal effects of the judgment, providing for the possibility of establishing a different starting date when particular circumstances arise. For example, judges may, with adequate reasons, declare a rule of law constitutionally unlawful from the day of adoption (*ex tunc*) or another day or by setting the date in the future (*pro futuro*). In determining the date of termination of the effects of the rule declared unconstitutional, the Constitutional Court considers several principles: the principle of justice, the principle of legality, the principle of separation of powers, legal expectations and the principle of certainty[19]. In this way, the Constitutional Court, "at the sub-constitutional level", "directly influences legal regulation, as it is authorized to decide on the existence of the legal norm in the Latvian legal system".[20] That implies that the Court "will decide on the 'destiny' of a norm"[21] which has been challenged for constitutional illegality.

Retroactive judgments (*ex tunc*) are an exception.[22] Since a declaration of unconstitutionality of a law or of an act treated as such may adversely affect the rights of third parties and public interests, the decision to apply retroactive effect should be limited to exceptional cases.

Retroactive judgments are of particular importance in judgments arising from the lodging of a constitutional complaint, since the application of retroactive effect may be the only, and most effective, possibility of ensuring protection of the fundamental rights alleged to have been infringed. Through the adoption of retroactive judgments, the Constitutional Court has therefore emphasized the main purpose of the constitutional appeal, which is to provide protection (not only theoretical but also) practical to fundamental rights in cases of violation, having as its main function to ensure that those rights are effectively protected and fully restored[23]

In other cases, the Constitutional Court has modulated the temporal effects of the judgment for the future, requiring that the rule declared constitutionally illegitimate continues to be applied for a certain period. It usually uses this type of

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[18] *Rodiņa, A.* Constitutional Court as a guardian, p. 589, according to which it is the tool most frequently used in practice by the Constitutional Court and "it provides an opportunity to reach a fair balance between two values: legal certainty and legality".

[19] See Judgement of the Constitutional Court of the Republic of Latvia of 11 March 1998 in case No. 04-05(97). Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/1997/12/04-0597_Spriedums_ENG.pdf [last viewed 14.07.2023].

[20] *Rodiņa, A., Spale, A.* The Constitutional Court of the Republic of Latvia as a law-maker. Current practice. In: Judicial Law-Making in European Constitutional Courts, *Florczak-Wątor, M.* (ed.). London and New York: Routledge, 2020, p. 154.

[21] Ibid.

[22] *Heringa, A. W.* Constitutions Compared. An Introduction to Comparative Constitutional Law, Cambridge: Intersentia, 2016, p. 223.

[23] Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2009 in case No. 2009-43-01, para. 35.3. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf [last viewed 14.07.2023]. In the case at hand, the Constitutional Court declared Article 2, para. 1 and Article 3, para. 1 of the Law on the Disbursement of State Pensions and Allowances in the period from 2009 to 2012 to be unconstitutional due to conflict with Articles 1 and 109 of the *Satversme*, ordered that the withholding of pensions in the period in question be stopped by 1 March 2010, and finally ordered *Saiema* to establish a procedure for the reimbursement of withholdings always in the period in question and no later than 1 March 2010.

instrument when the legislator needs a certain period to regulate the case or to amend an unconstitutional rule of law to avoid a legal vacuum.[24]

3. The driving force of constitutional complaint to the process of evolution of the legal system

The protection of fundamental rights through constitutional complaint has contributed to considerably increasing the role of the Constitutional Court in the delicate balance between the powers of the State. This instrument makes it possible to delegate to the constitutional judge the decision of political issues that should have been addressed by other political institutions (i.e., *Saiema*, Government, etc.) and thus contribute to the overall development of the legal system[25] and the implementation of the principles of the rule of law.

The examination of some cases decided by the Constitutional Court at the end of a complaint procedure shows how much this instrument has contributed to improving the regulatory regulation of certain sectors.

In case No. 2005-12-0103, of 20 December 2005, the Constitutional Court declared unconstitutionality and nullity from the moment of the enactment of a series of regulatory acts that had made substantial and procedural changes to the law 'On Coercive Expropriation of Real Estate for State or Public Needs' of 15 September 1992,[26] which thus regained effectiveness from the moment of publication of the constitutional judgment.[27] The constitutional complaint had arisen from the infringement of the right to property, a fundamental right enshrined in Article 105 of the *Satversme*, by certain legislative acts that had introduced a more restrictive discipline on compensation, issued during an expropriation procedure for public utility initiated against the applicants. Compared with the original law, which did not expressly provide for the time when the right of ownership of immovable property passed from the previous owner to the new purchaser (the State or the local authority), the subsequent regulation, on the other hand, established that the public authority became the owner of the right of ownership of immovable property already after the entry into force of the "specific law" and that it could register them in the land register, even if the owner had not yet received fair compensation. The procedure for the payment of fair compensation to the expropriated owner "future and in an indeterminable period of time",[28] it did not respect the guarantees provided for the protection of the right to property by Article 105 of the *Satversme*, which "charges the State with the duty of creating a fair balance (proportionality) between the public interests and those of the particular owner with the help of fair compensation,

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[24] Judgement of the Constitutional Court of the Republic of Latvia of 8 April 2021 in case No. 2020-34-03. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wpcontent/uploads/2020/07/2020-34-03_spriedums. pdf#search=2020-34-03 [last viewed 14.07.2023].

[25] *Sweet, A. S.* Governing with Judges. Constitutional Politics in Europe. Oxford: Oxford University Press, 2000, pp. 140–141.

[26] Likums "Par nekustamā īpašuma piespiedu atsavināšanu valsts vai sabiedriskajām vajadzībām" [Law "On Coercive Expropriation of Real Estate for State or Public Needs"] (15.09.1992). Available: https://likumi.lv/ta/id/66329-par-nekustama-ipasuma-piespiedu-atsavinasanunbspvalsts-vai-sabiedriskajam-vajadzibam [last viewed: 25.08.2023].

[27] Judgement of the Constitutional Court of the Republic of Latvia of 20 December 2005 in case No. 2005-12-0103. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2005/05/2005-12-0103_Spriedums_ENG.pdf#search=expropriation [last viewed 14.07.2023].

[28] Ibid., para. 2.

determined by a clear and prospective process".[29] Added to this was the infringement of the principles of legitimate expectations and legal certainty, enshrined in Article 1 of the *Satversme*, since the State had not provided for any "considerate transition to the new legal regulation", but it had even strengthened the applicants' conviction that the procedure would be conducted based on the previous rules.[30] The driving force of the complaint to the development of the legal system and to the improvement of the quality of regulatory regulation of a sector emerges, in this case, from the part of the judgment in which the Constitutional Court goes so far as to indicate to the legislator the principles and criteria to be followed in the preparation of a reform law. In fact, "taking into consideration the principle of good administration, following from Article 1 of the *Satversme* and Article 10 of the State Administration Law […], the Law 'On Coercive Expropriation of Real Estate for State or Public Needs' or the Cabinet of Ministers Regulations, issued on the basis of this Law, shall incorporate prospective, clear and general criteria for determination of 'fair compensation', by which respective institutions might be guided when offering concrete sums of money or an equivalent property to the owner at the time of talks about coercive expropriation of real estate".[31]

In case No. 2010-38-01, of 30 December 2010, the Constitutional Court recognized the provisions of the Civil Code, which provided that a person had to be recognized as lacking capacity to act if he was mentally ill or lacked all or most of his mental capacity, as not complying with Article 96 of the *Satversme*[32]. The complaint had been lodged by a person who had been denied the opportunity to take substantive decisions independently, since the rules in force at that time provided for the recognition of a penalty of lack of capacity to act. The Constitutional Court held that this restriction, which provided only for full incapacity, was disproportionate, and therefore, unconstitutional. The Court stated in its judgment that it was possible to regulate and limit legal capacity differently and provided a possible solution to this situation based on the experience of other countries. After the ruling of the Constitutional Court entered into force, changes were made to the Civil Code.

Ultimately, "although the CC cannot directly act as a legislator, it has directly influenced, firstly, the adoption of specific legal norms and, secondly, the contents of norms"].[33] In this second case, the legislator "transfers the ideas and interpretation of a legal norm provided in judgements to the actual text of law"[34].

In other cases, indeed infrequent, the Constitutional Court has intervened to assess the constitutionality of a legal gap, which, according to legal literature, is a power that

[29] Judgement of the Constitutional Court of the Republic of Latvia of 20 December 2005 in case No. 2005-12-0103. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2005/05/2005-12-0103_Spriedums_ENG.pdf#search=expropriation, para. 22.3. [last viewed 14.07.2023].

[30] "Which shall be regarded as one of the cornerstones of the Republic of Latvia as a democratic and law-governed state". Ibid., para. 24.

[31] Ibid., para. 23.3.3.

[32] Judgement of the Constitutional Court of the Republic of Latvia of 30 December 2010 in case No. 2010-38-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/04/2010-38-01_Spriedums_ENG.pdf#search= [last viewed 14.07.2023].

[33] *Rodiņa, A., Spale, A.* The Constitutional Court of the Republic of Latvia as a law-maker, p. 154.

[34] Ibid., pp. 154–155.

derives "from the very essence of the implementation of constitutional justice"[35]. In these circumstances, the Constitutional Court formally establishes the absence of a legal rule, the appropriateness or necessity of which to introduce it into the legal order falls within the competence of the legislature. However, if there is no legal rule governing a given case and this situation can lead to a violation of *Satversme*, then the Constitutional Court must be involved in resolving the particular issue. For example, in the case 2010-50-03 of 18 March 2011, a person challenged before the Constitutional Court a provision of the Cabinet Regulation No. 423 'Regulations of Internal Procedure of the Deprivation of Liberty Institution' (the Annex to Regulation), to the extent that this rule did not allow the preservation of religious objects. In other words, the legal regulation provided a list of objects that could be kept by prisoners, but the rule did not provide for the right to store religious objects (for example, icons, crosses or rosaries). Interpreting Article 99 of the *Satversme*, which guarantees the right to freedom of thought, conscience and religion, together with international human rights documents and the practice of their application, the Constitutional Court noted that regulatory regulations should allow a detention institution to decide to allow or prohibit prisoners from holding religious objects, taking into account the circumstances of each individual case, and should also ensure that this practice is based on common principles. In this case, the Constitutional Court has, first, verified the existence of a legal loophole, secondly, established that, after the entry into force of the sentence, the legislature (executive branch) should prepare amendments to the regulation that guaranteed the prisoner to store religious objects in a cell, after receiving the permission of the head of the custody institution.[36]

The possibility that the constitutional complaint contributes to the process of evolution of the legal system depends, however, for the most part on the high level of trust that society places in the Constitutional Court.[37] It can perform its functions properly only if there is effective recognition of both public authority and citizens.[38]

In the Republic of Latvia, thanks to the support of the society,[39] the Constitutional Court can perform its functions to ensure the full implementation of constitutional values and the effective guarantee of human fundamental rights.

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[35] *Mesonis, G.* Judicial Activism in the Context of Jurisprudence of the Constitutional Court. In: Judicial Activism of a Constitutional Court in a Democratic State, Constitutional Court of the Republic of Latvia, 2016, p. 352. Available: https://www.satv.tiesa.gov.lv/en/wp-content/uploads/sites/2/2017/06/Book_Judicial-activism-of-the-Constitutional-Court-in-a-Democratic-State_part_2_ENG.pdf [last viewed 14.07.2023].

[36] Ministru kabineta noteikumi No. 847, gada 1. novembrī – Grozījumi Ministru kabineta 2006. gada 30. maija noteikumos Nr. 423 "Brīvības atņemšanas iestādes iekšējās kārtības noteikumi" [Regulations of the Cabinet of Ministers No. 847, of 1 November 2011 – "Amendments to the Cabinet of Ministers Regulation No. 423 of 30 May 2006 "Internal Regulation of the Imprisonment Institution""].

[37] Judgement of the Constitutional Court of the Republic of Latvia of 12 November 2015 in case No. 2015-06-01, para. 16.2. Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2015/01/2015-06-01_Spriedums_ENG.pdf [last viewed 14.07.2023].

[38] *Glick, H. R.* Courts, Politics and Justice. New York: McGraw-Hill Book Company, 1988, p. 326.

[39] The results of the first-ever survey on the Republic of Latvia residents' assessment of the Constitutional Court and various aspects of its work showed that it represents the constitutional judicial body that enjoys the greatest trust among citizens: in fact, 51% of respondents said they had "full trust" or "sufficient trust" in the Constitutional Court (see Constitutional Court of the Republic of Latvia. Research: Half of Latvia Inhabitants Trusts to the Constitutional Court, 2020. Available: https://www.satv.tiesa.gov.lv/press- release/petijums-satversmes-tiesai-uzticas-puse-latvijas-iedzivotaju/ [last viewed 14.07.2023]).

4. The constitutional model of fundamental rights protection in Italy

In Italy, the constitutional model of protection of rights is based on three fundamental pillars:

The first pillar is represented by Articles 24 and 113 of the Constitution, which guarantee, respectively, the right to take legal action for the protection of one's rights and legitimate interests and to enforce the judicial protection of the same both against private subjects and against the State and other public bodies.

The second pillar is Article 28 of the Constitution, which enshrines the principle of criminal, civil and administrative liability of officials and civil servants for acts committed in violation of rights.

The third pillar consists of Article 134 of the Constitution, which limits the review of the Constitutional Court to disputes concerning the constitutional legitimacy of laws and acts, having the force of law, of the State and the Regions, and the consequent rules on the cross-appeal of laws (Article 1 of Constitutional Law 9 February 1948, No. 1[40]; Articles 23 and 30 of Law 11 March 1953, No. 87[41]).

This model has some salient features: the judge of rights is the ordinary judge, flanked, exceptionally and in cases of exclusive jurisdiction, by the administrative judge; they can all turn to their offices to claim the protection of their rights and interests and to assert the responsibility of the agents who have violated them; the judge is required to apply the law correctly, because ordinary law is the instrument by which rights are recognized and the conditions for their claim are defined.[42]

You can only go to court to obtain the assertion of a right already recognized by the legislator or the extension or strengthening of its protection. The judicial remedy must be supported by a claim to affirm or expand an individual right, which can only be satisfied through the process. The applicant must, in other words, demonstrate that he has an interest in bringing proceedings,[43] that is, that the measure requested from the court appears appropriate and necessary to remove the infringement of his right. The judge, for his part, is required to rule on the application even in the absence of an express rule governing the case, since non *liquet* is not allowed and, on the contrary, the denial of justice is sanctioned.[44] The cases – indeed not uncommon – in which there is no legislative discipline of the case are the most problematic: usually, the rule to be applied to the dispute is elaborated by the judge using constitutional principles and ordinary law.

Sometimes, however, it can happen that the judge is asked for something more than the simple application of the law that protects a right, something that simply

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[40] Constitutional Law No. 1, of 9 February 1948 – "Rules on judgments of constitutional legitimacy and guarantees of independence of the Constitutional Court". Available: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge.costituzionale:1948;1 [last viewed: 14.07.2023].

[41] Law No. 87, of 11 March 1953 – "Rules on the constitution and operation of the Constitutional Court". Available: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1953-03-11;87 [last viewed: 14.07.2023].

[42] For a broad and timely analysis of the constitutional model of fundamental rights protection, see *Bin, R.* Chi è il giudice dei diritti? Il modello costituzionale e alcune deviazioni [Who is the judge of rights? The constitutional model and some deviations]. Rivista AIC, Vol. 4, 2018, p. 633.

[43] See Code of Civil Procedure (28.10.1948), Art. 100: "To make a claim or to contradict it, it is necessary to have an interest in it". Available: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1940-10-28;1443 [last viewed: 14.07.2023].

[44] See the Article 3 of the Law No. 117, of 13 April 1988 – "Compensation for damages caused in the exercise of judicial functions and civil liability of magistrates". Available: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1988-04-13;117 [last viewed: 14.07.2023].

goes beyond what can be recognized to the applicant through an interpretation of the legislative provisions, something that, however, is based on constitutional principles. The path to follow is easily deduced from the constitutional model of protection of rights outlined above: if the judge considers that he cannot 'force' the letter of the law with a 'constitutionally oriented' interpretation, he may, even at the request of the party, refer the question to the Constitutional Court, whose judgment, if favourable to the applicant, will terminate the law 'in the part in which' the protection of the right is not sufficiently ensured. This operation, in addition to being perfectly compatible with the principles on which the model of protection of rights guaranteed by the Constitution rests, does not transform the Constitutional Court into the 'judge of rights'. The ordinary judge continues, in fact, to be invested with the task of protecting rights, while the Constitutional Court intervenes only to 'help' the judge to apply ordinary law without, however, disapplying the Constitution and only if it is demonstrated that the protection of the right obtained through the interpretation of current legislation would not be sufficient with respect to constitutional guarantees.

Ultimately, in the model of protection outlined by the Constitution, rights are governed by state legislation, within the perimeter and in the manner outlined by it, and are applied by ordinary and administrative judges, limited to cases of exclusive jurisdiction, with the help of the Constitutional Court.

5. The introduction of direct recourse to the Constitutional Court in Italy: what further opportunity to protect fundamental rights?

The possibility of providing for citizens to act directly before the Constitutional Court to react to an infringement of a fundamental right guaranteed by the Constitution, is a theme that has animated the debate on the Italian model of constitutional justice since the work of the Constituent Assembly.[45] The issue has reappeared, on several occasions, to the attention of legal literature, Parliament and the Constitutional Court itself, fuelled, on the one hand, by the need to offer a (more) effective instrument of differentiated protection of the fundamental rights of the individual, on the other, the need to fill the gaps present in the incidental model of constitutional review of laws and acts having the force of law developed in the national legal system.[46]

[45] For a general framing of the issue and related debate, see *Mezzanotte, C.* Il giudizio sulle leggi. I. Le ideologie del Costituente [The judgment on the laws. I. The ideologies of the Constituent Assembly]. Milano: Giuffrè, 1979; *Romboli, R.* Il giudizio costituzionale incidentale come processo senza parti [Incidental constitutional judgment as a trial without parties]. Napoli: Editoriale Scientifica, 1985; *Carlassare, L.* I diritti davanti alla Corte costituzionale: ricorso individuale o rilettura dell'art. 27 L. No. 87/1953? [Rights before the Constitutional Court: individual appeal or re-reading of art. 27 L. n. 87/1953?]. Diritto e società, 1997, p. 443; *Nicotra Guerrera, I.* Giudizio sulle leggi e accesso del privato di fronte all'art. 24 Cost. [Judgment on the laws and access of the private before art. 24 of the Constitution] In: Il contraddittorio nel giudizio sulle leggi (Atti del seminario di Milano svoltosi il 16 e 17 maggio 1997) [The contradictory in the judgment on the laws (Proceeding of the Milan seminar held on 16–17 May 1997)], *Angiolini, V.* (ed.). Torino: Giappichelli, 1998, p. 491.

[46] For a diachronic summary of this development, see *AA.VV.*, I controlli sul potere [Power controls]. Firenze: Vallecchi, 1967; nonché a *Bottari, C.* Prime osservazioni sul ricorso diretto di costituzionalità [First observations on the direct appeal of constitutionality]. Rivista trimestrale di diritto e procedura civile. 1977, p. 755 ss.; *Scavone, A.* Appunti sulle proposte di introduzione del ricorso costituzionale diretto in Italia [Notes on the proposals for the introduction of direct constitutional redress in Italy]. Rivista trimestrale di diritto e procedura civile, 1981, p. 1252 ss.; *Tirio, F.* «Maschera» e «volto» del ricorso individuale di costituzionalità ["Mask" and "face" of individual appeal of constitutionality. In: Il

The proposals for the introduction of the institute have often been presented not as an alternative to the incidental judgment, but in addition to and to complete it, noting the inconsistencies and inadequacies. In the most advanced phase, the debate led to the Parliamentary Committee for Constitutional Reforms, established by Constitutional Law No. 1 of 1997, and resulted in the proposal to amend Article 134 of the draft reform of Part Two of the Constitution through the extension of the competences of the Constitutional Court to "appeals for the protection, against the public authorities, of the fundamental rights guaranteed by the Constitution, according to conditions, forms and terms within which it may be proposed established by constitutional law".[47]

Beyond the proposals, and the consequent solutions, there would seem to be two obstacles to the introduction of a direct appeal by the individual to the Constitutional Court.

The first obstacle is constituted not so much by Article 134 of the Constitution which, as we have seen, merely establishes the jurisdiction of the constitutional judge over disputes relating to the constitutionality of laws and acts, having the force of law, of the State and the Regions, but rather by Constitutional Law No. 1 of 1948 and Law No. 87 of 1953, which constitute the judgment of constitutionality exclusively on access in an incidental way ("in the course of a trial"). A direct appeal to the Constitutional Court could, therefore, be introduced through a revision of those laws.

The second obstacle stems, however, from the characteristics of the constitutional model for the protection of fundamental rights, which was examined above.

Some relatively recent judgments of the Constitutional Court have, however, shown that precisely the protection of certain fundamental rights would legitimize a form of direct constitutional appeal 'disguised' as a cross-appeal. The reference is, finally, to the judgment of the Constitutional Court 9 February 2017, No. 35,[48] which declared the partial constitutional illegitimacy of the electoral law 6 May 2015, No. 52 'Provisions on elections to the Chamber of Deputies' (so-called *Italicum*) in the part relating to the runoff, due to the lack of a minimum threshold of votes to be admitted to the second round, and the multiple candidacies of the list leaders.[49] It is not so

diritto costituzionale a duecento anni dall'istituzione della prima cattedra in Europa (Atti del Convegno di Ferrara, 2–3 maggio 1997) [Constitutional law of two hundred years after the establishment of the first chair in Europe (Proceedings of the Ferrara Conference, 2–3 May 1997)], *Carlassare, P.* (ed.). Padova: Cedam, 1998.

47 On this point, see *Romboli, R.* La giustizia costituzionale nel progetto della Bicamerale. Diritto pubblico, 1997, p. 833, which defines direct appeal in the constitutional reform project as "an institution that is still faceless".

48 Judgment of the Italian Constitutional Court of 9 February 2017 in case No. 35. Available: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2017&numero=35 [last viewed 14.07.2023].

49 For an in-depth analysis of the content and critical issues of Act No. 52 of 2015, see *Manfrellotti, R.* Il rapporto di fiducia tra sistema elettorale e disciplina costituzionale [The relationship of trust between the electoral system and constitutional discipline]. Napoli: A. De Frede Editore, 2021, p. 99. The A. explains that Law No. 52 of 2015 regulated the electoral system of the Chamber of Deputies, as in the meantime the draft constitutional reform that had provided for a non-elective legitimacy of the Senate was under discussion in Parliament. Among the doctrine's comments on Constitutional Court ruling No. 35 of 2017, see *Dickmann, R.* Le questioni all'attenzione del legislatore dopo la sentenza n. 35 del 2017 della Corte costituzionale [The issues to the attention of the legislator after the judgment No. 35 of 2017 of the Constitutional Court]. Dirittifondamentali.it, Vol. 1, 2017, p. 1; *Luciani, M. Bis in idem*: La nuova sentenza della Corte costituzionale sulla legge elettorale politica [Bis in idem: The new ruling of the Constitutional Court on the political electoral law]. Rivista AIC, Vol. 1, 2017, p. 1; *Romboli, R.* L'incostituzionalità dell'«Italicum»: la Consulta conferma il superamento della storica «zona franca» delle leggi elettorali, ma anche la creazione di una nuova per le leggi costituzionalmente necessarie

much the reasons put forward by the Constitutional Court that are relevant here, but rather the fact that the question of constitutionality has reached the constitutional courts through an action for a declaration brought before the ordinary court concerning the denial of the right to vote in employment, guaranteed by Article 48 of the Constitution. In this case, the judgment of acceptance comes to "concretize in itself the protection requested from the remittent and to exhaust it, while the character of incidentally necessarily presupposes that the *petitum* of the judgment in the course of which the question is raised does not coincide with the submission of the question itself",[50] undermining the very characteristics of constitutional judgment.

Summary

In the Republic of Latvia, the constitutional complaint has proved to be an effective tool not only for the protection of fundamental human rights, but also for the impetus given to the process of evolution of the legal system. The examination of some cases decided by the Constitutional Court has shown how this instrument has contributed to improving the regulatory regulation of certain sectors. The role of the Constitutional Court in the delicate balance between the powers of the State has been considerably strengthened, since through the constitutional complaint the decision of political issues that should have been addressed by the other political institutions has been delegated to the Constitutional Court and thus contributes to the overall development of the legal system and to the implementation of the principles of the rule of law.

In Italy, the opportunity to provide for direct appeals by citizens to the Constitutional Court for the protection of fundamental human rights has been, for many years, at the centre of a lively scientific and political debate. The legal obstacles to the introduction of this remedy are, as we have seen, on the one hand, by the configuration of the judgment on constitutionality, based exclusively on access on an incidental basis according to Constitutional Law No. 1 of 1948 and Law No. 87 of 1953, and, on the other, by the characteristics of the model for the protection of fundamental human rights.

In fact, some judgments of the Constitutional Court declaring the constitutional illegitimacy of certain electoral laws in so far as they violated the right to vote have shown that the protection of certain fundamental rights would legitimize a form of direct appeal 'disguised' as a cross-appeal. Beyond the formal correctness of this solution, a direct appeal to the Constitutional Court could be introduced in Italy only through a revision of those laws and only through a careful political assessment weighing advantages and disadvantages, together with the need to provide admissibility filters against the risk of dangerous traffic jams in constitutional justice.

[The unconstitutionality of the «Italicum»: the Consulta confirms the overcoming of the historic "free zone" of electoral laws, but also the creation of a new one for constitutionally necessary laws]. Foro Italiano, Parte I, 2017, p. 782; *Ruggeri, A.* La Corte alla sofferta ricerca di un equilibrio tra le ragioni della rappresentanza e quelle della governabilità: un'autentica quadratura del cerchio, riuscita però solo a metà nella pronunzia sull'*Italicum* [The Court in the painful search for a balance between the reasons of representation and those governability: an authentic squaring of the circle, but only half successful in the pronouncement on *Italicum*]. www.forumcostituzionale.it, 25 febbraio 2017.

[50] See Order of Constitutional Court of 5 February 1999 in case No. 17. Available: https://giurcost.org/decisioni/1999/0017o-99.html [last viewed 14.07.2023].

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Regulation on Terminating Joint Ownership and Reform Thereof in Latvia

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On 1 May 2022, amendments to Section 1074 and 1075 of the Civil Law entered into force, reforming the basic regulation on terminating joint ownership in Latvia. The current article provides a focussed overview of the previous regulation on terminating joint ownership and the case law, as well as considers the causes, aims and achieved outcomes of the reform implemented by the legislator, providing, to the extent possible, comparison with the Austrian, Swiss and German basic regulation on terminating joint ownership. Due to the limited scope of the article, the new regulation of Section 1074[1] of the Civil Law on excluding one joint owner from joint ownership is not examined; moreover, in practice this outcome can be achieved also by applying the new solutions for terminating joint ownership, set out in Section 1075 of the Civil Law.

Keywords: termination of joint ownership, types of division, partial termination of joint ownership, division of built-up immovable property into apartment properties.

Contents

Introduction

On 1 May 2022, the law of 3 February 2022 "Amendments to the Civil Law" (hereafter – the Amendments) entered into force, reforming the basic regulation on terminating divided joint ownership, included in Section 1074 and 1075 of the Civil Law (hereafter – CL).

The need to reform the regulation on terminating joint ownership was foregrounded by the practice of some businessmen, becoming more widespread over recent years, of purchasing residential buildings or undivided shares of apartment property at compulsory auctions in order to submit, soon afterwards, with the aim of gaining profit, a claim to court regarding termination of joint ownership, requesting the court to auction the whole immoveable property and divide the received moneys among joint owners, thus creating serious risk for the other joint owners of losing their previous and, often, the only home.

Moreover, the Supreme Court (the Senate) already by its ancillary decision in case No. SKC-259/2019 (C04169414) informed the Latvian legislator about the incompatibility of CL Section 1075 with the contemporary circumstances, by not conceiving the forms of terminating joint ownership consistent with them. The Senate also noted that the regulation of CL Section 1075 regarding the forms of terminating joint ownership should be revised and improved consistently with the current situation, envisaging, *inter alia*, division of a multi-apartment building into apartment properties as one of the forms of terminating joint ownership.[1]

To clearly characterise the outcomes of the reform implemented by the Amendments, the first part of the article will focus on the previous regulation concerning termination of joint ownership and the practice of its application. The second part of the article, in turn, will examine the new regulation, included in CL Section 1074 and 1075, analysing, insofar possible, the most important innovations and providing legal assessment thereof.

Due to the limited length of the article, the new regulation of CL Section 1074[1] regarding the exclusion of a joint owner (referred to as a "disloyal joint owner") from joint ownership due to their illegal actions will not be examined. Furthermore, in practice, this outcome could also be achieved by applying the new solutions for terminating joint ownership, as set out in CL Section 1075. That is, in case of a joint ownership termination dispute, by adjudicating the share of the "disloyal joint owner" to one or several other joint owners (see para. 2 of CL Section 1075 (1)), or by deciding to sell the share of the "disloyal joint owner" at an auction (see para. 3 of CL Section 1075).

[1] The Senate's Ancillary Decision of 17.12.2019 in case No. SKC-259/2019 (C04169414), paras 9–10.

1. Previous regulation and case law

1.1. Right to request termination of joint ownership

CL Section 1074 provides that "none of the joint owners may be forced to remain in jointly owned property, provided that it is not provided otherwise in the provisions under which the joint ownership is established", therefore "each joint owner may at any time require a division". I.e., in accordance with the general principle, each joint owner has the right to require, at any time and without any special pre-conditions setting in, division or termination of joint ownership.

The reciprocal right of joint owners, set out in CL Section 1074, to require termination of jointly owned property, is a claim of constitutive nature, inseparably linked to the undivided shares owned by the respective joint owner. Since the said claim can be exercised "at any time", it is not subject to prescription.[2] Moreover, the fact that the joint property had been in divided use, determined by an agreement between the joint owners or by a court's judgement (see CL Section 1070 (1)), *per se* does not affect the right of each joint owner to require termination of joint ownership at any time.[3]

Termination of joint ownership may be voluntary, i.e., by joint owners concluding an agreement on division. However, if the joint owners are unable to agree on termination of joint ownership or specific type of division, the dispute must be resolved in court through claims procedure, on the basis of a claim, brought by one or several joint owners, aimed at terminating the joint ownership and determining the specific type of division by a court's decision (see CL Section 1075).[4]

Upon concluding an agreement on division, joint owners may freely choose a specific type of division, *inter alia*, agree on partial termination of the joint ownership, e.g., one joint owner leaving the joint ownership for commensurate monetary compensation, retaining the joint ownership relations among the remaining joint owners.

As regards termination of joint ownership through judicial proceedings, CL Section 1074 (in the wording that was in force until 30.04.2022) did not envisage the court's jurisdiction to terminate joint ownership only partially. Therefore, in the case of a dispute, joint owners had to take into consideration that, pursuant to the general principle, the court could choose only one of the ways for terminating joint ownership, listed exhaustively in CL Section 1075.[5] Thus, for example, the court did not have the jurisdiction to satisfy, by its judgement, a claim, whereby three joint owners had requested "excluding" from joint ownership the fourth joint owner (for commensurate monetary compensation), retaining the joint ownership relations among the claimants.[6]

It should be noted that, in exceptional cases, the Senate, in its previous case law, has approved of such type of division, as the result of which the joint ownership was only partially terminated, actually dividing the built-up immoveable property

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[2] *Grūtups,* A., Kalniņš, *E.* Civillikuma komentāri. Trešā daļa. Lietu tiesības. *Īpašums*. 2. izd. [Commentaries on the Civil Law. Part Three. Rights *in Rem*. Property. 2nd ed.]. Rīga: Tiesu namu aģentūra, 2002, p. 275; Senāta 25.02.2009. spriedums lietā Nr. SKC-54/2009 (C28210405), para. 10.3.

[3] The Senate's Judgement of 03.02.2022 in case No. SKC-53/2022 (C33327619), para. 9.3.

[4] *Grūtups,* A., Kalniņš, E. Civillikuma komentāri, p. 277; The Senate's Judgement of 22.04.2020 in case No. SKC-120/2020 (C17096215), para. 10.3.

[5] The Senate's Judgement of 05.12.2007 in case No. SPC-60/2007, reasoned part.

[6] Augstākās tiesas tiesu prakses apkopojums "Kopīpašums" [Digest of the Supreme Court's Case Law "Joint Ownership"]. Rīga, 2011, pp. 17, 30–31.

into two shares, one of which remained in the joint ownership of two joint owners, whereas the second one was transferred into individual ownership of the third joint owner, concluding that, in the special circumstances of the particular case, such a solution was not contrary to the meaning of CL Section 1075.[7]

Pursuant to CL Section 1075 (in the wording that was in force until 30.04.2022), division of a jointly owned residential building into apartment properties (see Section 6 of Law on Residential Properties) was not considered to be "dividing" in the meaning of CL Section 1074.[8] Hence, the court did not have the jurisdiction to resolve disputes among joint owners regarding termination of joint ownership, by deciding to divide such a building into several apartment properties.[9]

1.2. Restrictions on division

Pursuant to CL Section 1074, the right to request termination of joint ownership may be denied or otherwise restricted; moreover, such a restriction on division may follow not only from the legal transaction (e.g., testament, joint owners' agreement) or law (see Section 4 (2) of the Law on Residential Properties), but also from the principle of good faith, enshrined in CL Section 1.

Thus, for example, it has been recognised in the previous case law that such joint owner of apartment property (merchant) had acted contrary to good faith who, already two months after acquiring 1/3 of the undivided shares at an auction, with the purpose of gaining profit, had required termination of the joint ownership and auctioning of the joint apartment property, thereby trying to oust from the joint ownership two other joint owners (natural persons), whose valid interests to continue the joint ownership relation and not to lose their sole home – compared to the claimant's interests, in the special circumstances of the particular case, had to be recognised as being more important and deserving greater protection,[10] as the result of which the totality of circumstances is the grounds for dismissing the claim regarding termination of joint ownership, brought by the claimant.[11]

1.3. Terminating joint ownership through court

In the case of a dispute, each of the joint owners has the right to bring a claim against all the other joint owners[12] regarding termination of joint ownership to achieve, thus, termination of joint ownership through court.

The claim regarding termination of joint ownership is "a double-sided claim" (*actio duplex*), i.e., its goal is a positive solution to the issue of division. This means, firstly, that, in accordance with the general principle, the adjudication of this claim may not end with a dismissal of the claim. Unless a restriction on division exists, the court must positively resolve the dispute among the joint owners regarding termination of the joint ownership and should rule, in the interests of all the joint owners, on satisfying (fully or partially) the claim that has been brought.[13] Secondly, in legal

[7] Augstākās tiesas tiesu prakses apkopojums "Kopīpašums" [Digest of the Supreme Court's Case Law "Joint Ownership"]. Rīga, 2011, pp. 5–9, 31.

[8] *Grūtups,* A., Kalniņš, E. Civillikuma komentāri, p. 275; The Senate's Judgement of 17.12.2019 in case No. SKC-259/2019 (C04169414), para. 7.5.

[9] E.g.: Judgement by the Department of Civil Cases of the Supreme Court of 20.06.2016 in case No. C31187908, para. 13.5.

[10] The Senate's Judgement of 16.12.2020 in case No. SKC-231/2020 (C30501917), para. 6.2.

[11] Judgement by the Riga Regional Court of 14.10.2021 in case No.C30501917, para. 12.

[12] *Rozenfelds, J.* Lietu tiesības [Rights *in Rem*]. 4. izd. Rīga: Zvaigzne ABC, 2011, p. 56.

[13] *Grūtups,* A., *Kalniņš,* E. Civillikuma komentāri, p. 277; The Senate's Judgement of 08.06.2021 in case No. SKC-542/2021 (C30434016), para. 10.2.

proceedings, the legal status of all participants in the civil case (parties) substantially is equal, although procedurally the party bringing the claim acts as the claimant, while all the other joint owners appear as defendants. Therefore, the court may rule (enforce) on execution in favour of the other party not only from the defendant but also from the claimant themselves, and, in this regard, it is not required that the defendant should bring a respective counter-claim.[14]

a) Types of division and the court's jurisdiction

In adjudicating a dispute regarding termination of joint ownership, in principle, a court may choose only one of the types of division, listed exhaustively in CL Section 1075[15], and it is not authorised to apply a type of division not envisaged in this provision.[16]

I.e., pursuant to CL Section 1075 (in the wording that was in force until 30.04.2022), a court could terminate joint ownership by determining one of the three following types of division: (1) actual division of the joint property and adjudging to each of the joint owners actual shares in ownership, (2) transferring the whole joint property (adjudging) to one of the joint owners in individual ownership with their duty to pay to the others for their shares in money, or (3) auctioning the joint property and dividing the moneys received among the joint owners according to their undivided shares.

It should be noted for comparison that, e.g., the basic regulation on terminating joint ownership in Austria,[17] Switzerland[18] and Germany[19] does not even envisage the court's jurisdiction, in case of a dispute, for transferring the whole joint property to one of the joint owners with their duty to pay to the others for their shares in money,[20] because a court has the jurisdiction to decide either on (1) actual division of the joint property (division in kind) or else (2) auctioning it (civil division).

As recognised in the Senate's judicature, CL Section 1075 authorises the court to choose, at its own discretion, the type of division, which, considering all facts of the case, is the most appropriate and just.[21] In this respect, the court, firstly, "shall decide on the matter in accordance with a sense of justice and the general principles of law" (see CL Section 5). Secondly, in choosing a particular type of division pursuant to CL Section 1075, the court must consider, in particular, "the characteristics of the subject-matter to be divided and the circumstances regarding the property".

At the same time, the authorisation included in CL Section 1075 does not grant to the court the possibility to choose one or another type of division arbitrarily, at

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[14] *Grūtups,* A., *Kalniņš, E.* Civillikuma komentāri, pp. 277–278; The Senate's Judgement of 22.04.2020 in case No. SKC-120/2020 (C17096215), para. 10.3.

[15] The Senate's Judgement of 17.12.2019 in case No. SKC-259/2019 (C04169414), para. 7.5.

[16] The Senate's Judgement of 05.12.2007 in case No. SPC-60/2007, reasoned part.

[17] The Civil Code of Austria (*Allgemeines bürgerliches Gesetzbuch*), paras 842 and 843.

[18] The Civil Code of Switzerland (*Zivilgesetzbuch*), para. 651.

[19] The Civil Code of Germany (*Bürgerliches Gesetzbuch*), paras 752 and 753.

[20] In the Swiss Law, this type of division is envisaged only in the special norms, which regulate, e.g., termination of spouses' jointly owned property or termination of joint ownership of a pet (see the 2nd part of para 205, para. 271, para. 651.a of the Civil Code of Switzerland).

[21] The Senate's Judgement of 28.10.2016 in case No. SKC-415/2016 (C04224109), para. 10; The Senate's Judgement of 15.02.2018 in case No. SKC-73/2018 (C17073413), para. 9; The Senate's Judgement of 03.02.2022 in case No. SKC-53/2022 (C33327619), para. 9.1.

its subjective discretion. The court's choice should be objectively substantiated, have sufficiently convincing motivation and comply with the requirements of justice.[22]

b) Actual division of jointly owned property

Legal divisibility of the joint property is the pre-condition for actual division (see CL Section 847); moreover, the actual shares, determined through division, as to their value, in principle, should correspond to an owner's undivided shares. Since such division is not always feasible in practice, division of the joint immovable property into such shares that do not coincide precisely with the undivided shares of the joint owners is also admissible, simultaneously collecting from the acquirer of the largest share commensurate monetary remuneration in favour of the joint owner receiving a smaller actual share in terms of value.[23]

In deciding on actual division, the court should take into consideration, which of the joint owners has a more valid interest to receive one or another actual share, in particular, if the joint owners have determined a divided use of the joint immovable property and each of them is already separately using a particular area of the immovable property (see CL Section 1070 (1)).[24]

If the actual division of the immovable property does not ensure an appropriate totally independent use of one share to be partitioned, the court, simultaneously with determining the actual division, may also establish a coercive servitude, required for such use (see CL Section 1075), for example, a road servitude to ensure access to one plot of land, to be actually partitioned, from a public road or street, which crosses the other land plot to be separated.

c) Adjudging the whole jointly owned property to one joint owner

Pursuant to CL Section 1075 (in the wording that was in force until 30.04.2022), the court had the jurisdiction to adjudge the whole joint property to one joint owner, simultaneously collecting from them monetary remuneration for the undivided shares of other joint owners not only when the property was not actually divisible, but also in other cases when, pursuant to the circumstances of the case, this type of division, compared to actual division of the joint property or its auctioning, was preferable (e.g., the undivided share of one joint owner is much larger compared to the undivided share of the other joint owner).[25]

Joint property should be adjudged to that joint owner who has expressed the wish to keep the whole property with the duty to pay their share in moneys to the other joint owners. If several joint owners have expressed this wish, the court must consider which of the said joint owners has a more valid interest to receive the whole property. If the interests of both or several joint owners in keeping the whole joint property are equally valid, the court may resolve the said matter by resorting to drawing of lots, referred to in CL Section 1075, as "a desperate measure".

In determining the amount of remuneration to be collected, the court should use as the basis the market value of the joint property at the time when the civil case

[22] *Kalniņš, E.* Laulāto manta laulāto likumiskajās mantiskajās attiecībās [Spouses' Property in Legal Property Relations]. Rīga: Tiesu namu aģentūra, 2010, p. 300.

[23] The Senate's Judgement of 21.02.2019 in case No. SKC-33/2019 (C19046014), para. 9.2.

[24] *Grūtups,* A., *Kalniņš,* E. Civillikuma komentāri, p. 279.

[25] The Senate's Judgement of 14.05.2013 in case No. SKC-173/2013 (C04220405), para. 7.

regarding termination of the joint property is examined on its merits.[26] Moreover, the amount of remuneration that the other joint owners are entitled to should be determined in accordance with the size of their undivided shares, i.e., as the share of the value of the entire joint property proportionate to the undivided share of the particular joint owner.[27]

d) Auctioning the whole jointly owned property

Considering the characteristics of the property to be divided and the circumstances regarding the property, the court, pursuant to CL Section 1075 (in the wording that was in force until 30.04.2022), could also choose as the most suitable and just type of division auctioning the whole property, dividing the moneys gained from the sale between the joint owners, in accordance with their undivided shares.

As recognised in the previous case law, the reason for deciding on auctioning of the joint immovable property may be, e.g., the fact that the undivided shares of all the joint owners are encumbered by mortgages and none of the joint owners has expressed the wish to keep the whole joint property, or to divide it into actual shares.[28] Whereas if, e.g., the jointly owned house (which is not actually divisible) has been the sole permanent place of residence for one joint owner for more than 30 years, but two other joint owners had stayed in this house periodically and do not want to keep it as "estate left by the parents", the most appropriate and just type of division is not auctioning the jointly owned house but adjudging it to the first joint owner who, by bringing a counter claim, has expressed the wish to keep the whole house with the duty to pay out to the other joint owners their shares in moneys.[29]

2. New regulation

2.1. Causes and aim of the reform

As confirmed by the recent Latvian case law, the previous basic regulation on terminating joint ownership (see CL Section 1074 and 1075), intended for "standard situations", not always turned out be suitable for adjudicating fairly and, most importantly, positively a dispute regarding termination of joint ownership in such situations where special circumstances were found, *inter alia*, incompatibility of the actions by the joint owner requiring division with good faith (see CL Section 1).

a) Law-making instead of law development

Likewise, the application of the provisions of CL Section 1074 and 1075 in conjunction with the principle of good faith, enshrined in CL Section 1, in the previous case law, basically, has not led to positive resolution of the dispute regarding termination of joint ownership (e.g., by a court's judgement terminating the joint ownership only partially and excluding from it the joint owner who had

[26] The Senate's Judgement of 14.05.2013 in case No. SKC-173/2013 (C04220405), para. 8; The Senate's Judgement of 15.11.2017 in case No. SKC-263/2017 (C04205509), para. 9; The Senate's Judgement of 02.12.2021 in case No. SKC-84/2021 (C04306814), para. 7.1.

[27] The Senate's Judgement of 30.03.2017 in case No. SKC-105/2017 (C04344910), para. 12.3; Judgement by the Riga Regional Court of 13.09.2017 in case No. C04344910, paras 15–17.

[28] The Senate's Judgement of 16.01.2020 in case No. SKC-36/2020 (C04148214), paras 1, 3, 4.

[29] The Senate's Judgement of 15.02.2018 in case No. SKC-73/2018 (C17073413), para. 10; Judgement by the Riga Regional Court of 08.04.2019 in case No. C17073413, para. 9.4.

acted contrary to good faith) but to dismissal of the claim brought by the dishonest joint owner.[30]

Moreover, the possibility for the court, by applying CL Section 1, to depart from the regulation of CL Section 1075 and by its judgement divide the jointly owned residential building into apartment properties, if this building is not actually divisible, but can be divided into apartment properties and if, in the special circumstances of the particular case, the application of two other types of division, envisaged in CL Section 1075, would lead to an obviously unfair result (e.g., in a situation where one of the joint owners, acting contrary to good faith, has required termination of the joint ownership and auctioning the jointly owned residential building, as a result of which the other joint owners might lose their sole home)[31] has not been accepted in the previous case law.

Hence, the Latvian legislator has decided to reform the regulation on terminating joint ownership through legislation, i.e., by the Amendments, firstly, by expanding the court's jurisdiction and introducing several new types of division.

b) Substance and aim of the new regulation

In reforming the regulation on terminating joint ownership, firstly, CL Section 1075 has been expressed in new wording, significantly expanding the court's jurisdiction and introducing several new types of division, in the case of application whereof the joint ownership relations are not terminated completely, i.e., these relations are either retained among those joint owners who do not wish to terminate joint ownership (see para. 2 and para. 3 of CL Section 1075 (1)), or are transformed into "qualified" joint ownership relations or relations between apartment owners (see para. 5 of CL Section 1075 (1)).

Secondly, a second part has been added to CL Section 1074, which sets out a new legal restriction on division. I.e., if the joint property is "immovable property, containing a building with residential premises", then a joint owner who has acquired an undivided share through legal transaction "may request division of the joint ownership no sooner than five years after corroboration of the title to property in the Land Register, and only if there is an important reason for that."

Thirdly, a new section, Section 1074[1], has been added to CL, which regulates the exclusion from joint ownership a joint owner who "by exercising their rights in bad faith or by not fulfilling the duties as an honest and careful manager causes to the other joint owners or to third persons significant harm" (as noted in the introduction to this article, this new regulation will not be examined here).

The main reason why a new legal restriction on division (see CL Section 1074 (2)), as well as several new types of division (see paras 2, 3 and 5 of CL Section 1075 (1)) were added to the regulation on terminating joint ownership is, of course, the practice, referred to in the introduction to this article, which has become more widespread over recent years.

Thus, the jurisdiction, granted to the court, to divide the joint immovable property into apartment properties (see para. 5 of CL Section 1075 (1)) is, first of all, intended for the protection of the rights and valid interests of the joint owners of multi-apartment buildings against such dishonest actions by one or several joint

[30] E.g.: The Senate's Judgement of 14.01.2004 in case No. SKC-5/2004, reasoned part; The Senate's Judgement of 16.12.2020 in case No. SKC-231/2020 (C30501917), paras 2, 6.3; Judgement by the Riga Regional Court of 14.10.2021 in case No. C30501917, para. 12.

[31] The Senate's Judgement of 17.12.2019 in case No. SKC-259/2019 (C04169414), paras 3.3, 7.4, 7.5.

owners who request termination of joint ownership with the aim of gaining profit and ignoring the valid and protected interests of the other joint owners. However, the basic aim for introducing the other new types of division is the same because, *inter alia*, also the joint owners of such immovable property, where the building belonging to it cannot be either legally or actually divided into apartment properties, can end up in a similar situation.

Moreover, the new types of division, set out in CL Section 1075, may prove to be the most suitable solutions also in cases where the joint owner who has requested termination of the joint ownership has not acted contrary to good faith.

2.2. New restriction on division

Pursuant to CL Section 1074 (2), a joint owner who, through a legal transaction, has acquired an undivided share of "immovable property containing a building with residential premises" has the right to request through court termination of the joint ownership no sooner than within five years after acquisition of the undivided share and only if they have "serious reason" (this provision does not restrict the possibility for the new joint owner to terminate the joint ownership by reaching an agreement thereof with the other joint owners).

Notwithstanding the proportionality assessment, included in the Justification for the Amendments,[32] a reasonable legal justification cannot be found in it as to why the new joint owner has been denied the possibility to request through court at least the division of the jointly owned immovable property into apartment properties (see para. 5 of CL Section 1075 (1)). Of course, in cases where the other joint owners totally ignore or unfoundedly dismiss the proposal of the new joint owner to agree on dividing the joint immovable property into apartment properties, such action by the other joint owners could possibly be qualified as "a serious reason" in the meaning of CL Section 1074 (2). However, a much more foreseeable solution that would also decrease the possible legal risks for the new joint owner in the case law would be, e.g., application of teleological reduction, with the court narrowing the scope of application for CL Section 1074 (2) and, as an exception, not applying the restriction on division envisaged therein to a case, where the joint owners are unable to reach an agreement on dividing the joint immovable property into apartment properties, or a specific version of such division.

2.3. New types of division

Amendments to CL Section 1075 have significantly expanded the court's jurisdiction, by introducing, in addition to the three existing types of division, four new types. Moreover, the new regulation grants to the court the jurisdiction to terminate the joint ownership fully or partially, simultaneously applying or combining several of the types of division, exhaustively enumerated in CL Section 1075.

Thus, firstly, alongside (1) actual division of the whole jointly owned property, (2) transferring the whole jointly owned property to one joint owner, or (3) auctioning the whole jointly owned property, CLS Section 1075 provides also for the court's jurisdiction (4) "to transfer the whole property to several joint owners with the duty to compensate for the share in moneys", (5) "to transfer a share to one or several joint owners with the duty to compensate for the share in moneys", or (6) to rule on

[32] Likumprojekta Nr. 906/Lp13 "Grozījumi Civillikumā" anotācija [Annotation to the Draft Law No. 906/Lp13 "Amendments to the Civil Law"]. Available: http://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/123C10880FD85CA5C2258663003A0CEF?OpenDocument#B [last viewed 11.04.2023].

"selling a share" (see paras 2 and 3 of CL Section 1075 (1)), as well as the possibility (7) to decide to "divide into apartment properties immovable property containing a building with residential premises" (see para. 5 of CL Section 1075 (1). Thus, similarly to the Austrian law,[33] now, in Latvia, a division of built-up immovable property into apartment properties is envisaged as one of the types of division.

Secondly, a provision has been added to CL Section 1075, providing that, insofar possible, selling of the undivided share should be considered instead of selling the whole jointly owned property (see CL Section 1075 (3)). Whereas such immovable property, which contains a building with residential premises, should be divided, to the extent possible, into apartment properties (the 1st sentence of CL Section 1075 (2)), not excluding the possibility for the court to determine another type of division, more appropriate for the joint owners' interests or more suitable otherwise (see the 2nd sentence of CL Section 1075 (2)).

It needs to be added that, with the new wording of CL Section 1075, the majority of findings expressed in the previous legal doctrine and case law in relation to termination of joint ownership has not lost its relevance.

At the same time, of course, it should be taken into account that the previous wording of CL Section 1075 did not envisage the court's jurisdiction to terminate the joint ownership only partially; i.e., this norm provided only for the court's possibility to choose one of the three types of division, listed exhaustively in CL Section 1075; moreover, division of immovable property into apartment properties was not considered as being a "division" in the meaning of CL Section 1074.

a) Transferring the whole jointly owned property to several joint owners

In difference to the previous regulation, which authorised the court to choose as the most appropriate and just type of division the transferring of the whole property to only one joint owner, the new regulation of CL Section 1075 envisages the possibility for a court also to rule on "transferring the whole property to several joint owners with the duty to compensate for the share in moneys (see para. 2 of CL Section 1075 (1)).

This type of division is a very appropriate solution if, e.g., two of the four joint owners want to keep the joint property in joint ownership, whereas the other two want to exit the joint ownership, receiving for it a commensurate monetary compensation but the joint owners are unable to agree on the amount of compensation to be disbursed to the two other joint owners, which has led to the first two joint owners, as co-claimants, bringing a claim in court on terminating the joint ownership.

b) Transferring a share to one or several joint owners

In difference to the previous regulation, which authorised the court to choose as the most appropriate and fair type of division the auctioning of the whole property, i.e., the undivided shares of all other joint owners, to only one joint owner, the new regulation of CL Section 1075 provides also a possibility for the court to rule on "transferring a share to one or several joint overs with the duty to compensate for the share in moneys" (see para. 2 of CL Section 1075 (1)).

The court may decide on this type of division not only when, e.g., the claimant has requested the court to transfer (adjudge) their undivided share to other joint owners, collecting from them monetary compensation, but also if, for example, the claimant has requested the court to adjudge to them the undivided shares of one or several

[33] Item 3 of para. 3 of the Austrian Law on Apartment Property (*Wohnungseigentumsgesetz*).

joint owners, simultaneously collecting from the claimant a monetary compensation in favour of these joint owners.

c) Auctioning a share

In difference to the previous regulation, which authorised the court to choose as the most appropriate and just type of division selling the whole property at an auction, the new regulation of CL Section 1075 provides a possibility for the court to rule on "selling a share" at an auction (see para. 3 of CL Section 1075). Moreover, pursuant to the general principle, selling of an undivided share takes the priority over selling the whole property (see CL 1075 (3)).

It is underscored in the Substantiation of the Amendments[34] that a joint owner does not have the right to request through court an auctioning of an undivided share of another joint owner, because such a claim "would be incompatible with the meaning and purpose of CL Section 1074 and 1075". Whereas the court, in adjudicating disputes regarding termination of joint ownership, has the jurisdiction to choose, in its fair discretion, the aforementioned type of division and thus, "exclude" one of the joint owners from the joint ownership if, in the circumstances of the particular case, this is the most appropriate and just solution.

This, in particular, applies to situations where the joint owner requesting the division has acted contrary to good faith. I.e., in difference to the previous case law, pursuant to which the attempts of one joint owner to exercise the right, envisaged in CL Section 1074, contrary to good faith led, basically, to the dismissal of the claim brought by them (not to positive adjudication of the dispute regarding termination of joint ownership), in such a situation, the new regulation gives the court the opportunity to satisfy partially the claim brought by the dishonest joint owner, by ruling on partial termination of the joint ownership and auctioning the share of the dishonest joint owner.

d) Dividing the jointly owned property into apartment properties

The most significant innovation is the type of division, envisaged in para. 5 of CL Section 1075 (1), i.e., division of built-up immovable property into apartment property. This type of division has certain similarities to the division of immovable property into actual shares; therefore, several basic rules of the actual division are applicable also to the division into apartment properties.

Since the precondition for the division, envisaged in para. 5 of CL Section 1075 (1), is the possibility to divide the jointly owned immovable property into separate apartment properties, this type of division, in principle, is applicable only to such immovable property, which contains a multi-apartment building, i.e., a residential building that contains more than one apartment (see Section 2 (1), Section 3 (1) and Section 6 of the Law on Residential Properties).

Pursuant to the general principle, the apartment properties, formed as the result of such division, should correspond to the number of joint owners and their undivided shares (value thereof), although such accuracy in division is not always possible. Moreover, in difference to the Austrian law,[35] division of the immovable property

[34] Likumprojekta Nr. 906/Lp13 "Grozījumi Civillikumā" anotācija [Annotation to the Draft Law No. 906/Lp13 "Amendments to the Civil Law"]. Available: http://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/123C10880FD85CA5C2258663003A0CEF?OpenDocument#B [last viewed 11.04.2023].

[35] Pursuant to the Austrian law, the basic rules of actual division must be accordingly applied to the division of built-up immovable property into apartment property (see item 3 of para. 3 of the Austrian Law on Apartment Property). Moreover, to implement such division, each joint owner must receive

into apartment properties is not mandatorily required to form objects of apartment properties, corresponding to the number of all joint owners, because those joint owners who (e.g., due to the small undivided share), as the result of this division, do not obtain apartment property, have the right to "receive compensation for their share in moneys" (see the 1st sentence of CL Section 1075 (2)).

In dividing immovable property into apartment properties, the court, to the extent possible, should take into account, which apartments (groups of premises) are already used separately by each of the joint owners if they have agreed on divided use of the jointly owned immovable property (see CL Section 1070 (1)). I.e., in the case of dispute, the court must assess, which joint owner has more valid interests in receiving one or another newly formed apartment property.

If, in dividing a residential building into apartment properties, it is possible to adjudge to each joint owner one or several apartment properties, but they do not correspond accurately to their undivided shares, the court may act in accordance with the solution approved in the previous case law by collecting commensurate monetary compensation.

Summary

In reforming the regulation on terminating joint ownership, four new types of division have been envisaged in the law in addition to the three existing types of division, *inter alia*, the division of built-up immovable property into apartment properties.

The main advantage of the new types of division, envisaged in CL Section 1075, is the fact that these additional legal solutions give to the court the possibility to terminate joint ownership only partially, *amongst other things,* by applying or combining several types of division and, thus, impacting to a lesser extent or not at all the rights and valid interests of other joint owners.

The new regulation of CL Section 1075 not only significantly relieves the court from the need to consider, in each particular dispute regarding termination of joint ownership, application of the principle of good faith, enshrined in CL Section 1, and the need to adjust the existing legal regulation, but also makes the regulation on terminating joint ownership more flexible and more suitable for resolving different disputes fairly.

The new regulation allows dealing effectively with dishonest joint owners who have requested the termination of joint ownership, moreover, with the types of division already envisaged in law. This is because the court, when adjudicating the dispute on its merits, has the authority to terminate joint ownership only partially, i.e., with respect to the dishonest joint owner, thus, excluding them from the joint ownership relations while retaining the relations among the other joint owners.

Since the new restriction on division, set out in CL Section 1074 (2), applies to all joint owners who have acquired their undivided shares through legal transactions, in certain situations, it places disproportional restriction, *inter alia*, for the duration of five years, on the right of every joint owner, set out in CL Section 1074 (1) and para. 5 of CL Section (1), to request through the court the division of the jointly owned

an object corresponding to their undivided shares, having approximately the same features, i.e., it should be possible to form sufficiently appropriate objects of apartment properties corresponding to the number of joint owners. (*Iro,* G. Sachenrecht [Property law]. 6. Aufl. Wien: Verlag Österreich, 2016, Rz 5/24, 5/30, 5/32; *Koziol, H.*, *Bydlinski, P.*, *Bollenberger, R.* (Hrsg.) Kurzkommentar zum ABGB [Brief Commentary on General Civil Code]. 5. Aufl. Wien: Verlag Österreich, 2017, § 830, Rz 4, § 843, Rz 1, 3).

immovable property into apartment properties. One of the solutions is narrowing the scope of application of CL Section 1074 (2) through teleological reduction and not apply this provision to the aforementioned new type of division.

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The Concept of Loyalty in Legal Regulation in the Republic of Latvia: Current Situation and Challenges

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This publication analyses the concept of loyalty in legal regulation of the Republic of Latvia. The requirement for loyalty is included in several regulatory acts that determine professional standards and requirements for admission to public service or employment. The aim of the paper is to analyse the concept of loyalty in legal regulation and the practice of its application, to identify possible problems, and to propose solutions. The authors have conducted a study using the methods of interpreting the rules of law adopted in legal science. Grammatical, historical, comparative, teleological method and general research methods were used, such as comparison and summarization, causal relationship detection, analysis, and synthesis. Within the framework of the paper, several conclusions are made and proposals are offered for strengthening the requirement of loyalty to the Latvian state in the regulatory framework.

Keywords: loyalty, officials with special service ranks, pedagogues, service, state, state workers, the requirement to be loyal to the state.

Contents

Introduction

The Preamble of the Constitution of the Republic of Latvia states notes: "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"[1].

Commenting on this norm, Professor Ringolds Balodis of the University of Latvia pointed out that it contains various specific constitutional obligations of the individual, the purpose of which is to ensure the existence and functioning of the state.[2] As such fundamental duties are recognized, for example, (1) loyalty to the constitutional foundations of the state (includes obedience to the law), (2) willingness to protect the state, (3) maintenance of the state (includes obligations to perform public duties, including paying taxes, etc.).

The aforementioned finds its reflection in the practice of the Constitutional Court of the Republic of Latvia (Latvian: *Latvijas Republikas Satversmes tiesa*), which notes that a democratic state system must be protected from people who are ethically unqualified to become representatives of a democratic state at the political or administrative level, and who have proven by their actions that they have not been loyal to the democratic state system.[3] The Department of Administrative Cases of the Supreme Court of the Republic of Latvia (Latvian: *Latvijas Republikas Augstākās tiesas Administratīvo lietu departaments*) also states in one of its judgments: In the process of democracy, the loyalty of all citizens to this country with its democracy and basic values is self-evident, because otherwise, the creation and existence of this country would not have been necessary.[4] The nature of an independent state and a democratic state system requires that the fate of the state be decided by persons who are directly interested in the existence and development of this state.

At the same time, it should be emphasized that, when interpreted grammatically, loyalty is understood as behaviour that manifests respect for the existing power, compliance with its laws, or behaviour that manifests an honest, correct, respectful attitude (towards something or someone).[5]

The authors of the paper would like to highlight the fact that the above-mentioned findings have been established in the regulatory framework of the Republic of

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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 *Balodis, R.* (sc. ed.). Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi [Commentaries on the Satversme of the Republic of Latvia. Introduction. Chapter I. General Provisions]. Collective of authors under scientific editorship by prof. R. Balodis. Riga: Latvijas Vēstnesis, 2014, p. 133. Available: https://www.saeima.lv/satversme/Ievads_Balodis.pdf [last viewed 01.03.2023].

3 Judgement of the Constitutional Court of the Republic of Latvia of 30 August 2000 in case No. 2000-03-01, para. 6, Latvijas Vēstnesis, No. 307/309, 01.09.2000.

4 Judgement of the Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 12 February 2014 in case No. A420577912, SA-1/2014, para. 35. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/355724.pdf [last viewed 01.03.2023].

5 Latviešu literārās valodas vārdnīca [Latvian Literary Language Dictionary]. 4. sējums. J–L. Riga: Zinātne, 1980, 738. lpp.

Latvia, court practice, and research even before the war against Ukraine started by the Russian Federation. However, it cannot be denied that the aggression of the Russian Federation against the neighbouring country has once again raised the issues concerning the loyalty of the citizens of the Republic of Latvia, especially those in public service or work, to their country.

The aim of the paper is to analyse the concept of loyalty in legal regulation and the 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 methods of legal norms interpretation: grammatical, systemic, historical, and teleological.

1. Understanding the concept of loyalty and the historical development of the regulatory framework

Every service or job in a state administrative institution includes the duties that are necessary to ensure the implementation of state functions. The duty of loyalty (the duty to be loyal to the state) is directly related to the principle of servitude, which is the basis of every state service (*servus* in Latin). Professor Kārlis Dišlers has recognized: "The principle of service creates a new relationship between citizens and the state and manifests itself in conscientious and willing performance of public duties towards the state"[6].

Court practice has recognized: "Civil servants, including those in the specialized service, are a special category of persons who perform executive functions, and special social guarantees and requirements are set for these persons, including that the civil servant may not, outside the time of performance of duties, discredit himself, the institution and the state; that the civil servant should treat other members of society with sufficient respect and abide by their rights; that the civil servant should behave in such a way as to increase trust in the public administration"[7].

As the lawyer Didzis Šenbergs has pointed out: "The concept of loyalty in the European legal doctrine, having experienced a significant transformation since its inception, can now be defined as the obligation to be loyal to the state in the sense of trusting the values established in its basic law or the basic principles of the constitution […]. In the Western world, there is no reason to talk about personal loyalty to the specific government, state civil servants must be loyal to the country, in our case – to the Republic of Latvia, as well as to its Constitution"[8].

In compliance with the above, on 26 March 2015, the *Saeima* of the Republic of Latvia amended the State Civil Service Law, stating in Article 15, Part 1, Clause 2, that the civil servant's basic duty is "to be loyal to the Republic of Latvia and its Constitution irrespective of his or her political convictions and to maintain political

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6 *Dišlers, K.* Pienākuma elements tiesībās. [Element of Obligation in Law]. Tieslietu Ministrijas Vēstnesis, No. 3, 1937, p. 441.

7 *Danovskis, E.* Tiesu prakse lietās par valsts dienestu (2007–2013) [Summary of Case Law on Public Service]. Riga: Latvijas Republikas Augstākā tiesa, 2013. Available: http://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/Valsts_dienests_tiesu_prakses_apkopojums_30102013.doc [last viewed 01.03.2023].

8 *Šēnbergs, D.* Lojalitāte Latvijas Republikai un tās Satversmei: jāgroza valsts dienesta likums. [Loyalty to the Republic of Latvia and its Constitution: the civil service law must be amended]. Available: https://ir.lv/2015/03/24/lojalitate-latvijas-republikai-un-tas-satversmei-jagroza-valsts-dienesta-likums/ [last viewed 01.03.2023].

neutrality"[9]. Thus, this law strengthened the old opinion of the Constitutional Court of the Republic of Latvia that "the state must be protected from those who have proven by their actions that they have not been loyal to the democratic state system […]. One of the basic elements characterizing an individual's relationship with the state in public service and especially in administrative relations is political loyalty. The state must strive to ensure a democratic, legal, efficient, open, and accessible public administration. It is necessary to trust that those working in the state administration will be loyal to the state and will perform their duties in the interests of the state and society. Political loyalty is understood not as supporting the political goals of the respective government, but as loyalty to the country for which the person belonging to the public service works"[10]. In addition, the highest manifestation of loyalty to the country is patriotism – love of one's homeland, nation; loyalty to one's homeland, nation, readiness to selflessly work for them.[11]

On 18 June 2015, the duty of loyalty was also strengthened in the Education Law, stipulating that a person "who is loyal to the Republic of Latvia and its Constitution"[12] has the right to work as a head of an educational institution and a teacher. On the other hand, on 1 January 2017, the amendments to the Education Law entered into force, which determine the steps to be taken, if it is established that a pedagogue or the head of an educational institution is not loyal to the Republic of Latvia and its Constitution, violates the prohibition of discrimination and different treatment, as well as does not fulfil the obligation to raise decent, honest, responsible human beings – patriots of Latvia.[13]

In this context, it should be noted that the fundamental values of the existence and development of the Latvian state have been established in the Constitution of the Republic of Latvia (especially those stipulated in the Introduction, Articles 1–4 and Chapter VIII of the Constitution of the Republic of Latvia), which in their essence are closely related to the state education standards and guidelines, as well as the goals and tasks set in the parenting guidelines. Their implementation in the educational institution is ensured by pedagogues who, with their activity, pedagogical approach, and attitude, motivate students to learn, acquire knowledge, skills, values, and virtues, including strengthening the understanding of the Latvian state, its system, and legal acts (rule of law) and also such values as life and health, respect and equality, freedom, family, work, culture, Latvian language, etc., forming the students' evaluative attitude and responsibility for themselves and their actions, as well as the surrounding environment and society as a whole. Such an approach meets the interests of the learners, and, furthermore, those of the entire society and the state.

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[9] Valsts civildienesta likums [State Civil Service Law] (07.09.2000). Latvijas Vēstnesis, No. 331/333, 22.09.2000; Grozījumi Valsts civildienesta likumā [Amendments to the State Civil Service Law] (26.03.2015). Latvijas Vēstnesis, No. 68, 08.04.2015.

[10] Judgement of the Constitutional Court of the Republic of Latvia of 11 April 2006 in case No. 2005-24-01. Latvijas Vēstnesis, No. 61, 18.04.2006.

[11] Latviešu literārās valodas vārdnīca [Latvian Literary Language Dictionary]. 6. sējums, 1. daļa. N–P. Rīga: Zinātne, 1986, 524. lpp.

[12] Izglītības likums [Education Law] (29.10.1998). Latvijas Vēstnesis, No. 343/344, 17.11.1998. See also: *Dālderis, I.* Ziņojums Saeimas Kārtības ruļļa 144. panta kārtībā par balsošanas motīviem par 2016. gada 23. novembra Saeimas ārkārtas sēdē izskatāmo likumprojekta "Grozījumi Izglītības likumā" pieņemšanu otrajā, galīgajā lasījumā. [Report in accordance with Article 144 of the Rules of Procedure of the *Saeima* on the reasons for voting on the second, final reading of the bill "Amendments to the Education Law" to be considered at the extraordinary session of the *Saeima* on 23 November 2016.] Available: https://www.saeima.lv/steno/Zinojums_par_BalsMot_20161123_12S_Dalderis.pdf [last viewed 01.03.2023].

[13] Ibid.

It is common knowledge that the opinion and actions expressed by the pedagogue can significantly influence the students' attitude toward learning and the processes taking place in society. In addition, "for a teacher, not only his professional qualification is important, but also his personal characteristics, because in the learning process, the teacher must be an example to the students"[14].

If the pedagogue is disloyal to the Republic of Latvia and its Constitution, a conflict of roles is directly formed, and double standards are developed in the educational environment, because the pedagogue must not only respect and observe the values established in the Constitution of the Republic of Latvia, but also, according to the educational standards and guidelines, the educational programme developed and licensed by the state must implement the content of education and upbringing determined by the state, promote the understanding and observance of the aforementioned values in the educational institution with their actions. Also, the pedagogue must raise Latvian patriots and strengthen belonging to the Republic of Latvia, fulfil other duties of the pedagogue specified in the Law on Education, and other regulatory acts. In the view of the State Service for the Quality of Education, "disloyalty to the Republic of Latvia and its Constitution manifests itself as deliberate action or a deliberate lack of action, expressing distrust of the Republic of Latvia and the basic values enshrined in its Constitution"[15]. It can be conveyed both in a lesson or a class, and in the opinions and actions expressed by the teacher outside of work duties, for example, in communication on social media, in various publications, or at public events.

In compliance with the above, it is necessary to distinguish the disloyalty of the pedagogue from other violations of the pedagogue's rights or ethics, shortcomings or errors in the pedagogue's professional activity (Article 51, part two of the Education Law stipulates that "teachers of educational institutions shall be responsible for their work, the methods, techniques, and results thereof"), and the daily work of the pedagogue must be distinguished from the pedagogue's right to engage in political activities allowed in the state, to express a critical or sceptical opinion, for example, about the activities of the government or educational administration institutions.

Article 100 of the Constitution of the Republic of Latvia states: "Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express his or her views. Censorship is prohibited."[16] At the same time, freedom of expression is not absolute and does not mean permissiveness.[17] Article 116 of the Constitution of the Republic of Latvia states that the person's rights may be restricted in certain cases indicated by law, in order

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[14] *Mihailovs, I. J., Krūmiņa, A. A.* Pedagoga atbildības problēmjautājumi Latvijā [Problems of Pedagogues Responsibility in Latvia]. Grām.: Proceedings of the International Scientific Conferences of Faculty of Social Sciences of Daugavpils University. The materials of the International Scientific Conference "Social Sciences for Regional Development 2016". Part II. Current Problems of State and Law. Prof. V. Meņšikova zin. red. Daugavpils: Daugavpils Universitātes Akadēmiskais apgāds "Saule", 2017, pp. 103–110. Available: https://du.lv/wp-content/uploads/2022/03/SZF-krajums_II_Tiesibas_2017.pdf [last viewed 01.03.2023].

[15] Izglītības kvalitātes valsts dienesta vēstule "Par pedagogu lojalitāti Latvijas Republikai un tās Satversmei" [Letter of the State Education Quality Service "On the loyalty of pedagogues to the Republic of Latvia and its Constitution"] (13.01.2017). Available: https://www.ikvd.gov.lv/lv/media/69/download [last viewed 01.03.2023].

[16] Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Latvijas Vēstnesis, No. 43, 01.07.1993.

[17] Judgement of the Constitutional Court of the Republic of Latvia of 29 October 2003 in case No. 2003-05-01. Latvijas Vēstnesis, No. 152, 30.10.2003.

to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals.

A person's loyalty and its limits should be evaluated in each case. However, in the opinion of the authors, by analogy with Article 77 of the Constitution of the Republic of Latvia, the first, second, third, fourth, sixth or seventy-seventh Article of the Constitution, is the framework that can be exceeded only by national referendum.

Likewise, the judgment of the Constitutional Court of the Republic of Latvia of 21 December 2017, in case No. 2017-03-01 recognized that a person who "holds the position of a pedagogue or head of an educational institution, performs an important function for the state – ensures the rights to quality education enshrined in the Constitution, which includes, among other things, a loyal attitude towards the Latvian state and its Constitution. In the educational process, every student's right to development is ensured by improving their talents and abilities, students are instilled with respect for the basic values of a democratic legal state, personal and national identity, belonging to civil society and other aspects essential for personality development are strengthened […] the educator and the head of the educational institution influence the development of each student's personality and understanding of society and the country. Although democratic values and civil society have been strengthened in Latvia since the restoration of independence, nevertheless, taking into account historical experience, the state must continue to take special care of defending and strengthening democratic values in the field of education"[18].

Thus, if a pedagogue expresses disloyalty to the Latvian state and its Constitution during the teaching and upbringing process, not only is an appropriate educational process not ensured, students and the quality of education, in general, are negatively affected, but also the interests of the state and society are impacted, engendering negative consequences for democracy, security, and development. The aforementioned also causes long-term consequences, especially manifested in so-called critical moments, including the impact upon the attitude towards work or service duties. In addition, due to the security and interest priorities of the state (and also the society or its groups, for example, students), it is permissible and proportionate to influence persons in the state service or at work, requiring to be loyal to the state and its basic law.

2. Disadvantages of the systemic approach in ensuring the necessity for loyalty

The effectiveness of the law enforcer's activity depends on several factors, including the fact that the legal norms of different powers, which determine his activity, are interconnected, organized, and located in a unified system. If the aforementioned conditions are met, the law enforcer, interpreting the relevant legal provisions, shall clarify their meaning concerning other legal provisions.

Taking into account that one of the authors of this paper has extensive work experience in the interpretation of police legal norms, the article will evaluate how the systemic method of interpreting legal norms worked, explaining the concept of loyalty in relation to the actions performed by an official with a special rank who holds the position of the Ministry of the Interior (the Internal Security Bureau (Latvian:

[18] Judgement of the Constitutional Court of the Republic of Latvia of 21 December 2017 in case No. 2017-03-01. Latvijas Vēstnesis, No. 256, 27.12.2017.

Iekšējās drošības birojs); the State Police (Latvian: *Valsts policija*); the State Border Guard (Latvian: *Valsts robežsardze*); the State Fire and Rescue Service (Latvian: *Valsts ugunsdzēsības un glābšanas dienests*), or the Prison Administration (Latvian: *Ieslodzījuma vietu pārvalde*).

On 5 February 2020, a new code of ethics of the State Police was adopted.[19] This regulatory act defines seven basic principles of ethics: professionalism, honesty, objectivity, work for the benefit of society, confidentiality, responsibility, and loyalty. 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.[20] It is positive that the new regulation included two new basic ethical principles "Work for the benefit of society" and "Loyalty", which were absent from the earlier framework. The quality of the normative act has also improved – the content of the norms has become clearer.

In the Code of Ethics of the State Police, the principle of Loyalty is included in point 11.7, and contains four subsections stating, 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:

- while performing official (position, work) duties, always considers state interests primary in relation to personal interests (11.7.1);
- in public statements, is loyal to the state and the State Police and respects the goals and core values of the State Police (11.7.2);
- 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 (11.7.3);
- 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 (11.7.4).

Interestingly, the Code of Ethics of the State Police highlights the need to be loyal precisely in "public statements". It should be noted, that judicial practice has established – the opinions expressed between two persons cannot be considered public. Furthermore, the court practice includes cases when, the court has not found a lack of loyalty in the actions of a police officer, when evaluating a case where he has inflicted insignificant bodily harm on someone outside of his official duties.[21] At the same time, it should be noted that the basic principle of loyalty was included in the regulatory framework of the State Police only on 5 February 2020, and a judicial practice evaluating non-compliance with the aforementioned principle has not developed.

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[19] Valsts policijas ētikas kodekss [Code of Ethics of the State Police] (05.02.2020). Available: https://www.vp.gov.lv/lv/media/715/download [last viewed 01.03.2023].

[20] *Treļs, Ē.* Valsts policijas darbinieka profesionālās ētikas pamatprincipi [Basic Principles of the Professional Ethics of State Police Officers]. Socrates: Riga Stradins University Faculty of Law Electronic Scientific Journal of Law, No. 3(18), 2020, p. 110. Available: https://doi.org/10.25143/socr.18.2020.3.097-113 [last viewed 01.03.2023].

[21] Judgement of the Administrative Court of the Republic of Latvia of 31 January 2023 in case No. A42-00726-23/3. Available: https://manas.tiesas.lv/eTiesasMvc/eclinolemumi/ECLI:LV:ADRJRIT:2023:0131.A420260522.3.S [last viewed 01.03.2023].

In turn, the European Court of Human Rights has recognised that a person's right to access court in cases concerning employment in public service may be restricted because of the special relationship between the State and a civil servant, which is characterised by the obligation of loyalty and duty of discretion – "special bond of trust and loyalty" between the civil servant and the State as an employer.[22] While agreeing with this conclusion, the Constitutional Court of the Republic of Latvia stated the following: The provision on the relationship of special trustworthiness and loyalty towards the State is the basis for restrictions linked with the status of a public official, which per se cannot be perceived as being disproportional from the vantage point of the equality principle.[23]

Unfortunately, the laws that directly determine the police activity in the country and the place of the police officer in it – the law "On Police",[24] 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,[25] Law on Disciplinary Liability of the Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Latvian Prison Administration[26] – does not include the term "loyalty". In the opinion of the authors, such a requirement should necessarily be included in relation to the admission of an official with a special service rank to the service. Compared to the fourth part of Article 30 of the Education Law, which stipulates that a person who has an impeccable reputation, who is loyal to the Republic of Latvia and its Constitution, is entitled to work as the head of the educational institution,[27] 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 does not pose such a requirement for loyalty to a candidate for a police officer, although an impeccable reputation is required from him.[28] Likewise, the principle of loyalty is absent from the Cabinet of Ministers Recommendation of 21 November 2018 "Values of State Administration and Fundamental Principles of Ethics"[29].

In addition, the country has not developed a procedure for obtaining information about a person's loyalty and impeccable reputation, as well as a methodology for

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[22] The decision of the European Court of Human Rights of 18 November 2014 in Spūlis and Vaškevičs v. Latvia, applications No. 2631/10 and 12253/10, para. 41. Available: https://hudoc.echr.coe.int/eng?i=001-148877 [last viewed 01.03.2023].

[23] Judgement of the Constitutional Court of the Republic of Latvia of 23 November 2015 in case No. 2015-10-01, para. 17.2. Latvijas Vēstnesis, No. 231, 25.11.2015.

[24] Par policiju [On Police] (04.06.1991). Ziņotājs, No. 31/32, 15.08.1991.

[25] 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] (15.06.2006). Latvijas Vēstnesis, No. 101, 30.06.2006.

[26] Iekšlietu ministrijas sistēmas iestāžu un Ieslodzījuma vietu pārvaldes amatpersonu ar speciālajām dienesta pakāpēm disciplināratbildības likums [Law on Disciplinary Liability of the Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Latvian Prison Administration] (15.06.2006). Latvijas Vēstnesis, No. 101, 30.06.2006.

[27] Izglītības likums [Education Law] (29.10.1998). Latvijas Vēstnesis, No. 343/344, 17.11.1998.

[28] 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] (15.06.2006), Section 7 (1) para. 3^1, Latvijas Vēstnesis, No. 101, 30.06.2006.

[29] 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.

evaluating loyalty or impeccable reputation. This has raised several important issues that have not been regulated in the regulatory enactments, for example, the following: who and how verifies the loyalty and reputation of persons.

Meanwhile, the colleagues from Estonia have already found the answer to this question. Paragraph 42 "Collection of information for deciding on employment in service of person" of the law "Police and Border Guard Act" (Estonian: *Politsei ja piirivalve seadus*) of the Republic of Estonia provides: "(1) A person applying for employment in the police service shall submit a personal data form to the Police and Border Guard Board or the Estonian Internal Security Service. The personal data form requires data that enables the assessment of the person's suitability for service. In addition, data concerning relatives and relatives by marriage (parents, sister, brother, children, spouse, former spouse), and also the given name and surname, personal identification code (in the absence of a personal identification code, date and place of birth) and contact information of a partner in a relationship resembling marriage may be required.

(2) The format of the personal data form of a person applying for employment in the police service and the period of retention of the data requested in the personal data form shall be established by the minister responsible for the field by a regulation.

(3) For the verification of the data presented in the personal data form, the Director General of the Estonian Internal Security Service, the rector of the Estonian Academy of Security Sciences or the Director General of the Police and Border Guard Board, or an official authorised by him or her shall have the right to:

1) address state authorities and local government authorities, and also natural and legal persons with an inquiry concerning the personal data of a person applying for employment in service;
2) talk to the person specified in the personal data form, and also to his or her employer and representatives of his or her educational institution and other persons in order to determine the applicant's moral character and other personal characteristics and if necessary and with the consent of the person being questioned, take his or her statement in writing;
3) verify whether the person specified in the personal data form has been punished for an intentionally committed criminal offence, whether the person has been sentenced to imprisonment, or whether he or she is a suspect or accused in criminal proceedings;
4) verify personal data from the database of the state, local government or another legal person in public law or legal person in private law;
5) process personal data addressed to the general public and available from public sources.

(4) The authority or person who has received an inquiry specified in subsection (3) above shall reply to the inquiry immediately but within ten working days at the latest as of the receipt of the inquiry.

(4^1) A fact established during the collection of data for the decision to hire a person may be the basis for a refusal to hire.

(4^2) The reason for refusal and the fact underlying the refusal specified in Clause 4.1 of this paragraph shall not be disclosed to the extent that it may be unavoidably necessary to ensure:

1) national security;
2) national protection;
3) public order;

4) prevention, detection, prosecution, or execution of criminal offences;
5) the protection of the data subject or the protection of the rights and freedoms of other persons.

(4.[3]) The Police and Border Guard Board or the Defence Police Board may check a police officer's eligibility for police service even during service if there is reasonable suspicion that there is a circumstance that would prevent him from being called up to the police.

(5) The provisions of this section shall extend also to a person who is applying for acceptance to vocational education studies or professional higher education studies in the specialty of the police or border guard, or for the position of a police officer in an institution of professional higher education for public defence. Personal data for deciding on the suitability for police service of the said person shall be collected by the Police and Border Guard Board"[30].

The authors propose to the Latvian legislature to follow the good practice of Estonia and to adopt this country's regulation with non-essential clarifications and reservations regarding the collection of information for deciding on employment in service of the person and to amend 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.

In addition, this regulation can become the basis for developing a loyalty assessment methodology, which can be used in other industries or professional fields, especially in the context of current events.

3. Contemporary challenges and future development opportunities

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 unauthorised events.[31] In a contrast to these activities, the highest degree of loyalty – the examples of proof of the expression of patriotism – became topical in Latvian society.

As part of a study commissioned by the Ministry of Defence, it was found that 41% of Latvian residents say that the war in Ukraine has made them evaluate their role in strengthening national defence.[32] Within two months, from 24 February to 22 April 2022, 2,516 applications for the National Guard of the Republic of Latvia (Latvian: *Latvijas Republikas Zemessardze*) were received.

To prevent the activities of persons disloyal to Latvia, the legislator was forced to act quickly, improving the regulatory framework according to the development of events. On 31 March 2022, amendments were made to Law on Administrative Penalties

[30] Politsei ja piirivalve seadus [Police and Border Guard Act] (06.05.2009). Available: https://estlex.ee/estlex/?id=76&aktid=115458&fd=1&leht=1 [last viewed 01.03.2023].

[31] *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 01.03.2023].

[32] Aizsardzības ministrija: 41% Latvijas iedzīvotāju karš Ukrainā ir licis izvērtēt savu lomu valsts aizsardzības stiprināšanā [Ministry of Defence: 41% of Latvian residents have made the war in Ukraine evaluate their role in strengthening national defence] (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 01.03.2023].

for Offences in the Field of Administration, Public Order, and Use of the Official Language of the Republic of Latvia, supplementing Chapter III "Administrative Offences in the Field of Public Order" with Section 13[1] "Use of symbols glorifying military aggression and war crimes in a public place" in the following wording: "For the use of symbols glorifying military aggression and war crimes in a public place, except in cases where there is no purpose to justify or glorify these crimes, a warning or a fine of up to seventy units is applied to a natural person, and a legal entity – up to five hundred and eighty units"[33].

One of the authors of the current article had previously indicated that the disposition of the newly created article may create problematic issues for those applying the law.[34] Section 5(3) of the Law on Administrative Liability provides: "administrative liability for the offences specified in a law or binding regulations of local governments shall arise unless criminal liability is imposed for such offences"[35], whereas Section 74[1] of the Criminal Law states that "for a person who commits public glorification of genocide, crime against humanity, crime against peace or war crime or who commits public glorification, denial, acquittal or gross trivialisation of committed genocide, crime against humanity, crime against peace or war crime, including genocide, crime against humanity, crime against peace or war crime against the Republic of Latvia and its inhabitants committed by the U.S.S.R. or Nazi Germany"[36]. Analysing Section 13[1] of the Law of the Republic of Latvia Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language and Section 74[1] of the Criminal Law, it should be established that the law practitioner, in order to distinguish these articles, clarifies the purpose of the relevant offense.

Section 5(1) of the Law on Administrative Liability provides: "an administrative offence is an unlawful culpable action (an act or failure to act) of a person for which administrative liability is provided for in a law or binding regulations of local governments"[37].

Legal scientist Edvīns Danovskis points out that, if in the law of administrative violations one can theoretically talk about the subjective side, then in any case with a different content than in criminal law, where the subjective side is formed by the mental attitude of a natural person towards the offense. Considering the very simple structure of an administrative offense and the concept of an administrative offense included in the Law on Administrative Liability applying the elements of

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[33] Administratīvo sodu likums par pārkāpumiem pārvaldes, sabiedriskās kārtības un valsts valodas lietošanas jomā [Law of the Republic of Latvia Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language] (07.05.2020). Latvijas Vēstnesis, No. 96, 20.05.2020; Grozījumi Administratīvo sodu likumā par pārkāpumiem pārvaldes, sabiedriskās kārtības un valsts valodas lietošanas jomā [Amendments to the Law of the Republic of Latvia Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language] (31.03.2022). Latvijas Vēstnesis, No. 75A, 19.04.2022.

[34] *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. 24. Available: https://juristavards.lv/doc/281551-normativa-regulejuma-problemjautajumi-lietas-par-naida-izraisisanu/ [last viewed 01.03.2023].

[35] Administratīvās atbildības likums [Administrative Liability Law: Law of the Republic of Latvia] (25.10.2018). Latvijas Vēstnesis, No. 225, 14.11.2018.

[36] Krimināllikums [Criminal Law] (17.06.1998). Latvijas Vēstnesis, No. 199/200, 08.07.1998.

[37] Administratīvās atbildības likums [Administrative Liability Law: Law of the Republic of Latvia] (25.10.2018). Latvijas Vēstnesis, No. 225, 14.11.2018.

a criminal offense to administrative offenses is not justified from a theoretical point of view.[38]

It should be noted that the legislator, supplementing Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language of the Republic of Latvia with Article 13[1] has deviated from the new scientific position by including the need to establish the purpose in the provision of the article. To establish the composition of the relevant criminal offense, the law enforcement officer must prove the motive and purpose.

University of Latvia professor Uldis Krastiņš points out that the motive and purpose are independent subjective features of a criminal offense, which, like the form of guilt, must be proven if they are included in the provisions of the Special Part of the Criminal Law.[39] He also notes – if the motive and purpose are not included in the number of features of the composition of a criminal offense, then they do not affect the qualification of a criminal offense, although no offense committed with direct intent is realized without a motive and purpose. Motive is defined as an internal incentive, drive, inclination that directs the will of the perpetrator to commit a criminal offense. On the other hand, the goal is the intended result that a person wants to achieve when committing a criminal offense.

The above-mentioned opinions should be taken into account by the person applying the rights when establishing whether the symbols glorifying military aggression and war crimes have been used in a public place, as the goals of the person who used these symbols should be clarified. This means that in all cases where the law enforcer will not be able to prove that the mentioned symbols were used to justify or glorify war crimes, administrative responsibility will arise.

In the opinion of the authors, in all cases where a person has been prosecuted for the aforementioned offenses and the criminal offenses included in Chapter X "Crimes against the State" of the Criminal Law, there is a reason to question the loyalty of this person to the Latvian state and its Constitution.

At the moment, representatives of society are also involved in activities related to the initiative to prevent persons disloyal to the Latvian state, the so-called "*pro-Kremlin*-minded persons", from running in the state, local government and European Parliament elections, as well as holding civil service positions and positions in state and local government institutions and their structural units.[40] In the opinion of the authors of the initiative, the above will be of multiple benefits to society, including a reason to remind about the priority of state and public interests, safety, and also protection – that the state administration, security structures, supervisory institutions will be denied the opportunity to be disloyal or harmful to the state.

During the development of the article, the mentioned initiative, signed by 13,504 persons, reached the *Saeima* of the Republic of Latvia. On 19 January 2023,

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[38] *Danovskis, E.* Administratīvās atbildības likuma pamatnoteikumu svarīgākās nostādnes [Important Notions of Basic Provisions of Administrative Liability Law]. Grām.: Protecting values enshrined in Constitution: perspectives of different fields of law. Collection of research papers of the 77th International Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2019, pp. 462–463. Available: https://doi.org/10.22364/juzk.77.49 [last viewed 01.03.2023].

[39] *Krastiņš, U.* Tieša nodoma tvērums krimināltiesībās [Direct Intent in Criminal Law]. Riga: Tiesu namu aģentūra, 2017, p. 32.

[40] Aizliegt ieņemt amatus valsts un pašvaldību institūcijās prokremliski noskaņotām personām [Prohibit pro-Kremlin persons from holding positions in state and local government institutions] (18.05.2022). Available: https://manabalss.lv/aizliegt-ienemt-amatus-valsts-un-pasvaldibu-institucijas-prokrieviski-noskanotam-personam/show [last viewed 01.03.2023].

the opinions of the *Saeima* factions[41] were heard and the deputies who spoke in the *Saeima* debates expressed their support for a thorough but quick evaluation of this initiative in the *Saeima* commissions. In the opinion of the authors of the article, this initiative should not be limited only to "*pro-Kremlin*-minded persons". Instead, this issue should be viewed more broadly, applying this restriction to all persons disloyal to the Latvian state, accordingly developing and strengthening the methodology for assessing disloyalty. Persons disloyal to Latvia have committed several administrative violations and criminal offenses. On 21 October 2022, the Latvian State Security Service (Latvian: *Valsts drošības dienests*, VDD) reported that since the beginning of Russia's armed forces' invasion of Ukraine, Latvian State Security Service has initiated 27 criminal proceedings, while four proceedings had been taken over from the State Police concerning hate speech and activities in support of Russia's aggression and interests.[42] Criminal proceedings have been initiated on the basis of suspicion for various criminal offences: for activities directed towards triggering national hatred or enmity against Latvians and Ukrainians (Section 78 of Criminal Law), public glorifying and acquittal of Russia's war crimes (Section 74^1 of Criminal Law), activities aimed at triggering national hatred or enmity against Latvians and Ukrainians (Section 78 of Criminal Law), providing support in collecting financial resources and other goods for Russian soldiers involved in warfare in Ukraine (Section 77^2 of Criminal Law), an action directed against Latvia (Section 80 of Criminal Law) and assistance to a foreign State in activities directed against Latvia (Section 81^1 of Criminal Law). In eight of these criminal proceedings, the Latvian State Security Service concluded the pre-trial investigation and referred the materials of the criminal proceedings to the Prosecutor's Office to initiate criminal prosecution against the suspects. Within the other criminal proceedings, the pre-trial investigation continues, so far, 15 persons have been recognized as suspects, while seven others – as persons against whom criminal proceedings have been enacted. This information allows the authors to predict that issue of the activities of disloyal subjects will not lose its relevance in the years to come.

Thus, a clear regulatory framework, setting the requirement for a person in public service or work to be loyal to the Latvian state and its Constitution, and strengthening the loyalty assessment methodology in regulatory acts would allow to avoid several problematic issues and solve problem situations accordingly, ensuring the priority and protection of state and public interests, as well as confirming concern for the existence and development of the country in the wider scope. Likewise, discussions on the principle of "loyalty" are to be continued, constituting the subject of further studies.

Summary

The requirement for those employed in the public sector to be loyal to the state and its basic law is proportionate and appropriate to the nature of modern state service or work. It is related to the priority of development and interests of the state and society. Therefore, the duty of loyalty, as mentioned before, is advanced in the interests of the state and society, because loyalty to the state, for which those employed in public

[41] Frakciju viedokļi 2023. gada 19. janvārī [Opinions of the factions on 19 January 2023] (20.01.2023). Available: https://www.saeima.lv/lv/aktualitates/14-saeimas-frakciju-viedokli/31838-frakciju-viedokli-2023-gada-19-janvari [last viewed 01.03.2023].

[42] The Latvian State Security Service. VDD detains an aggressive supporter of Russia's war (21.10.2022). Available: https://vdd.gov.lv/en/news/press-releases/vdd-detains-aggressive-supporter-of-russias-war [last viewed 01.03.2023].

service work, is a prerequisite for democracy, security, and justice, the existence and development of the state, and at the same time – for everyone, who lives in this state or receives state services, allowing to trust that persons who ensure the implementation of state functions are loyal to the state, and act in the interests of the state.

It is necessary to distinguish a person's right to express an opinion, to criticize the government or other administrative institutions, and to be sceptical of a person's trust or loyalty to the state and its basic law. It is possible to separate disloyalty as a deliberate manifestation of action from shortcomings and mistakes in professional activity, and other violations, which appropriately raises the issue of loyalty assessment methodology, which should be encompassed in regulatory acts.

In the authors' opinion, it would be appropriate to amend the 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 and supplement Section 7(1) "Requirements for Acceptance into Service" with the following new paragraph 3^2: "who is loyal to the Republic of Latvia and its Constitution".

It would also be appropriate to amend the 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, and supplement the following new Section 7^1 "Collection of information for deciding on employment in service of person":

"(1) A person applying for employment in the service shall submit a personal data form. The personal data form requires data that enables the assessment of the person's suitability for service. In addition, data concerning relatives and relatives by marriage (parents, sister, brother, children, spouse, former spouse), and also the given name and surname, personal identification code (in the absence of a personal identification code, date and place of birth) and contact information of a partner in a relationship resembling marriage may be required.

(2) For the verification of the data presented in the personal data form, the authorized officers shall have the right to:

1) address state authorities and local government authorities, and also natural and legal persons with an inquiry concerning the personal data of a person applying for employment in service;
2) talk to the person specified in the personal data form, and also to his or her employer and representatives of his or her educational institution and other persons in order to determine the applicant's moral character, loyalty, and other personal characteristics and, if necessary and with the consent of the person being questioned, take his or her statement in writing;
3) verify whether the person specified in the personal data form has been punished for an intentionally committed criminal offence, whether the person has been sentenced to imprisonment, or whether he or she is a suspect or accused in criminal proceedings;
4) verify personal data from the database of the state, local government or another legal person in public law or legal person in private law;
5) process personal data addressed to the general public and available from public sources.

(3) The authority or person who has received an inquiry specified in subsection (2) of this section shall reply to the inquiry immediately but within ten working days at the latest as of the receipt of the inquiry.

(4) A fact established during the collection of data for the decision to hire a person may be the basis for a refusal to hire.

(5) Subsection (4) of this section indicates the reason for the refusal and the fact underlying the refusal shall not be disclosed to the extent that it may be unavoidably necessary to ensure:

1) national security;
2) national defence;
3) public order;
4) prevention, detection, prosecution, or execution of criminal offences;
5) the protection of the data subject or the protection of the rights and freedoms of other persons.

(6) The official's suitability for service can also be checked during service if there are reasonable suspicions that there are any conditions that would prevent him from being in service.

(7) The format of the personal data form of a person applying for employment in the police service, the period of retention of the data requested in the personal data form, and the procedures for the conduct of a background check shall be determined by the Cabinet."

In addition to the above, it would be appropriate to amend the Recommendation of the Cabinet of Ministers No. 1 of 21 November 2018 "Values of State Administration and Fundamental Principles of Ethics", and by supplementing paragraph 4 "The employee shall act according to the following values of State administration" with the following subparagraph 4.8: "loyalty", and subparagraph 5.8 that clearly explains, how this happens.

The authors predict that the issue of the activities of disloyal subjects will not lose its relevance in the years to come. At the same time, the issue of loyalty should also be brought up in other areas or sectors, for example, in connection with mandatory military service or work in municipalities and their institutions, as well as in other areas of national importance.

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