REVISITING THE LIMITS OF FREEDOM WHILE LIVING UNDER THREAT. II

9–10 November 2023, Riga

Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia

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PREFACE

I am delighted to prepare the preface to the Compendium II of the 9th International Scientific Conference *Revisiting the Limits of Freedom While Living Under Threat*. It is an enduring privilege, which makes me feel truly honoured.

This conference saw the participation, beyond the best of Latvian legal scholars, of jurists from different EU jurisdictions gathering in Riga to address top-notch legal issues. Nine editions of International Conferences truly made the Faculty of Law a European hub for law debates, an indispensable forum, which highlights the most crucial juridical problems, current trends and comparative analyses.

This year, the conference topic was properly chosen to mark a cornerstone principle of the Western political tradition, for which European countries have, in their history, fought heavy battles to establish peace, protect freedom and human rights in their societies. That principle states: freedom can never be taken for granted and must be constantly preserved. Therefore, the rather troubling times that are challenging the continent – on the eastern borders because of the war, whilst on the southern borders due to the huge immigration waves – call jurists, not only politicians, to ponder the balance of freedoms. What a burdensome task!

This year's compendium once more abounds with noteworthy and compelling contributions. Most of them in their titles highlight words like fundamental rights, restrictions of rights, borders, emergency, expulsion, freedom of expression and freedom of movement, populism, crimes (even those committed by public officers), social purpose of private law, care for the elderly and many more. I dare to say that these are the terms of legal inquietude. The pages dedicated to them clearly envisage the risks to our rights and freedoms, the price that European legal jurisdictions could be compelled to pay, as they face those threats.

The efforts of the authors are directed toward finding new rules that would be adequate for handling the unsettling changes without causing any harm to the constitutional rights and freedoms. The reasoning of their research is rigorous, the conclusions they reach are convincing, the frequently offered comparative analysis is valuable.

Politics is doomed without law and legal frameworks, this is the lesson learned by the world, – not only Europe, – in the aftermath of the French Revolution in which jurists, on the path of the the Enlightenment philosophy, played an apical

role in arguing and designing an architecture of legal principles, which brought the societies to the Rule of Law, often paying a blood tribute.

The compendium I am introducing is a *coup de maître* in the juridical literature, another magnificent achievement of the University of Latvia Faculty of Law in the European landscape.

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SECTION 1

PUBLIC LAW

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PERMISSIBILITY OF REFERENDUMS: LITHUANIAN CASE IN THE CONTEXT OF POLITICAL THEORIES

Key words: referendum, constitutional law, legal theory

Summary

Referendums are a direct manifestation of the sovereign power of the People. However, the rule of law raises certain procedural and material requirements for referendums. They are enforced by the courts, and their power not to permit a referendum provokes deep questions regarding the concept of democracy. In Aristotle's theory, certain foundations for this model can be found, along with potential criteria for maintaining a proportionate balance between authority of the courts and the will of the People.

Introduction

In Lithuanian law, courts have the power to decide, whether a referendum can be permitted. Among other factors, in the exercise of this power, compatibility with the Constitution is considered. This applies even when a referendum proposal contains a constitutional amendment. Such power of the judiciary can seem to compete with other constitutional provisions that provide supreme power to the People.

The jurisprudence of the Lithuanian courts lacks the logical resolution of this competition (which, by some could be seen as a contradiction). Although valuable insights can be found in the writings of other theorists as well, the limitations of a single article oblige to analyse the authors only one at a time. For this purpose, Aristotle's "Politics" was selected as the main source, on account of its richness in insights on the discussed issue and its prominence among other theories, therefore, other authors, whose theories concern the analysed issue, are discussed briefly.

Accordingly, the aim of this article is to explore whether and how the Lithuanian model of legal review on referendum permissibility is compatible with prominent political theories. This is achieved firstly by analysing the Lithuanian case and

formulating its comprehensive description and justification of internal coherence in the law. Secondly, the relevant political theory elements are presented by selecting the remarks that are relevant to the discussed issue and bear the potential to resolve possible competition of legal provisions in Lithuanian referendum law, as well as give criteria for applying the Lithuanian model, where the judiciary is granted discretion.

1. The Case No. R-22-629/2021

On 29 December 2021, the Supreme Administrative Court of Lithuania (hereinafter – the Court) announced a decision to uphold the Supreme Electoral Commission's (hereinafter – SEC) position that the disputed referendum cannot be held. This case originated when a group of Lithuanian citizens addressed SEC with a request to register their initiative for a referendum. Under a regular procedure, SEC would register it and issue signature collection sheets to collect the necessary 300 thousand citizen signatures to initiate a mandatory referendum. However, SEC denied this request on the grounds that the proposal was incompatible with the Constitution of Lithuania.

The proposal included an amendment to the Constitution regarding parliamentary elections. The current system involves a mixed system, where 71 parliament members are elected in a majoritarian vote and 70 – in a proportional vote. The proposed amendment prescribed a fully majoritarian system, and additionally included a prohibition for candidates to receive foreign funding for their campaign; exceptional right of political parties and non-governmental organizations – the organizations registered in Lithuania to nominate a candidate for election; and other nuances. SEC stated that the proposed amendment was not compatible with other provisions of the Constitution. The SEC found contradictions with the material rules, according to which such an amendment in its nature would not be legitimate.

The Court agreed with the position that the suggested amendment is unconstitutional[1] but based this conclusion on different reasons which focused on the deficiencies of legal technique. These were based on constitutional requirements for the law to be clear and precise,[2] as well as the constitutional

[1] The Court was authorised to review legality of the SEC's decisions by the general rules of procedure and afterwards this power was assigned by a special rule in the Article 11 of the Constitutional Act on Referendum of 23 June, 2022, No. XIV-1163, that states "decisions regarding registration of the group […] can be appealed to the Supreme Administrative Court of Lithuania".

[2] E.g., in the 30 May 2003 ruling the Constitutional Court stated that "the requirement of legal certainty and clarity presupposes certain imperative requirements for legal regulation. It must be clear, coherent, legal norms must be formulated precisely, they cannot contain ambiguities".

requirement that the question proposed for a referendum must be clear (in order to ensure that the voters are properly aware what they are voting for).[3]

It was stated in the Court's decision that the proposed constitutional amendment had deficiencies which, taken together, deemed the provisions unclear and ambiguous; some of the provisions raised impossible requirements. Furthermore, the fulfilment of some requirements was dependent on arbitral circumstances. Regarding these findings, the Court found that the proposed amendment was incompatible with requirements arising from the principle of legal certainty and the SEC had the obligation to refuse the request to register the referendum initiative.[4]

2. Concerns regarding constitutionality of this procedure

In the presented case, Supreme Administrative Court of Lithuania exercised the power to review the constitutionality of a proposed constitutional amendment and had the final decision to "block" a citizens' referendum initiative. Freedom of referendum has been analysed in this regard[5], but two concerns regarding its constitutionality and relation to political theory are yet to be resolved. Firstly, the Constitutional Court of Lithuania has the exclusive right to interpret the Constitution. Secondly, Lithuania is a democratic republic and the sovereign power belongs to the People – is it compatible with the Court's power to impose restrictions on referendum?

Regarding the **assignment of power to interpret the Constitution**, on one hand, Article 6 of the Constitution states that it is a directly applicable act. Moreover, the Constitutional Court has expressly stated that the SEC must evaluate whether a referendum initiative meets the legal requirements,

[3] Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in Case No. 16/2014-29/2014. Available in Lithuanian: https://lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content [viewed 30.11.2023.].

[4] It was not disputed that the SEC had the obligation to refuse registering referendum initiative that proposes to consider questions which are incompatible with the Constitution. This duty was revealed in the 11 July 2014 ruling by the Constitutional Court.

[5] See, for example, Jarasiunas E. La Cour constitutionnelle de la Republique de Lituanie et la protection des fondements constitutionnels de l'institut des elections democratiques [The Constitutional Court of the Republic of Lithuania and the protection of the constitutional foundations of the Institute of Democratic Elections]. Jurisprudencija, 2007, 4(94), pp. 7–14; Kuris E. Constitutional Law in a Constitutional Democracy – View from the Consitutional Court of Lithuania. In Breitenmoser S., et al. Human Rights, Democracy and the Rule of Law. Liber amicorum Luzius Wildhaber. Zurich: Dike Verlag, 2007, pp. 1023–1042; Puraite-Andrikiene D. Teises aktu konstitucingumo patikros objektai Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje [Objects of constitutionality verification of legal acts in the jurisprudence of the Constitutional Court of the Republic of Lithuania]. Teise, 2020, No. 116, pp. 72–91; Sinkevicius V. Konstitucijos keitimo apribojimai [Restrictions on amending the Constitution]? Jurisprudencija, 2015, Vol. 22, No. 2, pp. 206–230; Zalimas D. Konstitucijos virsenybes uztikrinimas: kai kurie Konstitucinio Teismo implicitiniu įgaliojimu aspektai. Jurisprudencija, 2018, Vol. 25, No. 1, pp. 38–68.

among them – whether a proposed constitutional amendment does not violate the requirement to maintain consistency of the Constitution's provisions; if a proposal does not meet the relevant legal requirements, the SEC must refuse to register a referendum initiative.[6] However, on the other hand, in light of other constitutional provisions, the Constitutional Court has also stated that it is the only institution with the power to officially interpret the Constitution. Despite this, the former provisions create conditions where the only way for the Supreme Administrative Court to solve a dispute is by resorting to the interpretation of the Constitution.

Naturally, these provisions are intended to determine the supremacy of the interpretation provided by the Constitutional Court. However, such a system has a possible scenario that could result in complications – the scenario where the Administrative and Constitutional Court would have different views regarding the meaning of constitutional provisions and the Administrative Court's views would impose harder restrictions on the right to referendum. This could become manifest out of a simple mistake or from a less accidental factor influenced by different prerequisites for judicial impartiality. According to Article 112 of the Constitution, judges of administrative courts are appointed and removed by the President of the Republic, whereas justices of the Constitutional Court – by the Parliament from the candidates submitted by the President of the Republic, the Parliament Speaker, and the President of the Supreme Court. A more complex procedure of judge appointment and removal has a higher potential for unconditional judicial impartiality.

Multiple instruments could be used to diminish the risk of this worst scenario, whereby administrative courts would impose higher restrictions on the right to referendum than necessary in the view of the Constitutional Court. Among them are (1) granting the Constitutional Court the power to review the legality of the referendum initiative; (2) developing a dual concept of constitutional interpretation.

The first path in the Lithuanian legal system might include complicated reforms and each form is hardly compatible with the concept of constitutional review established in the Constitution. Validating such power can take the form of a constitutional amendment or judicial case law but either way constitutes intricacies explained in more detail in earlier publications. However, the development of a dual concept of constitutional interpretation bears very few shortcomings and the potential for a substantial reward. A likely channel to create it is through judicial interpretation in cases having a relation with the ordinary courts' power to apply and interpret the Constitution. This can include a concept of moderate constitutional interpretation which presupposes that ordinary courts do not have the power to creatively interpret the Constitution.

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[6] Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in Case No. 16/2014-29/2014. Available in Lithuanian: https://lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content [viewed 30.11.2023.].

Such a concept can be directed towards a goal that ordinary courts would not restrict human rights (among them – the right to referendum) more than it is necessary but simultaneously would ensure effective implementation of constitutional provisions. This presupposes that ordinary courts abstain from interpretation of the Constitution which has not been previously revealed by the Constitutional Court, therefore, referendum initiatives would not be permitted when they are clearly contradicting the Constitution – either provisions of its text or the Constitution's meaning laid out in the Constitutional Court's case law. Other factors to take into account for ordinary courts inevitably are the risk of significant harm to human rights or other constitutional values (e.g., state independence, territorial integrity, rule of law, and others). Such a concept, perhaps, can already be found between the lines of judicial practice (ordinary courts, naturally, abstain from a creative interpretation of the Constitution) but it has not been clearly articulated yet. This path would require the SEC and the Supreme Administrative Court to permit the referendum that does not violate the Constitution according to the aforementioned criteria and the referendum's constitutionality could be checked later in the Constitutional Court during the later stages of the process (e.g., when the Parliament announces a referendum, amendment of the law is adopted, etc.). This path seems to bear the potential to optimally balance the protection of constitutional values and the citizens' freedom to realize their sovereign power through referendum.

A conflict with the **nature of democratic governance** is the other concern related to the SEC's and administrative court's power not to permit a referendum. Article 2 of the Constitution states that sovereignty belongs to the People, and Article 3 – that no one can restrict or limit the sovereignty of the People.

In its justification of the Parliament's and the SEC's obligation not to permit an anticonstitutional referendum, the Constitutional Court of Lithuania has stated that, according to the Constitution, People execute their highest sovereign power, *inter alia*, through democratically elected representatives; the requirement to follow the Constitution is not a restriction or a limit on the sovereign power, the Constitution's purpose is to safeguard the fundamental values, and, accordingly, a referendum cannot be announced when it creates conditions to violate "constitutional principles, the Constitution itself, as the highest law".[7] However, this statement in itself does not fully resolve the conflict – it does logically refute a simple consideration that, if the People adopted the Constitution in a referendum, they should be able to amend *all* of its provisions and, moreover, why the "conflict" between the Constitution's provisions and provisions of a proposed amendment cannot be regarded as having a relation of general and special rule (according to

[7] Ruling of the Constitutional Court of the Republic of Lithuania of 11 July 2014 in Case No. 16/2014-29/2014. Available in Lithuanian: https://lrkt.lt/lt/teismo-aktai/paieska/135/ta24/content [viewed 30.11.2023.].

the latter view, the special rule has the priority of application over the general rule). There is a very thin line between a conclusion that two rules are in conflict and a conclusion that they are not in conflict – one rule merely specifies another one by providing an exception (for example, how one rule establishes a human right to privacy and a number of other rules, which provide exceptions to this right, are not regarded as contradictory). Therefore, to some extent, the SEC and the courts have discretion in deciding, whether a constitutional amendment is in violation of other provisions of the Constitution.

So, if the courts, not the voters in the referendum make the final decision on the question of what is unconstitutional – is not a restriction of the sovereignty?

A doctrinal model to resolve this conflict concerns the concept of sovereignty and the question of what can be regarded as an exercise of sovereignty.

It would not be easy to find legal or theoretical sources which define the sovereignty of the People as a majority's power to anything, anytime (in laymen's terms – a mob rule). Among other traits, sovereignty is described as a rule of the majority that has to follow the law. Representative democracy creates even more nuances. It is rather established in Western jurisprudence that the People in a referendum do not have the power to adopt such decisions as committing genocide. However, this cannot be considered a restriction or limit of sovereignty – the concept of sovereignty does not include the power to commit crimes against humanity. Also, from the *procedural* point of view, a referendum must be organized according to law, thus a referendum without any regard to procedural requirements or where voters are at gunpoint would not be valid. This naturally leads to the conclusion that sovereignty encompasses the right to make decisions in a referendum with the condition that the law is followed (both procedural and material rules) – similarly, individual rights (e.g. the right to a trial) do not guarantee the freedom to exercise certain rights in any desired way, but rather the freedom to exercise them according to law. Just as there is no right to receive legal remedy by shouting at the court's door, there is no sovereign power for a crowd to verbally hold a chaotic referendum.

Sovereignty is exercised through directly or indirectly elected officials and there is no compelling reason to disagree that a judge is one of those officials. Accordingly, the fact that the People exercise their will through the courts can be compatible with the concept of sovereignty, if we define it as a power to make decisions according to a legally established procedure and legally established grounds.

Additionally, even when courts would not permit a referendum on the grounds of its unconstitutionality, people still are able to hold such a referendum if they elect politicians who support it and eventually alter the composition of courts (when the judges' terms of service end) with new judges who also support the referendum in question. Therefore, this sort of "obstacle" in reality does not permanently restrict the right of the People to hold a referendum, but instead obliges them to take time to consider it.

3. Theoretical basis

The writings of Aristotle contain an extensive political and legal theory that does not omit the issue discussed above. In Aristotle's writings, theoretical grounds can be found that substantiate the described element of the Lithuanian legal system and with it – provide criteria to seek balance (the middle ground praised by Aristotle) in similar cases occurring in the future.

One way to categorize these insights is to form two groups: one that would be related to the rule of law, and and another – counterbalancing the majoritarian governance.

In Aristotle's "Politics", which includes analysis of democracies by the historians of the 4th century,[8] there is a remark directly related to the rule of law: "the rule of the law is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law [...] He who bids the law rule, may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast"[9]. Aristotle similarly stated that "all matters of this kind are better regulated by law than by the will of man, which is a very unsafe rule"[10]. The last quote was mentioned in the context of a discussion on how the position of public servants ought to be terminated. It seems to be provided by the way, in passing the discussion on other matters, but this statement fits with Aristotle's views on different matters. In the analysis of various forms of democracies, we can find a type where every citizen can be admitted to the government but the supreme power belongs not to the law, but to the majority of citizens. This sort of state is described as brought about by the demagogues and without a proper rule of law "the people become a monarch, and is many in one [...] the people, who is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and grows into a despot [...] this sort of democracy being relatively to other democracies what tyranny is to other forms of monarchy [...] they alike exercise a despotic rule over the better citizens [...] The law ought to be supreme over all, and the magistracies and the government should judge of particulars"[11].

Regarding the power of the majority in state governance in a wider perspective, it is worth to remember that a defining trait of good governance in Aristotle's theory is that the rulers pursue the common good. Opposing corrupted ruling of the few or the many is the one where rulers (even if the state is a democracy ruled by the majority) only pursue their own interests and neglect the interests of the rest[12]. The relevance of this insight concerns a possible threat of majoritarian

[8] Chambers M. Aristotle's 'Forms of Democracy'. Transactions and Proceedings of the American Philological Association, 1961, Vol. 92, p. 36.

[9] Aristotle. Politics. Translation by Jowett M. A. Oxford: Clarendon Press, 1885, p. 1287a.

[10] Ibid., p. 1272a.

[11] Ibid., p. 1292a.

[12] Ibid., p. 1279a.

decision-making – the possible infringement of the rights of minorities. The rule of law implemented through the judicial branch of government might help to avoid this threat. Together with the aforementioned quotes, Aristotle's insights on the rule of law and a key trait of good governance presuppose that the limits on the majority's arbitrary rule are a way to protect the stability of a state and the rights of "the governed". Additionally, this is supported by another observation: the chief cause for a revolutionary feeling is a desire for equality. Inferiors revolt in order that they may be equal, and equals that they may be superior[13].

Although there is plentiful research dedicated to Aristotle's writings, naturally (according to the author's best knowledge), it lacks a direct focus on the issue analysed in the current article. Scholarly literature contains observations that Aristotle prefers a *demos*, which only participates in assemblies to a limited extent,[14] hence, it is no surprise that some might find Aristotle's view "not democratic enough",[15] and some entitle it as an attempt to "render democracy acceptable by moderating it"[16]. Other commentaries of Aristotle's model state that "The whole contains all, not as a totality of undistinguished bodies, but as a collection of defined multitudes [...] Justice requires a democracy, perhaps not as democratic partisans would have it, but a democracy in which all factions have their fair say".[17] However, as noted by A. Scalia, Aristotle's directive on supremacy of law encompasses a nucleus of personal discretion[18] (of judges). It is hard to disregard the last point, since it hits the Achilles' heel of the idea of democracy governed by law by making it seem like a model wherein aristocratic governance (embodied by the judiciary) constantly rivals the democratic governance. Surely, we can assume that there is nothing wrong with that, nevertheless, few constitutions (if any) contain a statement that their respective state is a mix of aristocracy and democracy. Accordingly, a resolution requires either to end the contemplation before this point or go further.

Regarding this issue as considered by other authors, firstly, the proponents of natural law concept ought to be mentioned, because they usually contain the well-known principle *lex iniusta non est lex*, which was upheld by Cicero, St. Augustine, G. Radbruch, J. Finnis, and many others. A famous modern supporter of this view was Lon Fuller, whose theory of inner morality of law can also be seen as compatible with the discussed restrictions on referendum, as long

13 Aristotle. Politics. Translation by Jowett M. A. Oxford: Clarendon Press, 1885, p. 1302a.

14 Lintott A. Aristotle and Democracy. The Classical Quarterly, Vol. 42, No. 1, 1992, p. 125.

15 Anagnostopoulos G. Aristotle's Defense of the Multitude Being in Authority in Politics III.11. The Poetry in Philosophy: Essays in Honor of Christos C. Evangeliou, Mitsis P. and Reid H. L. (eds). Parnassos Press – Fonte Aretusa, 2021, p. 194.

16 Papageorgiou C. I. Four Or Five Types Of Democracy In Aristotle? History of Political Thought, 1990, Vol. 11, No. 1, p. 6.

17 Winthrop D. Aristotle on Participatory Democracy. Polity, 1978, Vol. 11, No. 2, p. 160.

18 Scalia A. The Rule of Law as a Law of Rules. The University of Chicago Law Review, 1989, Vol. 56, No. 4, p. 1176.

as those restrictions can be derived from Fuller's principles.[19] In connection with the supremacy of law, J. Locke has written that the legislative authority is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people and the legislative, or supreme authority, cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges.[20]

In the "Federalist No. 10" of the Federalist Papers, J. Madison acknowledged the dangers of majoritarian rule and endorsed the solution that is entitled as a republican state – the one where "the scheme of representation takes place". It is characterized, *inter alia*, by the delegation of the government which can make it likely that "the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose".[21]

When H. L. A. Hart attempted to define the boundaries of the law, he also drew attention to the question of sovereign power limits. The "Concept of Law" contains an insight that, although courts are not bound by popular opinion or morality in determining the validity of law, but "sometimes the supreme legislative power within the system is far from unlimited. A written constitution may restrict the competence of the legislature not merely by specifying the form and manner of legislation (which we may allow not to be limitations) but by excluding altogether certain matters from the scope of its legislative competence, thus imposing limitations of substance".[22]

R. Dworkin has also contemplated the idea of sovereignty restrictions by the concept of human rights. Among other things, he focused on the idea of sovereignty restrictions by international law (enforced by the international community),[23] which also was extensively analysed by D. Held in the "Models of Democracy".[24] An extensive analysis of problems arising from majoritarian governance can be found in the writings by R. A. Dahl.[25]

The common denominator and "the other" danger. The limited extent of this paper allows to show only a fraction of rich deliberation on this issue in the political theories, nevertheless, the insights of the aforementioned authors confirm that the concept of sovereign's limitations is not alien to the works of prominent theorists. However, just as Aristotle famously encouraged to seek for

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19 Fuller L. L. The Morality of Law. New Haven: Yale University Press, 1964.

20 Locke J. Second Treatise of Government. Available: https://www.johnlocke.net/2022/07/two-treatises-of-government-book-ii_84.html [viewed 19.01.2024.], pp. 135–136.

21 Madison J. Federalist No. 10. The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection. Library of Congress. Available: https://guides.loc.gov/federalist-papers/full-text [viewed 19.01.2024.].

22 Hart H. L. A. The Concept of Law. Oxford: Clarendon Press, 1961, pp. 67–68.

23 Dworkin R. Justice for Hedgehogs. Cambridge: The Belknap Press, 2011, pp. 332–334.

24 Held D. Models of Democracy. Cambridge: Polity Press, 2006.

25 Dahl R. A. Democracy and Its Critics. New Haven: Yale University Press, 1989.

the “middle”, another side of the coin cannot be ignored. Although there have not been cases in history where courts usurped the ruling of the state, unlimited intervention with the will of the majority of the People would not end well due to many reasons. Regarding this side of the scale, Aristotle remarked that when the majority is assembled, it is able to make more rational decisions than each individual on their own, consequently, the majority must be permitted to make decisions on public affairs[26]. The exact line where such permission collides with the requirements of law will always remain an open question to be decided *ad hoc*. Although the judiciary’s power not to permit a referendum can be justified, it should be exercised in a delicate manner. One of the criteria for resolving this conundrum in Aristotle’s writings is a question – would the referendum proposal disrupt the balance between the interests of the majority and minority? Also, if we turn to Hart’s so-called secondary norms, the suggested criterion could be a question of whether the referendum proposal threatens the rule of law system – the instruments which ensure that the government system balances the interests of the majority and minority.

Conclusions

1. The Lithuanian model of reviewing referendum permissibility enables the judiciary to recognize referendum initiatives as unconstitutional and, as a result, prohibit such referendums. At the first sight, this might seem in conflict with People’s sovereign power, however, this impression is countered with the view that the obligation to initiate referendums according to legal procedure and requirements is a part of democracy governed by the supremacy of law.
2. Foundations of the Lithuanian model in this regard can be found in political theory – plenty of prominent theorists found certain restrictions of the sovereignty to be an acceptable phenomenon. Among them, Aristotle discussed the issues of majoritarian governance, and one of measures to avoid them (and ensure proper governance of the state)[27]presented in his writings is the concept of the rule of law (in the sense that the rulers are subordinate to law), which essentially reflects the discussed model of mandatory legal review of referendum initiatives. The later political theories further support this model with rich insights, including the emphasis on the principle *lex iniusta non lex est* and contending that a republican democracy incorporates representative governance (in this context, it can be regarded as embodied by the judiciary).

[26] Aristotle 1885, pp. 1273a; 1281b–1282a.

[27] I.e., looking after the interests of all the classes of society.

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APPLYING PRINCIPLE OF EQUALITY IN CASE OF RESTRICTION OF RIGHTS

Key words: principle of equality, restriction of rights, rationality, constitutional review, judicial activism

Summary
The article analyses the practice of the Constitutional Court in the application of the principle of equality in cases where a legal norm establishes a restriction of rights. The article critically evaluates the fact that the court can declare a norm invalid only because a relevant restriction, which is otherwise necessary, appropriate and proportionate, has not been set for other persons who should have been subject to it. It is concluded that this can have serious negative consequences and violate the principle of rationality.

Introduction

The first sentence of Article 91 of the Constitution of the Republic of Latvia[1] (hereinafter – the Constitution) states: "All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind".[2] Relatively many cases have been considered in the Constitutional Court of the Republic of Latvia, in which compliance of legal norms with this article has been evaluated. In most of the cases, a legal norm is contested, which grants a person some benefit that another group of persons also wants to obtain. However, there are also cases where legal norms that set some restrictions of rights are evaluated. The Constitutional Court does not distinguish whether the case is about a restriction or a benefit, it always follows the same

1 The Constitution of the Republic of Latvia. Available in English: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [viewed 01.12.2023.].

2 See: Latvijas Republikas Satversmes 91. pants: tiesiskas vienlidzibas princips. Satversmes tiesas judikatura [Article 91 of the Constitution of the Republic of Latvia: The principle of legal equality. Jurisprudence of the Constitutional Court]. Riga, Tiesu namu agentura,, 2022.

methodology. If it is recognized that the groups are comparable and there is no legitimate purpose for different treatment, the norm is declared invalid.

The current article offers a discussion, whether such behaviour is always rational.

1. The case on the restriction of practice in engineering research

One such case was initiated after a person's constitutional complaint regarding the provision of the Construction Law[3], according to which a person had to obtain a second-level professional higher education by a certain time in order to be able to continue practice in construction design.[4] The requirement for such a level of education was and still is defined in Article 13 of the law, but Article 4 of the transitional provisions initially allowed that persons with first-level education, who had already obtained the right to practice, were entitled to continue their practice in engineering research, design or construction expertise, but not longer than until 31 December 2020. However, according to the contested norm in the Constitutional Court, which was adopted on 3 December 2020, the persons who had a practice in engineering research had a possibility to continue it without a time limit, but in construction design or expertise – only until 31 December 2020.[5]

Therefore, the contested legal provision improved the situation of those persons who did not obtain a second-level education and worked in the field of engineering research, but did not change the applicant's legal situation, since such a requirement was established already in 2013. However, the applicant believed that the contested norm unreasonably limited his right to occupation and legitimate trust, and this provision stipulated a different attitude, as the legislator had allowed to continue the practice in the specialty of engineering research without restrictions. The Constitutional Court had initiated a case regarding the compliance of the contested legal provision with several articles of the Constitution, including the first sentence of Article 91.

In its judgment, the Constitutional Court stated that the basic question in the case was whether the increased educational requirements for those who had previously obtained the right to practice were proportionate and could be fulfilled within the specified period. The court concluded that the contested norm served to ensure the quality and safety of the construction project and,

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[3] Buvniecibas likums [Construction Law] (09.07.2013.). Available: https://likumi.lv/ta/en/en/id/258572-construction-law [viewed 01.12.2023.].

[4] Judgment of the Constitutional Court if the Republic of Latvia of 21 April 2022 in Case No. 2021-27-01. Available in Latvian: https://likumi.lv/ta/id/331871-par-buvniecibas-likuma-parejas-noteikumu-4-punkta-pirma-teikuma-atbilstibu-latvijas-republikas-satversmes-1-pantam-91-panta-pir [viewed 01.12.2023.].

[5] Grozijumi Buvniecibas likuma [Amendments to Construction Law] (03.12.2020.). Available in Latvian: https://likumi.lv/ta/id/319556-grozijumi-buvniecibas-likuma [viewed 01.12.2023.].

accordingly, the building, as well as people's right to life, health and a favourable environment. The court recognized the requirements set out in the disputed norms as proportionate and enforceable within the specified period.

Next, the court turned to the principle of equality. The court emphasized that the principle of equality prohibited the adoption of such norms that, without a reasonable basis, allowed different treatment of persons who were in the same and comparable circumstances. The court concluded that persons who had obtained a first-level education and wanted to continue practice in engineering research, design or construction expertise were in the same and comparable conditions, but the challenged norm provided for different treatment. Consequently, the court concluded that the different treatment had no legitimate purpose, and therefore the challenged norm did not comply with the first sentence of Article 91 of the Constitution. The contested norm was declared invalid and the legislator was given time (eight months) to adopt a new regulation.

The legislator, in order to prevent the formal violation of equal treatment due to the aforementioned judgment of the Constitutional Court, excluded the word "engineering" from paragraph 3 of the transition provisions of the law, which contained similar requirements.[6] As a result, no person who already had practice in engineering research, design or construction expertise, but did not have a second level education, could continue their practice.

From a practical point of view, such a solution is probably justifiable, although there is also a separate opinion of the Constitutional Court judge, in which he explains why the legislator's arguments did not convince the judge that such educational requirements were really necessary.[7]

The outcome of the case for the applicant was that his legal situation, for which he had appealed to the Constitutional Court, was not improved, while it worsened the situation of persons who previously had the right to continue their practice in engineering research with a first-level education.

Although the applicant did not emphasize that he opposed the contested norm only to the extent that it did not establish a more favourable regulation regarding the construction design practice, the argumentation contained in the application indicated exactly this desire.[8] The applicant did not argue in his application, and it did not follow from the judgment of the Constitutional Court, that the court specifically focused on the analysis of the tasks to be performed

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[6] Grozijumi Buvniecibas likuma [Amendments to Construction Law] (15.12.2022). Available in Latvian: https://likumi.lv/ta/id/338206-grozijumi-buvniecibas-likuma [viewed 01.12.2023.].

[7] Satversmes tiesas tiesnesa Neimana J. atseviskas domas lieta Nr. 2021-27-01 [Separate opinion of the Constitutional Court Judge Neimanis J. in Case No. 2021-27-01]. Available in Latvian: https://likumi.lv/ta/id/333342-satversmes-tiesas-tiesnesa-jana-neimana-atseviskas-domas-lieta-nr-2021-27-01-par-buvniecibas-likuma-parejas-noteikumu-4-punkta- [viewed 01.12.2023.].

[8] It is unlikely that the applicant is satisfied that other persons whose education does not meet the requirements also lose their rights along with them. It is likely that he, believing that the relevant requirements are not necessary at all, is upset that, as a result of his application, the opportunity to continue practice is now also taken away from those who previously could work in engineering research.

during the engineering research. The court actually made the conclusion that the specialists mentioned in the disputed norm were in the same and according to certain criteria comprable conditions, taking into account only the fact that the legislator should set the same requirements for them.[9]

2. The rational core of judgment

Taking into account the above, the question of the limits of competence of the Constitutional Court is debatable. Should the Constitutional Court, analysing the validity of the restriction and concluding that the restriction is necessary, appropriate and proportionate, check whether such a restriction should have been imposed on other persons, as well? Can the applicant's rights be affected by the fact that other persons are not subject to the same restriction as the applicant, but which is in accordance with the Constitution?

Similar issues have been resolved in administrative courts. In an application to an administrative court, an appeal or a cassation complaint, it is often stated that the principle of equality has been violated, because the situation was not resolved in the same unfavourable way concerning some other person. If the administrative court recognizes that the unfavourable administrative act has been issued on the basis of a mandatory legal norm and is otherwise legal, it does not analyse other situations in which such an administrative act has not been issued or is more favourable. In that case, the administrative court usually states that the principle of legal equality does not create the right to equal treatment if the comparable situation is illegal.[10] Such insights can also be found in legal doctrine.[11]

Although the Constitutional Court, unlike the administrative court, usually performs abstract instead of concrete control of the rule of law, nevertheless, the applicant of the constitutional complaint, similarly to the applicant in the administrative court, must substantiate the presence of a specific violation of his rights. A person would not be able to justify the violation of rights by stating that because an incorrect legal regulation has been established for another group of persons, such an incorrect regulation should also be adopted regarding him.

It follows from the annotation of the amendments to the Construction Law that the aforementioned judgment of the Constitutional Court did not have significant consequences, as the regulation on specialists in the engineering research specialty was included in the transition regulations as a precaution, and

[9] See Paragraph 30 of the judgment of the Constitutional Court.

[10] See, for example, item 23 of the judgment of the Senate of 31 October 2023 in Case No. A43008017, SKA-4/2023 [ECLI:LV:AT:2023:1031.A43008017.12.S]. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [viewed 01.12.2023.].

[11] Levits E. Satversmes 91. panta komentars [Commentary on Article 91 of the Constitution]. In: Latvijas Republikas Satversmes komentari. VIII nodala. Cilveka pamattiesibas. Autoru kolektivs prof. R. Baloza zinatniska vadiba, Riga: Latvijas Vestnesis, 2011, p. 88.

not because there were persons to whom it applied.[12] However, there may be cases when the fact that the Constitutional Court, after recognizing a legal norm as necessary, appropriate and proportionate, additionally checks its compliance with the principle of equality and accordingly declares it invalid, may cause significant adverse consequences.

For example, the case when the applicant had indicated in the application another comparable group of persons not mentioned in the law, and therefore contested the norm of the Construction Law, which specified educational requirements. If the Constitutional Court recognized that this group should have been included, then following its practice, the court would have to declare the norm invalid due to the violation of the principle of equality. It would be invalidated not because the educational requirements are wrong or disproportionate, but only because the requirements are not imposed on any other group. Although the Constitutional Court in such cases usually gives the legislator time to correct the deficiency in the normative act, such a judgment would not be rational. In fact, the legislator should reissue the same norm, only supplementing it with another group. This approach of the Constitutional Court suggests going beyond the boundaries of the claim, and therefore excessive judicial activism – exceeding competence.[13]

For comparison, another example from the recent practice of the Constitutional Court can be given. Namely, the court examined the case in which it was checked whether the ban on a soldier to be a member of a political party was justified.[14] The court concluded that this restriction of freedom of association is justified. Since the case was also initiated regarding the compliance of the norm with Article 91 of the Constitution, the court examined whether the principle of equality had not been violated. Since the court concluded that the groups specified in the application were not comparable, the court recognized the conformity of the challenged norm. However, had the Constitutional Court recognized that the contested norms violated the principle of equality, it should, following its previous approach, recognize as invalid those legal norms that are completely correct and necessary and otherwise comply with the Constitution.

If the Constitutional Court assesses the compliance of the restriction with both another article of the Constitution and the principle of equality, and recognizes the restriction of fundamental rights as appropriate, then in connection

[12] See "Description of the problem" section of the Annotation of the Amendments to the Construction Law. Available in Latvian: https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/B5B574186DCA2AEBC22588F30028781E?OpenDocument [viewed 01.12.2023.].

[13] On positive and negative judicial activism, see: Tancevs E. Velreiz par aktivismu konstitucionalaja tiesvediba [Once more, about activism in constitutional proceedings]. Konstitucionalas tiesas aktivisms demokratiska valsti.Satversmes tiesas 2016. gada konferences materialu krajums. Riga: Latvijas Republikas Satversmes tiesa, 2016, pp. 53–89.

[14] Judgment of the Constitutional Court of the Republic of Latvia in Case No. 2022-33-01. Available in Latvian: Latvijas Vestnesis, 204, 20.10.2023. Information in English: https://www.satv.tiesa.gov.lv/en/press-release/prohibition-for-a-professional-service-soldier-to-become-a-member-of-a-political-party-complies-with-the-constitution/ [viewed 08.01.2024.].

with the principle of equality, it essentially evaluates not the contested norm, but the regulation included in another legal norm, which does not contain a restriction for another group. In fact, the compliance of the absence of any legal framework with the first sentence of Article 91 of the Constitution is assessed. It goes beyond the scope of the case. It also does not correspond to the positive goal of judicial activism and, therefore, to the permissible case – to guarantee justice for each person, in each specific case.[15]

In addition, with such a ruling, the Constitutional Court would limit the freedom of discretion of the legislator to decide, whose comparable groups should have their fundamental rights restricted, and would essentially impose the obligation to restrict fundamental rights of some other group of persons. This would mean an impermissible interference of the Constitutional Court in the competence of the legislator.

Taking into account the above, it can be concluded that if the Constitutional Court has recognized the restriction of fundamental rights set out in the contested norms as consistent with the Constitution, it does not have to evaluate the conformity of the contested norms with the principle of equality. The court must say that such an assessment cannot change the outcome of the judgment, so it is not useful. The principle of internal consistency of the Constitution provides that constitutionally protected values must be reconciled with each other when these values conflict.[16] The consideration of usefulness is one of the criteria that the Constitutional Court often examines when considering the compliance of a legal provision with the Constitution. From the perspective of usefulness, it should also assess the possible consequences of its judgment.

Likewise, this approach can be found in the jurisprudence of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR).

A whole chapter is dedicated to the principle of equality in the European Charter of Fundamental Rights[17]. However, in the judicial practice, there have so far been only a few cases in which a restriction of rights has been considered from the perspective of the principle of equality.

For example, the ECJ considered a case in which the Italian court had doubts about the validity of the norms of a regulation, but in the case of validity, doubted the compliance of its norms with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, which strengthen the principles of equality and non-discrimination. The ECJ recognized that the provision of the regulation is appropriate and valid. The court stated that, for this reason, "Articles 20 and 21 of

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15 Compare Osipova S. Tiesiska valsts vai "tiesnesu valsts" [Legal state or "judge state"]? Konstitucionalas tiesas aktivisms demokratiska valsti. Satversmes tiesas 2016. gada konferences materialu krajums Riga: Latvijas Republikas Satversmes tiesa, 2016, p. 93.

16 Pleps J. Satversmes iztulkosana [Interpretation of the Constitution]. Riga: Latvijas Vestnesis 2012, p. 223.

17 Charter of Fundamental Rights of the European Union. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT [viewed 01.12.2023.].

the Charter cannot usefully be relied on."[18] In other words, the court recognized that, given that the legal provision was correct, it was not useful to address the principle of equality.

The ECHR has issued a guide on case law on the application of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms[19] (hereinafter – the Convention) and Article 1 of Protocol 12, which strengthen the prohibition of discrimination.[20] This guide does not mention a single case in which the ECHR has found a violation because someone has not been subject to the same restriction as the applicant. On the other hand, in the jurisprudence search engine of this court, as one of the leading decisions related to Article 14 of the Convention, a decision can be found in which the court examined the complaint of a person sentenced to life imprisonment about the restriction of private life in connection with Article 14, because she was forbidden to keep a record player and the accessories necessary for it. In this case, the ECHR first analysed whether such a restriction was necessary and concluded that there was no violation of a person's private life. The court further stated that, taking this into account, it was not necessary to conduct a separate examination regarding Article 14 of the Convention.[21]

Thus, the approach suggested in this article would also correspond to the findings of the jurisprudence of the aforementioned courts.

If the different treatment seems obvious and therefore unfair, the Constitutional Court has the opportunity to draw the legislator's attention by *obiter dictum* to the fact that there are other comparable groups, thus allowing the legislator to consider for himself, according to his competence, whether the same or similar restriction of fundamental rights should be determined in relation to those groups.

Conclusions

1. If the Constitutional Court has recognized the restriction of fundamental rights established in the contested norms as necessary, appropriate and proportionate, it does not have to continue evaluating the conformity of the contested norms with the principle of equality.

[18] See para. 62–63 of ECJ Judgement of 06.05.2021. in Case No. C-142/20 Analisi G. Caracciolo. Available: https://curia.europa.eu/ [viewed 01.12.2023.].

[19] European Convention on Human Rights. Signed in Rome on 04.11.1950 [in the wording of 04.12.2023.]. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [viewed 01.12.2023.].

[20] Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Available: https://www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG [viewed 01.12.2023.].

[21] ECHR decision of 22 January 2008 in Case Wolfgang Beier v. Germany (application No. 20579/04). Available: https://hudoc.echr.coe.int/#{%22fulltext%22:[%2220579/04%22],%22itemid%22:[%22001-84948%22]} [viewed 01.12.2023.].

2. In such cases, the court should indicate that such an assessment is not useful, as the result of the case cannot be changed.
3. The Constitutional Court may, by *obiter dictum*, draw the attention of the legislator to the fact that there may be other comparable groups, thus allowing the legislator to consider for himself whether the same or similar restriction of fundamental rights cannot be determined with respect to those other groups.

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FREEDOM OF EXPRESSION VERSUS HATE SPEECH: LIMITS AND THEIR CHANGEABILITY

Key words: freedom of expression, hate speech, context, changeability

Summary
The main issue discussed in the present article is, as follows: whether the freedom of expression may be restricted, and whether it has actually been restricted in order to avoid hate speech in the situation of threat? The answer to this question is both 'yes' and 'no'. 'No', because the criteria for distinction between freedom of expression and hate speech remains unchanged, and 'yes', because, firstly, the criterion of 'the context' becomes more 'intense' and 'sensitive', and, secondly, the 'intensity' and 'sensitivity' of the context may be reflected in national legal regulation by recognizing additional situations as hate speech. Meanwhile, 'the context' is always changing, therefore the borders between the freedom of expression and hate speech likewise vary perpetually.

Introduction

The key issue discussed in this article is: whether the freedom of expression could be and actually is restricted in order to avoid hate speech in the situation of threat? The answer to this question could be both 'yes' and 'no'. 'No', because the criteria for distinction between the freedom of expression and hate speech remain unchanged, and 'yes', because, firstly, the substance of criterion 'context of expression' becomes more 'intense' or 'sensitive', and, secondly, the 'intensity' and 'sensitivity' of the context may be reflected in national legal regulation by recognising additional situations as hate speech. At the same time, the context is perpetually changing, hence, the border between the freedom of expression and hate speech likewise is subject to constant change.

1. The concept (definition) of hate speech

Presently, there are number of international agreements prohibiting hate speech, such as International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights, Additional Protocol to the Council of Europe Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems[1], Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[2]. However, none of them provides an exhaustive definition. At the same time, there are international soft law documents, which attempt to summarise this concept as stipulated by international agreements and documents of the bodies in charge of providing their interpretation.

Their most exhaustive definition is offered by European Commission against Racism and Intolerance (ECRI). ECRI is an institution of the Council of Europe, which specialises in questions relating to the fight against racism, discrimination, xenophobia, antisemitism, and intolerance in Europe.[3] In its General Policy Recommendation No. 15 on Combating Hate Speech[4], ECRI in substance delivers a synthesis of existing international standards in relation to hate speech established by the UN, Council of Europe, European Union and other international organisations.

ECRI General Policy Recommendation No.15 on Combating Hate Speech defines the hate speech as:

> *Hate speech is the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex,*

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1 Likums "Par Konvenciju par kibernoziegumiem un Konvencijas par kibernoziegumiem Papildu protokolu par rasisma un ksenofobijas noziedzigajiem nodarijumiem, kas tiek izdariti datorsistemas" [Law "On the Convention on Cybercrimes and the Additional Protocol to the Convention on Cybercrimes on the Offenses of Racism and Xenophobia Committed on Computer Systems"]. Official Gazette No. 171, 26 October 2006.

2 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Official Journal L 328/55, 6 December 2008.

3 ECRI European Commission against Racism and Intolerance. European Council, 2019. Available in English: https://rm.coe.int/leaflet-ecri-2019/168094b101 [viewed 16.04.2024.].

4 General Policy Recommendation No. 15 of the European Commission against Racism and Intolerance, 21 March 2016. Available: https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01 [viewed 16.04.2024.].

gender, gender identity, sexual orientation and other personal characteristics or status.[5]

European Commission against Racism and Intolerance also recognises that hate speech may take the form of public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and the glorification of persons convicted for having committed such crimes.[6]

As it follows from the definition, 'hate speech', firstly, requires an action, for example, advocacy, promotion of ideas, spreading of hatred, harassment, and, secondly, such actions must be based on a bias against a particular (vulnerable) group, or individuals belonging to the particular group (for example, Roma nationals, homosexuals, persons with disabilities).

2. The criteria for distinction between freedom of expression and hate speech

In the context of hate speech, the most complicated issue has always been distinguishing between freedom of expression as one of the basic freedoms in any democratic society, and hate speech. None of international agreements provide an answer to this question. However, there are other relevant legal sources, such as documents adopted by the international bodies in charge of interpretation of international agreements. The most well-known documents establishing criteria for distinction between freedom of expression and hate speech is Rabat Plan of Action[7] adopted by UN Human Rights Committee on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This document sets down the guidelines on how to strike a balance between Article 19 of the Covenant, which provides for freedom of expression, and Article 20, which prohibits incitement of discrimination, hostility or violence. The Rabat Plan of Action, among other things, lists the criteria for identification of hate speech.

It lists the following criteria to be assessed in order to establish, whether an expression could be considered as hate speech: context, speaker, intent, content and form, extent of the speech act and likelihood, including imminence, of the consequences.

[5] General Policy Recommendation No. 15 of the European Commission against Racism and Intolerance, 21 March 2016. Available: https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01 [viewed 16.04.2024.].

[6] Ibid.

[7] Rabat Action Plan, 22nd Session of the UN Human Right Committee, 11 January 2013. Available: https://digitallibrary.un.org/record/746343/files/A_HRC_22_17_Add.4-EN.pdf. [viewed 16.04.2024.].

The criteria have been further developed by other human rights bodies, notably, European Court of Human Rights[8] and ECRI.[9]

Consequently, the following aspects must be assessed:

- The content and form of speech: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered;
- The extent of the speech act: the extent includes such elements as the reach of the speech act, its public nature, its magnitude, and size of its audience;
- The means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular, when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups;
- The speaker's position or status in the society, and the audience to which the speech is directed;
- The objectives of the speech and/or intent: whether the speech was intended to offend vulnerable groups or disseminate bias concerning them;
- Likelihood, including imminence, of consequences.

3. The context of the speech as a central element

The ECtHR has stated that the content of the expressions is not the sole important aspect, "but also the context in which they were made".[10] Once again, this emphasises that the key criteria in establishing a distinction between the freedom of expression and hate speech are economic, social and political climate at the time of the speech, as well as historical and geographical context. The local situation is of an utmost importance. A good example of historical context relates to denial or trivialisation of Nazi crimes during World War II. The respective expressions are recognised as hate speech by numerous international organisations and tribunals including ECtHR, thus setting also geographical context, namely, the common understanding of such expressions as hate speech in the territory of Europe.[11]

As pointed out by the European Court of Human Rights, when it comes to whether or not statements are to be regarded as hate speech, it is essential to analyse the statements in their entirety, not abstractedly, because, even if

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8 See, for example, decision of the European Court of Human Rights (15 October 2015) in Case Perincek v. Switzerland, application No. 27510/08.

9 General Policy Recommendation No. 15 of EC.

10 See, for example, decision of the European Court of Human Rights, 5 December 2019 in Case Tagiyev and Huseynov v. Azerbaijan, application No. 13274/08, para. 41.

11 See, for example, Van Dijk P., Van Hoof F., Van Rijn A., Zwaak L. (eds). Theory and Practice of the European Convention on Human Rights. Intersentia, 2018, p. 1090.

a statement may appear amusing in one context, it may be regarded as hate speech in another.[12]

Likewise, the European Commission against Racism and Intolerance in its Recommendation No. 15 stresses – when assessing the context in which the respective hate speech is being used, it is crucial to establish, whether or not there are pre-existing serious tensions within the society to which this hate speech is linked. [13]

An important element in the identification of the hate speech is the fact that the expression is directed against vulnerable groups, thus, in establishing the context of the expression, it is crucial to acknowledge, which groups of society are in particularly vulnerable situation in the given socio-cultural context.[14] The internationally recognized characteristics of vulnerable groups include race, colour, language, religion, citizenship (nationality), and ethnic origin, religious or other beliefs, age, disability, gender, gender identity and sexual orientation. It is important to note that this list is not exhaustive, because the situation in the society is constantly changing.[15] Furthermore, according to the ECtHR, in addition to a particular characteristic of a persons or group, the status can also constitute the grounds for discrimination.[16]

In the times of complicated social and political situation, the criterion 'context' becomes more 'intense' and 'sensitive', thereby adding to the list topics which might lead to hate speech and likewise, augmenting the list the groups which might be subject to attack by hate speech.

4. National context and legal regulation

As pointed out previously, in assessing the expression and identifying the presence of hate speech, the context is the central and leading element. Thus, acknowledgment of the local social, economic, political, historical and geographical situation is of an utmost importance.

The economic, social and political situation is constantly changing. As regards the recent years in Latvia, the society has faced COVID-19 crisis and the war in

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[12] Benedek W., Kettermann M. C. Freedom of expression and the Internet. Council of Europe, 2nd edition, 2020, p. 100.

[13] General Policy Recommendation No. 15 of EC.

[14] OECD. A Practical Guide on Hate Crime Laws. 2009, pp. 38–39. Available: https://www.osce.org/files/f/documents/3/e/36426.pdf [viewed 16.04.2024.].

[15] Recommendation (20 May 2022) CM/Rec (2022) 16 of the Committee of Ministers to Member States on combating hate speech. Available: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a67955 [viewed 16.04.2024.]; also ECtHR has stressed that list of non-discrimination traits is not exhaustive, see, for example, decision of the European Court of Human Rights, 28 November 1984 in Case Rasmussen v. Denmark, application No. 9118/80, para. 34.

[16] Decision of European Court of Human Rights, 25 July 2017, in Case Carvalho Pinto de Sousa Morais v. Portugal, application No. 17484/15, para. 46.

Ukraine, each of these factors contributing to economic hardship. Notably, in each country the historical and geographical context is different, and that may accumulate and become more sensitive in certain circumstances. For example, the war in Ukraine is of a specific importance in Latvia, taking into account the country's historical background, i.e., Soviet occupation and its geographical location next to the conflict zone. Such aspects increase the tension between and towards specific groups of society, in Latvian context, based on ethnic and national origin. For example, there is an increased tension between such ethnic groups as Latvians and Russian-speaking population[17], as well as between Ukrainian civilians of the latter group residing in Latvia. On the other hand, the hybrid war operations organised by Belarus on Latvian border by inducing illegal immigration attempts has increased a xenophobic response of Latvian society in general. Furthermore, the social context is heated up by debates on legal recognition of partnership and ratification of Istanbul convention, spreading bias on account of gender and against homosexuals and transpersons, in the context where the bias against persons belonging to this group is already high.[18]

Taking into account this, the question is, how do Latvian legislator and legal regulation respond to it?

The basic legal regulation combating hate speech has been adopted already before the crises described above. In particular, Article 78 of the Criminal Law protects against hate speech based on nationality and race since 1998[19], on ethnic origin – since 2007[20], and religion – since 2014.[21] The Criminal Law was further amended in 2014 by Article 150 prohibiting hate speech on the basis of sex, age, disability, or any other trait.[22]

However, such legal regulation, according to the legislator's opinion, was insufficient taking into account a specifically historical context, thus, the Law on Administrative Penalties for Offences in the Field of Administration, Public

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[17] Ambrasa I. Petijums par naida runas un naida noziegumu atpazisanas un izmeklesanas prakses problemaspektiem Latvijas Republika [A study on problematic issues related to identification and investigation of the hate speech]. Ombuds Office of Latvia, 2016. Available in Latvian: https://www.tiesibsargs.lv/wp-content/uploads/2022/07/naida_noziegumu_un_naida_runas_izmeklesana_lv_2016_1496214733.pdf [viewed 16.04.2024.]; see also Dupate K. (ed.). Naida noziegumi un naida runa. Starptautiskie standarti un Latvijas tiesiskais regulejums un prakse [Hate Crimes and Hate Speech. International Standards and Latvian Legal Regulation and Its Application in Practice]. University of Latvia, 2022. Available in Latvian: https://www.jf.lu.lv/fileadmin/user_upload/lu_portal/fakultates/jf/Petijums_Naida_noziegumi_F.pdf [viewed 16.04.2024.].

[18] SKDS. Petijums par attieksmi pret LGBTQ+ personam Latvija [Research on attitude towards LGBTQ+ persons in Latvia]. 2020, Mozaika. Available in Latvian: https://www.dropbox.com/s/9vh64s1hnzcp9dl/2020.07.atskaiteSKDS.publ.pdf?dl=0 [viewed 16.04.2024.].

[19] Latvijas Republikas Kriminallikums [Republic of Latvia Criminal Law], Official Gazette No. 199/200, 8 July 1998.

[20] Grozijumi Kriminallikuma [Amendments to the Criminal Law]. Official Gazette No. 107, 5 July 2007.

[21] Grozijumi Kriminallikuma [Amendments to the Criminal Law]. Official Gazette No. 204, 15 October 2014.

[22] Ibid.

Order, and Use of the Official Language[23] was adopted on 2020, prohibiting the use and displaying of symbols of U.S.S.R. and fascist Germany (Article 13). As a consequence of the war in Ukraine, the legislator adopted amendments prohibiting the use of symbols glorifying military aggression and war crimes in a public place (Article 13[1]).

It follows that Latvian legislator in combatting hate speech responds to the changing social and political context by recognising particular expressions as illegal.

Meanwhile, the central question of this article is whether, in the times of crisis, the freedom of expression becomes more restricted?

Considering Latvian legal regulation, it could be argued in affirmative – the freedom of expression becomes more restricted, because several new expressions (expressions on particular topics) are made illegal. At the same time, an answer in negative applies likewise – because the criteria of distinction between the freedom of expression and hate speech remain unchanged. However, it must be admitted that in tense social, economic and political context the substance of the most prominent criterion for identification of hate speech, namely – 'context' becomes more 'intense' or 'sensitive'. It could be also argued that 'intensity' and 'sensitivity' of the social, economic and political context may be reflected in national legal regulation by recognising additional situations to the already defined ones as a hate speech.

Conclusions

1. According to international law, the distinction between the freedom of expression and hate speech must be drawn on the basis of such criteria as context, speaker, intent, content and form, extent of the speech act and likelihood, including imminence, of the consequences.
2. The central and main criterion, however, is the context in which an expression has been made. The social, economic and political context is of a particular importance, because, as emphasised by the European Court of Human Rights, a statement may appear amusing in one context, whereas it may be regarded as hate speech in another.
3. The recent crisis that unfolded in Latvia, especially the war in Ukraine, is considered particularly 'sensitive', taking into account not only the social and political context, but primarily – the historical and geographical context. The history of USSR occupation and proximity of war zone exacerbated the tensions amongst different ethnic and social groups in Latvia, bringing them to the surface.

[23] Administrativo sodu likums par parkapumiem parvaldes, sabiedriskas kartibas un valsts valodas lietosanas joma [Law on Administrative Penalties for Offences in the Field of Administration, Public Order, and Use of the Official Language], Official Gazette No. 96, 20 May 2020.

4. The changing political and social context led to the recognition of certain forms of expression as illegal under Latvian law.
5. At the same time, the criteria for distinction between the freedom of expression and hate speech has remained the same, hence, from this perspective, it might be argued that in the time of crisis the freedom of expression does not become more restricted. However, it must be admitted that the main criterion for distinction between the freedom of expression and hate speech – the 'context' in the times of political and social tension becomes more 'intense' and 'sensitive'. Therefore, it may be argued that the permissible borders of expression become narrower. The latter stance may also be substantiated by the fact that more 'intense' and 'sensitive' context may lead to prohibition of certain forms (topics) of expression as illegal.
6. Meanwhile, the context is perpetually changing, and consequently the border between the freedom of expression and hate speech is equally changeable.

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FREEDOM OF EXPRESSION IN TIME OF WAR: EXPANDED, RESTRICTED, MODIFIED?

Key words: freedom of expression, hate crime, war propaganda, derogation clause, European Convention on Human Rights, European Court of Human Rights.

Summary

The current article offers the analysis of the permitted extent of the freedom of expression in time of war and concerning war-related issues. The research addresses the freedom of expression in the framework of the derogation clause and jurisdiction under the European Convention on Human Rights, reveals the assessment of public comments on military operations, international crimes, terrorism and other forms of violence, as well as hate speech by the European Court of Human Rights, and emphasizes a crucial role of the mass media in times of conflict. The author concludes that the freedom of expression should be neither a weapon, nor a casualty of war and, in certain sense, it could become both, – expanded and restricted in time of war, however, hardly modified, as the task remains the same: balancing freedom and order.

Introduction

Despite the international community's efforts to ensure international peace and security entrusted mainly to the United Nations, the end of 2023 witnesses already two deadly international armed conflicts in Europe: Russia's aggression in Ukraine started on 24 February 2022 and Israeli's attacks on the Gaza Strip, respondingng to Hamas terrorist attacks on Israel on 7 October[1]. The last few years have not only caused immense casualties and demanded huge human losses, but have also placed the foundations of the world order at stake and threatened every percept of humanity. Nations, people and a human as an individual play a crucial role in war: in terms of resistance or surrender, resilience or adaptation, following war propaganda or fighting for truth.

[1] The latter may be prone to a wider academic discussion as regards the reference to an "international armed conflict", however, irrelevant for and thus not elaborated on in this article.

As noticed by researchers decades ago, including T. I. Emerson, "war and preparation for war create serious strains on a system of freedom of expression. Emotions run high lowering the degree of rationality which is required to make such a system viable".[2] Z. Chafee cited a familiar remark of E. Ludendorff: "wars are no longer won by armies in the field, but by the morale of the whole people".[3]

The freedom of expression is a complex and unique phenomenon as it deals with an interplay of human feelings and emotions which, affected by many circumstances, result in various forms and, once publicly expressed, may face a legitimate need of a state to limit this human right once it oversteps a red line of, for example, public incitement to hostility or hatred. Moreover, the analysis of the required balance is even more complicated in a wider scope, including the situation of a war and the jurisdiction of a state, to which people are subject.

This research aims at the analysis of the allowed extent of the freedom of expression in time of war (and other emergencies) and on war related issues. It addresses the following main aspects: general insights on the freedom of expression and war; restrictions under Article 10 of the European Convention on Human Rights (ECHR) and derogation clause under Article 15, including the issue of jurisdiction under Article 1; standards set by the European Court of Human Rights (the ECtHR or Court) on the allowed extent of the freedom of expression on war, international crimes, terrorism and related forms of violence and hate crime; as well as the right to receive and impart information as an integral part of this freedom and a crucial role of mass media in times of conflict.

1. General insights on the freedom of expression on and during war

The freedom of expression and war encompass different aspects, context and actors (individual, societies, states, mass media).

The freedom of expression is a fundamental human right, a condition for development of every man, an essential instrument for a democratic society, moreover, playing a crucial role in time of war, when even a human safety much depends on an impartial, correct and timely information on an ongoing military conflict. Naturally negative attitude towards the aggressor state usually tends to grow, turning into hatred, at times possibly expanding onward to the aggressor's nation (in separate cases it could even evolve encompassing the rejection of its language and culture); a state involved in the international military conflict may attempt to limit calls for criticism of its policy and there are many more scenarios.

A doctrinal insight that hate crime rate is affected by certain crises has recently been confirmed by the public reactions to the war in Ukraine and the situation in

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2 Emerson T. I. Freedom of Expression in Wartime. University of Pennsylvania Law Review, 1968, Vol. 116, No. 6, p. 975.

3 Chafee Z. Freedom of Speech in War Time. Harvard Law Review, 1919, Vol. 8, No. 32, p. 937.

the Gaza Strip. Israeli attacks on the Gaza Strip has given a rise to anti-Muslim and anti-Jewish hate reflected in demonstrations, Internet comments, slogans and public insults worldwide[4], cases of anti-Palestinian sentiments have also been announced. Even more forms of expression of feelings and emotions have been stipulated by Russia's full-scale aggression against Ukraine, which is already in the second year. The exercise of freedom is completely different in Russia (also Belarus), and Ukraine, as well as well as the states which support it. In Russia, for example, even children's 's drawings depicting war victims or calling for peace were subject to restrictions, separate silent voices against aggression were immediately suppressed by a governmental propaganda machine, mass media were ordered to call the aggression a special operation and each attempt to say the truth publicly has been immediately prevented[5], while in Ukraine and its supporting states different cases reflecting the growing anti-Russian hatred have been reported[6]. In response to Russia's campaign of disinformation and information manipulation, the European Union suspended the broadcasting activities of certain channels (Sputnik and RT/Russia Today)[7]. There were also the states staying in between: abstaining or undetermined. But above all, there have been fighters for truth – journalists, nongovernmental organisations, public figures and famous people, academics, lawyers, human rights activists speaking for truth to be heard worldwide and to be globally supported.

Even if the freedom of expression allows an option not to express any opinion, being undecided concerning an issue, or ignorant regarding an issue of public concern, especially implying only one clear answer, may beunpopular. For example, in Lithuania, the question about the attribution of Crimea became a test for public figures in public electoral debates, position on the war in Ukraine has been listed in the questionnaires for applicants by migration authorities, well-known actors, sportsmen and other public figures were urged to publicly announce their position on war; moreover, much debate was inspired after in some cases certain rights and benefits such as citizenship granted by way of exception were made subject to

[4] Mass media has been reporting remarkably increased number of cases, e.g. Antisemitic hate crimes in London up 1.350%, Met police say. Available: https://www.theguardian.com/news/2023/oct/20/antisemitic-hate-crimes-in-london-rise-1350-since-israel-hamas-war-met-says [viewed 22.11.2023.].

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the public declaration of one's position on war[8]. The state suspended transmission of a few Russian TV/Radio channels and Internet platforms owned, controlled, financed by Russia (or Belarus)[9].

The above are merely a few cases, – there are examples reflecting many other complex situations which encompass different circumstances; however, the freedom of expression shall be subject to the international (European) standards analysed below.

2. Freedom of expression and war: The ECtHR jurisprudence

The ECtHR jurisprudence encompasses the following main aspects of interplay between the freedom of expression and war: establishing jurisdiction, derogations, restrictions and context. The right is subject to restrictions established in Article 10 of the ECHR[10] and a standard "three-stage" test applied by the ECtHR in each case: whether the restrictions are prescribed by law, necessary in a democratic society for a legitimate aim and proportional. Moreover, the freedom may be derogated from at time of war under Article 15 of the ECHR. The applicant cannot benefit from the protection of the freedom of expression on the basis of Article 17 (prohibition of abuse of rights).

2.1. Jurisdiction and derogation clause

A war itself dodoes not provide valid grounds for limiting the freedom of expression excessively, however, the change of a state exercising authority and control over the territory and its people may at times affect the right even substantially. If a state attacks the territorial and political integrity of another state, the complaints

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[8] For example, in September 2023 the President of Lithuania signed a decree on withdrawing Lithuanian citizenship from a famous world and European figure skater Russian-born M. Drobiazko, – the citizenship was granted by way of exception as she maintained close professional and personal ties with the wife of the press secretary of Russian President and with her husband P. Vanagas participated in shows organised in Sochi after Russia's full-scale invasion of Ukraine, although the figure skater in a public letter claimed being uninvolved in Russian propaganda. President strips Russian ice dancer Drobiazko of Lithuanian citizenship. Available: https://www.lrt.lt/en/news-in-english/19/2078254/president-strips-russian-ice-dancer-drobiazko-of-lithuanian-citizenship [viewed 22.11.2023.].

[9] Lithuania blocks online access of sanctioned Russian media. Available: https://www.lrt.lt/en/news-in-english/19/1939384/lithuania-blocks-online-access-of-sanctioned-russian-media [viewed 22.11.2023.].

[10] Article 10 establishes the right to freedom of expression (Paragraph 1) and lists grounds for possible restriction on the exercise of this freedom: interests of national security, territorial integrity or public safety, prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary (Paragraph 2).

may be directed against such "active" state, however, where a state is unable to exercise its authority in a part of its territory, that presumption may be limited[11].

In the ECtHR judgment of 10 May 2001 in Case Cyprus v. Turkey (application No. 25781/94) the Court established Turkey's jurisdiction, as well as violation of Article 10 among others. Living conditions of Greek Cypriots in Karpas region of northern Cyprus (following the military operations conducted by Turkey, the Turkish Republic of Northern Cyprus was proclaimed unlawfully) amounted to the violation of the freedom of expression, insofar as the textbooks intended for use in the primary school (history, geography, etc.) were subject to excessive measures of censorship (vetting procedure in the context of confidence-building measures).

Freedom of expression is also among the claims of Ukraine and individuals in cases pending before the ECtHR against Russia mostly concerning the events in the Eastern Ukraine and Crimea. In the decision of 16 December 2020 in Case Ukraine v. Russia (re Crimea) (No. 20958/14 and 38334/18), the Court declared Ukraine's claims on the alleged existence of an administrative practice of suppression of non-Russian media beginning in February 2014 on the basis of the effective control that it exercised partly admissible: there was sufficient *prima facie* evidence regarding the practice of suppressing non-Russian media under Article 10 of the ECHR (including the closure of Ukrainian and Tatar television stations and the apprehension, intimidation and seizure of material from international journalists). Ukraine's allegations concerning Russia's attacks on journalists and the blocking of Ukrainian broadcasters, as well as a prohibition on teaching in the Ukrainian language is among the claims declared partly admissible in Case Ukraine v. Russia (re Eastern Ukraine) (application No. 8019/16)[12]. Similar discriminatory practice against Crimean Tatar and ethnic Ukrainians is confirmed by other international courts: International Court of Justice (ICJ) adopted provisional measures ordering Russia to refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis, and ensure the availability of education in the Ukrainian language[13].

A war situation is a clear ground for a derogation clause under Article 15 of the ECHR, which can also be invoked in other public emergencies, if threatening the life of the nation and only to the extent strictly required by the exigencies of the situation. For example, in the judgment of 21 September 2021 in Case Dareskizb Ltd v. Armenia (application No. 61737/08), Armenia failed to justify the need of

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[11] Guide on Article 1 of the ECHR: Obligation to respect human rights – Concepts of "jurisdiction" and imputability. Available: https://www.echr.coe.int/documents/d/echr/guide_art_1_eng [viewed 20.11.2023.].

[12] On 27 November 2020 joined the Case Ukraine and the Netherlands v. Russia (applications No. 8019/16, 43800/14 and 28525/20).

[13] ICJ Order of 19 April 2017 in Case Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation).

derogation from the freedom of expression, constituted by banning a publication in a newspaper in context of the opposition protests after the Presidential election, as they did not reach the required threshold, however, security situation (terrorism) in Northern Ireland met it in a number of cases, including the decision of 10 July 2001 in Case of G. Marshall v. United Kingdom (application No. 41571/98).

2.2. Assessment of restrictions in different contexts

The freedom of expression and war is often analysed focusing on a war propaganda, which generally means "a form of incitement to violence based on advocacy of national, racial or religious hatred"[14] (e.g. active call for hostility, support for aggression, etc.). The context is rather broad and it is further analysed in the ECtHR jurisprudence, assessing the allowed extent of the freedom of expression and its limitations in cases of commenting military operations, war, terrorism, international crimes, groups targeted by hatred, and related forms of incitement to hostility and public violence.

The ECtHR repeatedly confirms that under Paragraph 2 of Article 10 there is a little scope for restrictions of debate on questions of a public interest; however, all circumstances are to be taken into account in each case: content, form, tone, words, context, addressee, etc. Public assessment of military action was considered in the ECtHR judgment of 8 July 1999 in Case Surek and Ozdemir v. Turkey (applications No. 23927/94 and 24277/94). Weekly review published an interview with a leader of the Kurdistan Workers' Party (recognised as illegal organisation) and a declaration made by four socialist organisations, whereby the state's policies and military actions were condemned as being directed at driving the Kurds out of their territory, breaking their resistance and struggle for independence. The conviction for disseminating propaganda against the indivisibility of the state and provoking enmity and hatred among the people, taking into account a sensitive situation in south-east Turkey and a possible need to protect national security and territorial integrity, as well as the prevention of disorder in such time, was not upheld by the ECtHR. It stated that "domestic authorities [...] failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them" and that "the views expressed in the interviews could not be read as an incitement to violence". Article 10 had been breached, as sentencing was disproportionate and was not necessary in a democratic society. In another judgment of 16 March 2000 in Case Ozgur Gundem v. Turkey (application No. 23144/93), the Court agreed that articles containing passages which advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood, in the context of the conflict, could

[14] Propaganda and Freedom of the Media. Non-paper of the OSCE Office of the Representative on Freedom of the Media. Vienna, 2015. Available: https://www.osce.org/files/f/documents/b/3/203926.pdf [viewed 23.11.2023.], p. 14.

reasonably be regarded as encouraging the use of violence and thus the measures disputed in the complaint were proportionate to the legitimate aims of preventing crime and disorder, and could be justified as necessary in a democratic society (although excessive measures have been applied on the newspaper).

In other cases, the ECtHR assessed support for terrorism which is among the threats to international peace and security. For example, in the decision of 17 April 2018 in Case Roj TV A/S v. Denmark (application No. 24683/14), incitement to violence and support for terrorist activity were recognized as the abuse of rights (Article 17 of the ECHR), restrictions of the freedom of expression of a Danish company and a TV channel were held to be necessary. The programmes included incitement to violence and support for terrorist activity, the views expressed therein were disseminated to wide audience through television broadcasting and they directly concerned an issue which is paramount in modern European society – the prevention of terrorism and terrorist-related expressions advocating the use of violence for promotion of terror operation (by an organisation listed as terrorist).

Depiction of war and torture shall not necessarily be prohibited in all cases, as the freedom of expression also permits the forms of expression which may shock, disturb or offend. In judgment of 15 January 2009 in Case Orban and Others v. France (application No. 20985/05), where an author of the book, a member of the French armed forces, described the use of torture during the Algerian War, the Court regarded the book as a witness account by a former special services officer who had been directly involved in practices such as torture and summary execution in the course of his military service, and thus contributed to a debate on an issue of a public concern. The ECtHR did not upheld the national courts' remark on the lack of a critical stance with regard to these horrifying practices or the need to express regret. Accordingly, restriction of the publishers' freedom of expression (criticism for not distancing themselves from the general's account) had not been justified.

Applications which are inspired by totalitarian doctrine or express ideas that represent a threat to the democratic order and are liable to lead to the restoration of a totalitarian regime are not in line with the values of the ECHR. As regards search for historical truth, seeking it is an integral part of the freedom of expression. Debate on the causes of acts which might amount to war crimes or crimes against humanity should be able to take place freely as stated in judgment 3 October 2017 in Case Dmitriyevskiy v. Russia (application No. 42168/06). To the contrary, questioning the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but are clearly established, is not a historical research. Disputing the existence of crimes against humanity was one of the most severe forms of racial defamation and incitement to hatred of Jews as stated in the decision of 24 June 2003 in Case Garaudy v. France (application No. 65831/01).

A relevant part of the ECtHR jurisprudence is that on hate speech in context related with war and other situations of conflict. Attacks on ethnic or other

groups is against the values of the ECHR, such as tolerance, social peace and non-discrimination. Therefore, "it may be considered necessary in certain situations to sanction or even prevent forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued"[15].

The judgment of 16 January 2018 in Case Smajic v. Bosnia and Herzegovina (application No. 48657/16) was adopted in a case where the applicant claimed to have expressed his opinion on a matter of public concern, however, was convicted, as the state deemed it necessary, for incitement to national, racial and religious hatred, discord or intolerance following a number of Internet posts describing military action which could be undertaken against certain Serb villages in the event of another war. The Court declared the applicant's complaint under Article 10 inadmissible as manifestly ill-founded, and upheld the need of limiting his freedom of expression: the aim of protecting the reputation and rights of others was legitimate. Even if the statements were of a hypothetical nature, the ECtHR considered them as too sensitive in the context of inter-ethnic relationship of the post-conflict Bosnian society. The examination of the applicant's case by domestic courts was considered as careful, providing sufficient justification for his conviction, namely, his use of highly insulting expressions towards Serbs, and penalties imposed (a suspended sentence and seizing of the computer and laptop) had not been excessive.

3. Right to receive and impart information: The role of mass media

As regards the freedom of expression, mass media plays a special role, which becomes crucial at the time of war: fundamental human needs, including safety and well-being, even public stance concerning particular target groups depend on impartial and accurate information on war and other emergencies provided by mass media and its adherence to professional standards.

> *The independent and impartial media constitutes one of the essential foundations of a democratic society, and thereby can contribute to the protection of civilians and conflict prevention, as well as bring to the attention of the international community the horrors and reality of conflict*[16].

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[15] ECtHR Factsheet Hate Speech. Available: https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng [viewed 27.11.2023.], p. 1.

[16] Council of Europe. Journalism in situations of conflict and aggression. Principles extracted from the relevant Council of Europe and other international standards. Available: https://rm.coe.int/compilation-of-coe-standards-relating-to-journalism-in-situations-of-c/1680a5b775 [viewed 27.11.2023.].

The analysis of the freedom in question in the ECtHR jurisprudence also contains an emphasis on the fundamental role of the press in proper functioning of political democracy and its unique role in times of emergencies: "the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension"[17].

The main principles pertaining to the right to information and mass media have been derived by the Council of Europe from the ECHR, as well as the conventions and declarations of the United Nations. The restrictions of public's access to information are subject to and must not go beyond the limitations allowed by Article 10 of the ECHR; the states should use concrete and clearly defined terms when imposing restrictions on the freedom of expression and information in conflict situations, notably, regarding incitement to violence and public disorder; states should not misuse libel and defamation legislation to limit the freedom of expression and should refrain from intimidating journalists by lawsuits or disproportionate sanctions[18]. In addition, journalists (as civilians) shall be protected by the rules of International Humanitarian Law (shall not be subject to reprisals, etc.).

The effective implementation of the abovementioned principles is at stake in the light of the contemporary conflicts, often of hybrid nature, moreover, in a digital age. I. Khan, the Special Rapporteur on promotion and protection of freedom of opinion and expression, pointed to "the scale, spread and speed of disinformation, propaganda and hate speech, targeting civilians, particularly vulnerable and marginalised groups" as new and deeply worrying aspects in today's conflicts, where people are "being hit with manipulated information, Internet shutdowns or slowdowns, information blackouts and other restrictions on information"[19].

Russia's aggression in Ukraine particularly shows how journalists risk their lives as they report from the conflict zones. Experts appointed by the United Nations cited numerous cases when journalists have been "targeted, tortured, kidnapped, attacked and killed, or refused safe passage from cities and regions under siege"[20]. Human Rights Committee indicated thousands of cases of harassment and persecution of journalists, dozens of murders and attempted murders, abduction and torture, detention of hundreds of Russian journalists for reporting on the war in Ukraine or protests about the war, constituting a violation of the freedom of

[17] ECtHR judgment of 8 July 1999 in Case Surek and Ozdemir v. Turkey. Paragraph 63.

[18] Council of Europe. Journalism in situations of conflict and aggression.

[19] Protect freedom of expression as a vital 'survival right' of civilians in armed conflict: UN expert, 17 October 2022. Available: https://www.ohchr.org/en/press-releases/2022/10/protect-freedom-expression-vital-survival-right-civilians-armed-conflict-un [viewed 27.11.2023.].

[20] Ukraine: Journalists targeted and in danger, warn top rights experts. Available: https://news.un.org/en/story/2022/05/1117462 [viewed 27.11.2023.].

speech[21]. In response to such Russia's monopoly on information, the organisations of journalists and civil society (partner organisations of the Council of Europe's Platform to Promote the Protection of Journalism and Safety of Journalists) condemned the threats to the lives and safety of journalists resulting from Russia's invasion of Ukraine and called for the protection of Ukrainian and international reporters covering the war[22].

Conclusions

1. The freedom of expression should be neither a weapon, nor a casualty of war. In certain sense, it may become both at the time of war, – expanded and restricted. Expanded, as human safety much depends on the true and exhaustive information on war which, in its turn, naturally causes intense human emotions, public expression whereof, even if in a form of anger, hatred and frustration is not necessarily punishable. Restricted, as the state still holds a responsibility to protect its vital interests: the safety of its people, state's sovereignty and security, public order, including the need to prevent hate speech. The right is, however, hardly much modified: challenges posed by digital age and information wars demand new arsenal of instruments to address new types of threats in the ever-changing international landscape, the rationale remains the same although – balancing freedom and order.
2. A (temporal) change of effective jurisdiction arising from cases of violation of other state's territorial integrity may negatively impact the freedom of expression of residents and mass media in the respective territory. International military conflicts usually amount to a required threshold under the derogation clause established in Article 15 of the ECHR; limitations are also possible under Article 10. Many different scenarios of commenting war, international crimes, terrorism and attack on target groups are to be assessed taking into account all circumstances of a particular case, including the form of expression, words, context, addressee, region, etc. Public incitement to hatred and hostility, support for totalitarian regimes, call for terrorism or aggression and similar forms of promoting violence are not in line with the values of the ECHR.
3. The right to receive and impart information is inseparable from effective functioning and professional performance of mass media: accurate, impartial and timely coverage of conflict is essential for human safety and well-being,

[21] Human Rights Committee Considers Report of the Russian Federation in the Absence of a Delegation, Experts Raise Issues on the Persecution of Journalists and the Arrests of Protesters. Available: https://www.ohchr.org/en/news/2022/10/human-rights-committee-considers-report-russian-federation-absence-delegation-experts [viewed 27.11.2023.].

[22] Ukraine: Journalists targeted and in danger, warn top rights experts. Available: https://news.un.org/en/story/2022/05/1117462 [viewed 27.11.2023.].

journalism may also impact social stance and public attitude regarding issues of public concern. The freedom of the media, the same as the freedom of expression, shall not become a vehicle for spreading war propaganda, incitement to violence, hatred or hostility.

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LEGAL ASPECTS OF RESTRICTING ACTIVITIES OF POLITICAL PARTIES

Key words: political parties, Constitution, prohibition of political parties, dissolution of political parties, Constitutional Court, courts

Summary

The authors explore the regulatory framework on the restriction of the activities of political parties in the Republic of Latvia, outlining a comparison with other European countries in this context. The article analytically reflects the progress of the collective submission handed in to the Parliament of the Republic of Latvia (*Saeima*) in 2022, which called for a ban of one particular political party. In conjunction with this, the authors analyse the findings of the European Court of Human Rights on issues related to the prohibition of political parties, seeking a balance between freedom of association as a fundamental right, on the one hand, and the protection of state and public security, as well as democratic values, on the other.

Introduction

In the summer of 2022, shortly before the elections of the Parliament of the Republic of Latvia (hereinafter – *Saeima*), a collective submission signed by more than 10 000 applicants was submitted to *Saeima* in accordance with the procedure provided in the Rules of Order of *Saeima*[1] for banning the political party Latvian Russian Union, i.e., the motion "For a united society without the Latvian Russian

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[1] Rules of Order of *Saeima*. Available: https://likumi.lv/ta/en/en/id/57517-rules-of-order-of-saeima See Section 5.[3] Examination of Collective Submissions [viewed 05.11.2023.].

Union"[2]. After considering the collective submission, the particular political party was not banned, but on 16 June 2022, *Saeima* amended the Law on Political Parties adopted in 2006[3], supplementing Article 7 of this law with the fourth and fifth paragraphs, which stipulate certain prohibitions on the activities and ideology of political parties, i.e. prohibits political parties from acting against independence of Latvia or other democratic states. At the same time, several other norms of the Law on Political Parties were amended, which determine the supervision of the legality of the activities of political parties and regulates prohibition and termination of their activities.

Issues of banning certain political parties also arise from time to time in other countries, e.g. in 2022, 2023 pro-Russian parties were banned in Ukraine[4], Moldova[5]. Previously, this topic was actual in Germany.

In the article, the issue of restricting the activity of political parties due to the limited scope will be considered only from the constitutional law perspective, including the question, whether the state can ban specific political parties.

1. Latvian national framework for restricting and terminating the activities of political parties

Since the amendments of 16 June 2022 in the Law on Political Parties, Article 7(4) provides:

> *In its activities, the party is forbidden to act against the independence and territorial indivisibility of the Republic of Latvia or other democratic countries, to express or distribute proposals for the violent amendment of the Republic of Latvia or other democratic state institutions, to call for disobeying laws if this threatens national security, public safety or order, to preach violence or terrorism, open Nazi, fascism or communist ideology, propagate war, carry out activities aimed at inciting national, ethnic, racial, religious hatred or discord, glorify or encourage the commission of criminal offences.*

The fifth part of the Article provides:

> *In their activities, political parties shall be prohibited from providing support, including information (propaganda), to persons or states that undermine or*

[2] Statement of *Saeima*: On the further progress of the collective petition of 10 168 Latvian citizens "For a united society without the Latvian Russian Union". Available in Latvian: https://likumi.lv/ta/id/334738-par-10-168-latvijas-pilsonu-kolektiva-iesnieguma-par-vienotu-sabiedribu-bez-latvijas-krievu-savienibas-turpmako-virzibu [viewed 05.11.2023.].

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[4] Courts Ban Pro-Russian Parties in Ukraine. Available: https://www.promoteukraine.org/courts-ban-pro-russian-parties-in-ukraine/ [viewed 05.11.2023.].

[5] The pro-Russian party SOR is banned in Moldova. LETA. Available in Latvian: https://www.tvnet.lv/7799162/moldova-aizliegta-prokrieviska-partija-sor [viewed 05.11.2023.].

threaten the territorial integrity, sovereignty and independence of democratic states or the constitutional order.

These amendments were proposed in the context of the war launched by Russia in Ukraine.[6] The annotation of the amendments stated: "although *Saeima* has condemned Russia's aggression in Ukraine, there is still a part of society that supports it. This sentiment has been promoted by Russian propaganda, as well as by representatives of certain political forces who have expressed support of Russia's actions"[7]. Therefore, the legislator considered it important to provide that Latvian political parties are prohibited from publicly praising, denying or justifying genocide, crimes against humanity, crimes against peace, war crimes, as well as supporting actions aimed at undermining the territorial integrity, sovereignty, independence or constitutional order of democratic states.[8] At the same time, these amendments also specified the institutions exercising control over political parties. According to Article 38 – if the prosecutor's office or the state security authority establishes signs of a possible illegal activity of a party which is directed against or may harm the state security, or is otherwise contrary to *Satversme*, or its activities are indicative of violations referred to in the fourth or fifth paragraph of Article 7 of this Law, the prosecutor's office shall warn the party in writing about the inadmissibility of such activities. If a political party, upon receipt of the prosecutor's application, fails to remedy the violation within the prescribed time or commits a violation of which it has been warned in advance, the prosecutor shall bring an action in court for the termination of the party's activities.

According to the Law, the cases concerning the termination of activities of political parties are referred to one particular court of first instance – the Riga City Court (Article 45^3 of the Law). The court examines cases on the termination of a party activity without delay, applying the procedure laid down in the Civil Procedure Law. Although the adversarial principle prevails in civil procedure, in cases concerning the termination of political parties the court is to be more actively involved in the evidentiary aspect, i.e., in order to establish the true facts of the case within the limits of the claim and to achieve a legal and fair hearing, the court, when hearing cases concerning the termination of political parties where the interests of the state or public security are involved, shall clarify the facts of the case, examine the evidence and, if the submitted evidence is

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6 See *Saeima* statement on 22 April 2022 "On aggression and war crimes by the Russian Federation in Ukraine". Available in Latvian: https://likumi.lv/ta/id/331839-par-krievijas-federacijas-agresiju-un-kara-noziegumiem-ukraina; *Saeima* statement on 12 August, 2022 "On Russia's targeted military attacks against Ukrainian civilians and public space". Available in Latvian: https://likumi.lv/ta/id/334736-par-krievijas-merktiecigiem-militariem-uzbrukumiem-ukrainas-civiliedzivotajiem-un-sabiedriskajai-telpai [viewed 06.11.2023.].

7 Annotation to the draft law "Amendment to the Law on Political Parties". Available in Latvian: https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/84c6bd74195503d1c22588290049436a/$FILE/1431.PDF [viewed 06.11.2023.]. See also: Draft Law "Amendment to the Law on Political Parties", the first reading. Available in Latvian: https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/776A86545E6F1E1EC2258868002BDC41?OpenDocument [viewed 10.11.2023.].

8 Ibid.

insufficient, request it on its own initiative.[9] Although at the moment the Latvian court practice has not applied the procedure for termination of political parties' activities provided by the amendments adopted in 2022, this issue may potentially become topical, as in spring 2023 the Prosecutor General's Office issued a warning to the Latvian Russian Union for dissemination of Russian propaganda. If new violations in the activities of this party will be found within a year, the court may decide to terminate the activity of the political party in question.[10]

2. The right to form political parties and to be a member of them as a fundamental right: A comparative perspective

The right to form political parties and to be a member of them is one of the fundamental rights. In Latvia, it can be seen in the context of Article 102 of the Constitution of the Republic of Latvia (hereinafter – *Satversme*), which provides that "Everyone has the right to form and join associations, political parties and other public organisations."[11] This fundamental right – as freedom of association – is one of political rights. According to political science professor Daunis Auers, Latvia is one of those rare countries in Europe and even in the world where too many parties exist, as at the end of 2022, Latvia had 53 political parties, while Estonia had 12, Lithuania – 27, Sweden – 29 and Finland – 24.[12] One of the explanations for this is that in Latvia the foundation of a political party is relatively simple, since it takes only 200 members to found a party, whereas, for comparison, in Lithuania – 2000. At the same time, unlike other European countries, Latvia has a relatively low number of members in political parties – in Europe about 5% of the population is involved in political parties, while in Latvia only 1% of the population is involved in political parties.[13]

By exercising the fundamental rights laid down in Article 102 of *Satversme*, persons acquire the opportunity to participate in democratic processes.[14] As the Constitutional Court has precisely pointed out, political parties exist to carry out political activities. In other words, any political party is a mechanism for

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[9] Article $45^3(4)$.

[10] The Prosecutor General's Office has issued a warning to the Latvian Russian Union. Available in Latvian: https://www.lsm.lv/raksts/zinas/latvija/16.03.2023-generalprokuratura-izteikusi-bridinajumu-latvijas-krievu-savienibai.a501162/ [viewed 05.11.2023.].

[11] The Constitution of the Republic of Latvia. Available: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [viewed 05.11.2023.].

[12] Judgment of the Constitutional Court of the Republic of Latvia of 15 December 2022 in Case No. 2021-36-01, para. 11. Available in Latvian: https://likumi.lv/ta/id/338095-par-politisko-organizaciju-partiju-finansesanas-likuma-7sup1sup-panta-pirmas-dalas-2-punkta-atbilstibu-latvijas-republikas-satversmes-91-panta-pirmajam-teikumam [viewed 05.11.2023.].

[13] Ibid.

[14] Judgment of the Constitutional Court of the Republic of Latvia of 10 May 2013 in Case No. 2012-16-01, para. 17. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2012/07/2012-16-01_Spriedums_ENG.pdf#search= [viewed 05.11.2023.].

the exercise of power.[15] It is this feature that distinguishes political parties from public organizations.[16] In order to enable individuals to exercise this right, Article 102 of *Satversme* imposes an obligation on the state to create a legal framework that ensures the practical expression of the freedom of association, while also ensuring respect for the rights and public interests of third parties. Of course, taking into account the principle of harmonization of human rights, in the context of the activities of political parties, Latvia must also take into account the human rights guarantees deriving from international law, in particular from the European Convention on Human Rights.[17]

The issue of restriction of the activities of political parties is both legally and politically complex.[18] It is a dilemma that every democracy faces because, as the Council of Europe has pointed out, every democracy must strike a reasonable balance, weighing up the possible threats to its democratic system while preserving the right to express different political views. The national legislator is obliged to incorporate such balancing mechanisms into national legislation.[19] The Council of Europe's Venice Commission on Democracy through Law has issued guidelines[20] which set out the criteria for banning parties. According to the opinion of the Venice Commission, the ban of the party can be justified only if the political party condones the use of violence as a means of political struggle and also applies it with the aim of destroying the country's democratic system, which in turn will prevent the relevant country from ensuring compliance with the provisions of the European Convention on Human Rights. In addition, it is necessary for the decision to ban the party to be taken by the country's Constitutional Court or an equivalent court within the framework of a fair process; the situation when such

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15 Ibid., para. 19.See also: Judgment of the Constitutional Court of 18 October 2023 in Case No. 2022-33-01, para. 11. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/08/2022-33-01_Spriedums.pdf#search= [viewed 05.11.2023.].

16 Separate Opinions of Justices Arturs Kucs and Anita Rodina in Constitutional Court Case of the Republic of Latvia No. 2021-36-01, para. 3.2. With reference to: Kules V. T., Vinchorek P. Democracy. 20th century. The end. Riga: Zvaigzne ABC, 1996, p. 82. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/08/2021-36-01_atseviskas-domas_Kucs_Rodina.pdf#search= [viewed 05.11.2023.].

17 See more in: Daly T. G., Jones Ch. B. Parties versus democracy: Addressing today's political party threats to democratic rule. International Journal of Constitutional Law, 2020, Vol. 18, No. 2, pp. 509–538.

18 Mersel Y. The dissolution of political parties: The problem of internal democracy. International Journal Constitutional Law, 2006, Vol. 4, No. 1, pp. 84–113.

19 Council of Europe, Parliamentary Assembly. Resolution 1308 (2002) Restrictions on Political Parties in the Council of Europe Member States. Available: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17063&lang=en [viewed 05.11.2023.].

20 European Commission for Democracy through Law (Venice Commission). Guidelines on prohibition and dissolution of political parties and analogous measures. Adopted by the Venice Commission at its 41st plenary session (Venice, 10–11 December, 1999). CDL-INF (2000) 1. Available: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e [viewed 05.11.2023.].

a decision is taken by an administrative authority is, in the opinion of the Venice Commission, unacceptable.[21]

In many countries, constitutions do not directly define the requirements that political parties must meet, leaving this regulation to the special laws governing the activities of political parties.[22] However, the prohibition of specific party ideologies is *expressis verbis* provided in Article 13 of the 1997 Polish Constitution, which states: "Political parties and other organizations whose programmes are based on totalitarian methods and the ideology of Nazism, fascism and communism, as well as those whose programmes or activities support racial or national hatred, the use of violence to gain power or influence public policy, or provide for secrecy of their structure or affiliation, are prohibited."[23] Similar provisions can be found in the Portuguese Constitution adopted in 1976, Article 46 of which stipulates that organizations which disseminate racist or fascist ideology are not allowed.[24] The Constitutional Court of Portugal examines cases concerning the constitutionality of political parties on application by the public prosecutor.[25]

The question of the unconstitutionality of political parties is also included in the German Basic Law of 1949. Compared to the Polish and Portuguese Constitutions, the Basic Law for the Federal Republic of Germany does not mention specific prohibited ideologies, but Article 21(2) of the Basic Law lays down the principle that "parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional."[26] Namely, the drafters of the Basic Law, taking into account the experience of the Weimar Republic, had come to the concept of self-defending democracy, which must ensure that the enemies of the constitution, invoking the freedoms granted by the constitution, cannot interfere with or destroy the constitutional system or the state.[27] The Federal Constitutional Court of Germany decides on the unconstitutionality of parties and on their exclusion from public funding.[28] So far, two parties have been declared unconstitutional

[21] Pabel K. Parteiverbote auf dem europaischen Prufstand [Party bans under European scrutiny]. Zeitschrift fuer auslandisches offentliches Recht und Volkerrecht, 2003, Heft 4, S. 927–928.

[22] About restrictions of political parties in different EU Member States see: Serma A. Restricting political parties. In: Lawyers of the Ministry of Justice for the Centenary of Latvia. Riga: TNA, 2018, pp. 60–63.

[23] The Constitution of the Republic of Poland. Available: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm [viewed 05.11.2023.].

[24] Constitution of the Portuguese Republic. Available: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf [viewed 05.11.2023.].

[25] Ibid., Article 223.

[26] Grundgesetz fuer die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany]. Available: https://www.gesetze-im-internet.de/gg/ [viewed 05.11.2023.].

[27] Volp D. Parteiverbot und wehrhafte Demokratie [Party ban and defensive democracy]. Does the Parteiverbotsverfahren still have a role to play? Neue Juristische Zeitschrift, 2016, Heft 7, S. 460.

[28] Pabel K. 2003, Heft 4, S. 925.

on the basis of Article 21(2) of the Basic Law: the Socialist Reich Party in 1952 and the German Communist Party in 1956.[29] For example, in the judgment of the Federal Constitutional Court of Germany banning the Communist Party, the party's militantly aggressive attitude towards the existing state system was a prerequisite for the application of the ban. Accordingly, in order to apply the ban, it had to be established that the party intended to disrupt the functioning of the state system and in the further course of the process of dissolving it, the party's political course had to be determined with intent, which was basically aimed at the fight against the free democratic system.[30]

It should be noted that the judgments banning both abovementioned parties were handed down in the 1950s, shortly after the establishment of the German democratic system, which in contemporary Germany raises the question whether a procedure for banning parties would even be permissible in the context of an already established democratic system. In 2003, considering the case of prohibition of the National Democratic Party, the Constitutional Court set stronger criteria for prohibition of parties, and these criteria were further strengthened in the 2017 judgment in the proceedings concerning the National Democratic Party.[31] It is pointed out that the possibility to prohibit a political party does not really correspond to the basic idea of democracy, in which political competition for the favour of the electorate is free and unrestricted by state action.[32] According to Article 21(2) of the Basic Law, an unconstitutional party is characterized by having at least one of two objectives: to influence or eliminate the free democratic order or to threaten the existence of the State. As German doctrine points out, the concept of a free democratic order does not include the entire content of the Constitution, but only the highest fundamental values and principles.[33] The conclusion in German legal doctrine that the unconstitutionality of a political party's aims is not to be assessed formally, but the real aims (even if they are not publicly proclaimed) that are decisive in this respect, including the legal relevance of secret aims, provided that their existence can be proven, is also supportable.[34] Moreover, banning a political party can be a preventive measure which, in certain cases, can be implemented "before it is too late" – in other words, before the actual threat to the values of the state has arisen.[35]

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[29] Weber K. In: Weber K. (Hrsg.). Weber, Rechtsworterbuch [Weber, Legal Dictionary]. 28th edition. Munchen: Verlag C. H. Beck, 2022, Parteien, politische; Rn. 8b.

[30] Coelln C. von. In: Bundesverfassungsgerichtsgesetz. Kommentar. Band 2. 61. Erganzungslieferung [Federal Constitutional Court Act. Comment. Vol. 2, 61. Supplementary delivery]. Munchen: C. H. Beck, 2021, § 46, Rn. 12.

[31] Ibid., Rn. 3.

[32] Volp D. 2016, S. 459–460.

[33] Coelln C. von. 2021, § 46, Rn. 18–19.

[34] Ibid., Rn. 4.

[35] Ibid., Rn. 13–16.

3. European Court of Human Rights case law on the restriction and prohibition of party activities

The European Court of Human Rights (hereinafter – ECHR) has examined cases concerning political parties within the scope of Article 11 of the European Convention of Human Rights (hereinafter – the Convention). Article 11(1) of the Convention provides that everyone has the right to freedom of peaceful assembly and of association, including the right to form and join trade unions for the protection of his interests. Paragraph 2 of the same Article stipulates:

> *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*[36]

As regards the application of Article 11 of the Convention, it should be noted that, according to the established case law of the ECHR, democracy is impossible without pluralism.[37] One of the key features of democracy is the possibility to discuss issues raised by different political opinions, even if they are worrying or disturbing. In other words, freedom of expression is essential to democracy and it is also enshrined in Article 10 of the Convention. The activity of political parties is one of the ways of exercising collective freedom of expression, and political parties therefore can claim the protection of rights arising from Articles 10 and 11 of the Convention.[38]

Taking into account the essential role of political parties in the pluralism of opinion, any measure directed against them affects both freedom of association and also the functioning of democracy in the respective country.[39] Therefore, the exceptions set out in Article 11 of the Convention must be interpreted narrowly. Only convincing and compelling reasons can justify restrictions on freedom of association, including restrictions affecting the activity of political parties.[40]

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[36] European Convention on Human Rights. Signed in Rome on 04.11.1950. [in the wording of 23.10.2023.].

[37] Comp. with Judgment of the Constitutional Court of the Republic of Latvia of 5 February 2015 in Case No. 2014-03-01, para. 20.2. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2014-03-01_Spriedums.pdf#search= [viewed 05.11.12023.].

[38] ECHR judgement of 30 June 2009 in Case Herri Batasuna and Batasuna v. Spain (Application No. 25803/04 and 25817/04), para. 76.

[39] ECHR. Guide on Article 11 of the Convention – Freedom of assembly and association, 2022, p. 32. Available: https://www.echr.coe.int/documents/d/echr/guide_art_11_eng [viewed 23.10.2023.].

[40] ECHR judgement of 30 January 1998 in Case United Communist Party of Turkey and Others v. Turkey (application No 133/1996/752/951), para. 46.

In the jurisprudence of the ECHR, when assessing the state's right to intervene in the activities of political parties, it is determined that the nature and gravity of the intervention is a factor to be taken into account when assessing the proportionality of the intervention. Therefore, drastic measures such as the dissolution of an entire political party, may only be taken in the most serious cases.[41] The designation "most serious cases" for the purposes of the Convention means the cases where the dissolution of a party is based on a "pressing social need". In examining whether the refusal to register a political party or its dissolution is a "pressing social need", the ECHR takes into account the following considerations: (1) whether there was credible evidence that the threat to democracy from the party's potential activities was sufficiently imminent; (2) whether the actions of the party members were attributable to the political party in question; and (3) whether it was clear from those actions that the political party in question intended to operate in a manner that was or would be incompatible with the concept of a "democratic society".[42] The application of these criteria has been the basis of several ECHR judgments and, as the ECHR's case law of recent years shows, the question of restricting and prohibiting the activities of political parties remains a topical issue.

For example, in the case Refah Partisi (Welfare Party) and Others v. Turkey, the Turkish Constitutional Court had ruled that a political party should be dissolved on the grounds that it had become a "centre of illegal activities". In examination of the case, the ECHR found that there had been no violation of Article 11 of the Convention and that the decision to dissolve the party had been proportionate. According to the ECHR, the actions and speeches of Refah's party members and leaders had revealed the party's long-term policy. This policy was aimed at establishing a Sharia-based legal system and the party did not rule out the use of force to implement its policy. Given that these plans were incompatible with the concept of a "democratic society" and that the party had a realistic chance of putting these plans into practice, the ECHR found the decision of the Turkish Constitutional Court to be justified and the restriction imposed to be in accordance with a "pressing social need".[43] In the context of this case, not only the application of the above criteria is relevant, but also the Court's interpretation of the preventive and positive duty of the state to intervene in the activities of a political party. The ECHR stated in this judgment that, firstly, the state must not wait until a political party whose aims are contrary to the democratic order has acquired power and control in the state. When such a threat is identified, the state must already prevent the exercise of political activities that threaten the peace and democratic order of the state.[44] Secondly, the state not only has the right to

[41] ECHR judgement of 30 June 2009 in Case Herri Batasuna and Batasuna v. Spain (application No. 25803/04 and 25817/04), para. 78–79.

[42] ECHR 2022, pp. 32–33.

[43] Ibid., p. 33.

[44] ECHR judgement of 13 February 2003 in Case Refah Partisi (the Welfare Party) and Others v. Turkey (application No. 41340/98, 41342/98, 41343/98 and 41344/98), para. 102.

interfere preventively in the activities of a political party, but it also has a positive obligation under Article 1 of the Convention (which obliges the state to ensure the protection of the Convention rights).[45]

The ECHR reached similar conclusions in the Case Herri Batasuna and Batasuna v. Spain. The ECHR found no violation of the Convention in a decision taken by a Spanish court banning a particular political party. The Spanish court's decision was motivated by the evidence obtained, which clearly showed that the party was determined to achieve its political objectives through terrorism. The ECHR held that the Spanish court's decision was proportionate and lawful in the light of Spain's experience with previous terrorist attacks.[46]

In the Case Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania, the ECHR came to the opposite conclusion – it found that the state had violated Article 11 of the Convention by refusing to register a political party. In the present case, the Romanian authorities based their decision to refuse to register a political party on the argument that they could not allow the formation of a new communist party. In the ECHR's view, such a consideration alone is insufficient to justify a decision refusing to register a political party. Since in the present case there was nothing (including the party's programme) to suggest a call to violence or any other rejection of democratic principles, the activities of the political party would be compatible with a "democratic society".[47] The ECHR reached a similar conclusion in the Case Tsonev v. Bulgaria. In this case, the ECHR did not find any sign that the party, whatever its name (the intended name was the Bulgarian Communist Party), was seeking the domination of one social class over others. Nor was there any evidence that, by choosing to include the word "revolutionary" in the preamble to its statutes, the party had chosen a policy which posed a real threat to the Bulgarian state. Moreover, there was nothing in the party's declarations to suggest that its aims were undemocratic or that violence was intended to achieve them. Significantly, the ECHR further noted that if, however, the party's activities proved to be incompatible with the fundamental principles of a democratic state, the Romanian authorities would have legal mechanisms to suspend the political party.[48]

Finally, in the most recent case – Taganrog LRO and Others v. Russia – the ECHR ruled that a Russian court decision to dissolve a political party was unlawful. The illegality of the decision was mainly manifested in the fact that the Russian court applied the concept of "extremist activities" in an unjustifiably broad manner. In the given situation, it was not clear to the ECHR why this

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[45] ECHR judgement of 13 February 2003 in Case Refah Partisi (the Welfare Party) and Others v. Turkey (application No. 41340/98, 41342/98, 41343/98 and 41344/98), para. 103.

[46] ECHR judgement of 30 June 2009, Herri Batasuna and Batasuna v. Spain (application No. 25803/04 and 25817/04), para. 88–91.

[47] ECHR. Guide on Article 11 of the Convention – Freedom of assembly and association, 2022, p. 33. Available: https://www.echr.coe.int/documents/d/echr/guide_art_11_eng [viewed 21.10.2023.].

[48] ECHR judgement of 13 April 2006 in Case Tsonev v. Bulgaria (application No. 45963/99), para. 58–61.

general clause was being applied to the political party in question. In addition, the ECHR found that the party was not provided with adequate and effective remedies to defend itself against the charges against it. The impermissibly broad definition of "extremist activities", combined with the lack of remedy mechanisms, were sufficient grounds for the ECHR to find a violation of the Convention.[49] On the same grounds – unjustifiably broad interpretation of legal concepts and lack of remedies – the ECHR found the Russian court's decision in the case Ecodefence and Others v. Russia to be incompatible with the Convention.[50]

The ECHR has held that the statutes and programme of a political party are not the only criteria for determining the purpose and intention of a political party. Experience has shown that political parties whose aims have been contrary to the fundamental principles of democracy have not included these aims in their official documents. Thus, in order to dissolve a political party, it is necessary to assess both the programme and the activities of the leaders as a whole.[51]

Conclusions

1. The international situation, including the events in Ukraine, has prompted the Latvian legislator to introduce stricter regulations on the control of political parties and the banning of political parties that threaten state or public security. For this reason, in June 2022, substantial amendments in the Law on Political Parties were adopted, including more elaborated regulation about procedure for termination of the activities of parties that threaten state or public security.
2. The activities of political parties must be considered within the framework of freedom of association. Freedom of association is a fundamental right, which belongs to the group of political human rights. Freedom of association is enshrined in the constitutions of many countries. Article 102 of *Satversme* also defines political parties as one of the manifestations of freedom of association.
3. There are relatively few countries which *expressis verbis* in their constitutions define prohibition of the concrete ideology or unconstitutionality of specific political parties. However, even if such a regulation is not mentioned in the constitution, the state may restrict the activities of political parties, ensuring that such a restriction must be prescribed by law, it has a legitimate aim and it is necessary in a democratic society.
4. Political parties play a significant role in creating pluralism of opinion, hence, restrictions on the activities of political parties should be interpreted

[49] ECHR judgement of 7 July 2022 in Case Taganrog LRO and Others v. Russia (application No. 32401/10 and 19 others), para. 159.

[50] ECHR 2022, pp. 28–29.

[51] ECHR judgement of 13 February 2003 in Case Refah Partisi (the Welfare Party) and Others v. Turkey (application No. 41340/98, 41342/98, 41343/98 and 41344/98), para. 101.

as narrowly as possible when in doubt. ECHR case law on the right of the state to interfere in the activities of political parties has established that the nature and gravity of the interference is a factor to be considered when assessing the proportionality of the interference. Therefore, such a measure as the dissolution of an entire political party can only be taken in the most serious cases.

5. According to the principle of harmonization of human rights, the findings of the ECHR in the context of restricting the activities of political parties are also relevant for Latvia, as well as for other member states of the Convention. States should take into account the following "pressing social need" considerations, as set out in ECHR case law, when their supervisory authorities or national courts have to assess the refusal of registration of political parties or decide on their dissolution: (1) whether there was credible evidence that the threat to democracy from the party's potential activities was sufficiently imminent; (2) whether the actions of the party members were attributable to the political party in question; and (3) whether it was clear from those actions that the intended pattern of activity of the political party in question was or would be incompatible with the concept of a "democratic society".
6. The question of potentially dangerous political parties which threaten the protection of constitutional values (e.g. preach terrorist ideas, are directed against national security, public security and incite hatred) should be addressed already preventively, i.e. by providing in the national legislation the possibility to refuse registration of them. As the ECHR has also recognized, the state cannot wait until a political party whose aims are contrary to the democratic order has gained power and control in the state.

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EMERGENCY SITUATIONS AND CONCEPTIONS OF LAW*

Key words: emergency situations, extraordinary regimes, conceptions, theory, constitution

Summary

Based on the insights of legal theorists, the author of the current article constructs three conceptions of law that influence the consideration of emergency situations. In this sense, realistic, legalistic and mixed conceptions can be distinguished. None of them is satisfactory because they do not include an explanation of some of the existing forms of extraordinary regimes, nor do they consider any specific way of legal reasoning on emergency situations in a specific type of order. The author proposes the elimination of these deficiencies through a clearer classification of emergency regimes and orders. Searching for solutions for the improvement of three conceptions in this way leads to a more comprehensive theory of emergency situations that has advantages over any separate conception. This theory also includes the fourth position for emergency situations characteristic of constitutionalised legal orders.

Introduction

This article considers the theoretical conceptions of law through which emergency situations can be observed. Following the reflections on law by Carl Schmitt, Hans Kelsen and Lon Fuller, three conceptions of law are offered, reflecting on the understanding of emergency situations. The thesis of this article is that all three conceptions have shortcomings which prevent them from serving as an appropriate theoretical framework for practical problems. The theoretical tools employed for examining the thesis are conceptual analysis, ideal types and analysis of legal reasoning. The structure of the research is, as follows. The second section contains the outline of three conceptions of law in relation to emergency

* The author dedicates the current study to the memory of his father.

situations. Subsequently, in the third section, their shortcomings are presented. How these shortcomings can be overcome is then explained in the fourth section, and the advantages of the proposed comprehensive theory are pointed out. In the final, concluding section, the research results are summarised.

1. Three conceptions concerning emergency situations

A famous theoretical debate on emergency situations between Carl Schmitt[1] and Hans Kelsen[2] can be analysed with a focus on opposing opinions concerning the question of who should be the guardian of the constitution during an emergency situation[3], but it can also involve the background positions on law that reflect this disagreement.[4] These two aspects are related, because, if the question about the guardian of the constitution is reformulated to inquire whether decisions during an emergency situation can be evaluated by the adjudication, and if the possibility of subjecting problems to the adjudication is accepted as a necessary element of law, then a discussion can be opened on the question of whether emergency situations can be subjected to law. The Schmitt–Kelsen debate then becomes a debate about different understandings of law reflecting the considerations of emergency situations, which can be summarised, as follows. Schmitt believes that the "genuine political decision" cannot be decomposed into legal norms,[5] and that emergency situations are precisely the place where the political nature of law is demonstrated. Kelsen removes the "genuine political" from legal thinking in such a way that he reduces law to legal norms, and subjects the behaviour in emergency situations to the legal norms that govern them. According to George Schwab's interpretation of the Kelsen-Schmitt debate, Schmitt opposed Kelsen, "who, in endeavouring to construct a legal system that was scientifically airtight, banished the exception."[6]

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1 Schmitt C. The Guardian of the Constitution (Ch. I., 1–3, II.1(a), II.2(d)4, III, III.3). Translation of: Der Huter der Verfassung (1931). In: Vinx L. The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law. Cambridge: Cambridge University Press, 2015, pp. 79–174. Schmitt C. Closing Statement Before the Staatsgerichtshof in Leipzig. Translation of Schlussrede vor dem Staatsgerichtshof in Leipzig (1932). In: Vinx L. 2015, pp. 222–228.

2 Kelsen H. The Nature and Development of Constitutional Adjudication. Translation of: Wesen und Entwicklung der Staatsgerichtsbarkeit (1929). In: Vinx L. 2015, pp. 22–78. Kelsen H. Who Ought to be the Guardian of the Constitution? Translation of: Wer soll der Huter der Verfassung sein? (1931). In: Vinx L. 2015, pp. 174–221. Kelsen H. The Judgment of the Staatsgerichtshof of 25 October 1932. Translation of: Das Urteil des Staatsgerichtshofs vom 25. oktober 1932 (1932). In: Vinx L. 2015, pp. 228–253.

3 See: Gornisiewicz A. Dispute over the Guardian of the Constitution. Hans Kelsen, Carl Schmitt and the Weimar Case. Politeja, Vol. 3, No. 72, 2021, pp. 193–214.

4 An example of analysis of the background settings of the authors can be found at Dyzenhaus D. Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order? Cardozo Law Review, Vol. 27, No. 5, 2006, pp. 2005–2039.

5 Strong T. B. Foreword. In: Schmitt C. Political Theology. Four Chapters on the Concept of Sovereignty. Chicago and London: University of Chicago Press, 2005, p. xiv.

6 Schwab G. Introduction. In: Schmitt C. Political Theology. Four Chapters on the Concept of Sovereignty. Chicago and London: University of Chicago Press, 2005, p. xlii.

The third legal theorist of interest within this article is Lon Fuller. Although his considerations do not directly relate to emergency situations, his reflection on the limits of adjudication is important because, following the assumption made about the relationship between law and adjudication, it is possible to reformulate it as a reflection on the limits of law.

Based on the insights of these three authors, a description of three conceptions of law is proposed, that reflect considerations on emergency situations, which the author names realistic, legalistic and mixed conceptions. They are constructed as ideal types that are useful for understanding different approaches to a particular legal institute.

According to the realistic view, situations can arise when a legal authority has the "right power" to make decisions outside the law. Schmitt believed that the legal norm cannot regulate in extreme cases or in absolute states of exceptional situations.[7] In the context of Schmitt's theory, "a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures".[8] A legal norm that would try to guide crisis management has no legal consequences for those who manage crises.[9] A legal authority in an emergency situation is not limited by norms in achieving its goal because such limitations are not natural. Consequently, even if some legal norms did exist that would set limits on the legal authority, they have no legal effect in an emergency situation. This is why the legal order must be consistent with the nature of things and formulate a norm by which the legal order in an emergency situation is excluded and law itself gives way to politics.

A legalistic view of emergency situations does not recognise the "right power" of legal authorities to act outside the legal order. Everything that legal authorities do, they do through the legal order.[10] In the context of the debate, Schwab found that "Schmitt attempted to challenge those jurists who equated the state with the legal order – who considered the state to be a "system of ascriptions to a last point of ascription and to a last basic norm"." According to Kelsen, the state is identical to the legal order. David Dyzenhaus named this thesis – 'the thesis that the state is totally constituted by law'[11] – the Kelsen's Identity Thesis. Since Kelsen understood that the state is identical to the legal order and that legal order is a set of norms[12], he thus completely dismantled the concept of a sovereign who would decide outside of law in an emergency situation. Since, according to Kelsen,

[7] Schmitt C. Political Theology. Four Chapters on the Concept of Sovereignty. Chicago and London: University of Chicago Press, 2005, pp. 5 and 13.

[8] Schwab's comment in Schmitt C. 2005, p. 5, note 1.

[9] See: Schmitt C. 2005, p. 7.

[10] Schwab G. 2005, p. xli.

[11] Dyzenhaus D. 2006, p. 2010.

[12] Kelsen H. General Theory of State and Law. Cambridge: Harvard University Press, 1949, p. 182.

all situations can be interpreted through law,[13] this means that even exceptional situations can be decided based on posited legal norms.

Kelsen's understanding of the state and law does not mean that legal authorities in some jurisdictions cannot be free to make their decisions as they wish. Consistent application of the starting points of the legalistic view means that the legal order can be organised in such a way that legal authorities are allowed everything that is not prohibited to them. This approach can be called the legalistic approach in a weaker sense. Nevertheless, the legalistic view of modern states incorporates an additional setting by which legal authorities are prohibited from anything that is not expressly permitted to them. Nevertheless, even according to this variant of the legalistic approach in a stronger sense, the legal order can authorise a legal authority to do whatever it deems necessary in an emergency situation without legal restrictions to achieve a goal. It follows that both versions consider that the legal order can regulate everything, including the actions of legal authorities, in emergency situations. If a legal authority can decide without legal restrictions, it is because the legal order gives it the freedom to act in this way: according to the stronger variant of the legalistic order, this freedom must be prescribed, and according to the weaker variant, this freedom exists when no legal limitation of the actions of legal authorities is prescribed.

A mixed view of emergency situations rejects both extremes of previous conceptions: politics above law and law above politics. With the realistic and legalistic conception, it is about understanding the nature of law as a phenomenon. According to the first, law that is understood as a decision or institution cannot limit the political,[14] and according to the second, law that is understood as a set of norms can limit the political. The mixed view is not focused on the nature of law as such but on the nature of situations that determine whether something can be legally addressed. That is, natural boundaries exist between what can and cannot be regulated by law. Lon Fuller argued that adjudication has natural limits, which we can understand as the limits of law. According to him, courts judging in polycentric situations of specific proliferation of interests is not natural.[15] An example of a polycentric situation is when a doctor has to "prescribe a cure for a trouble of the lungs while also considering the heart, the kidneys and the digestion as well as the income and the family conditions of the patient."[16] The proliferation situation cannot be resolved in a way that presents arguments about the violation of an interest in accordance with the set standard. Adjudication is limited to situations for which presenting these arguments about the violation of

[13] Kelsen H. Peace Through Law. New Jersey: The Lawbook Exchange, 2008, p. 27. According to Kelsen, everything is permitted that is not prohibited.

[14] David Dyzenhaus founds that Schmitt's "highly political conception of law" supports the idea that "legitimate will always assert itself over the legal". Dyzenhaus D. Legality and Legitimacy. Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar. Oxford: Oxford University Press, 1997, p. 2.

[15] Fuller L. L. The Forms and Limits of Adjudication. Harvard Law Review, 1978, Vol. 92, No. 2, p. 394.

[16] Polanyi M. The Logic of Liberty, Abingdon: Routledge, 1951, p. 176.

rights and obligations is possible based on some standard.[17] To apply this thinking to emergency situations, it could be said that the law should be limited to relations in which the standards of rights and obligations in these situations can be naturally posited, whereas management decisions that solve the distribution of interests of a polycentric character would remain a matter of political decisions beyond the scope of law.

To sum up, according to the realistic view, emergency situations remain a legally empty space that cannot necessarily be regulated by law and legally supervised. By contrast, the legalistic view indicates that emergency situations can be regulated by law and are always subject to adjudicative supervision in such a way that legal restrictions must be respected, and according to a stronger variant, the freedom of action of legal authorities must be expressly allowed. Conversely, the mixed position suggests that some issues of emergency situations can be regulated and some issues cannot be regulated, and that adjudicative supervision is of limited scope.

2. Theoretical shortcomings of realistic, legalistic and mixed conceptions

Although each of the three above-mentioned conceptions reveals something about emergency situations, none of them is satisfactory because they suffer from theoretical shortcomings. Two shortcomings are to be pointed out here. The first is the inability of at least some of them to explain some examples of extraordinary regimes that exist in modern states. The second is an oversight of the possibility of legal reasoning in constitutionalised legal orders, which can be applied to everything – including emergency situations.

The first drawback stems from the unclear conceptual apparatus used by the conceptions. All three conceptions use the abstract concept of an emergency situation without referring to the legal regimes governing different types of emergency situations. Talking about an emergency situation, it is generally accepted that the respective situation is not the regular state of affairs. Seeing that it is not a regular state of affairs, what makes it exceptional and what are the consequences of this non-regular situation? One abstract explanation is that it is a kind of threat that requires "actions by the state not permissible when normal conditions exist"[18] and that these actions can be seen as some kind of extra-legal type. A paradigmatic example of this type of situation, which is often shared when thinking about emergency situations, is the situation considered by the constitution as a threat to the survival of the state and results in suspension of human rights in a non-defined way, followed by strengthening of executive power. However, this understanding of the emergency situation does not cover all possible cases.

[17] See Fuller's explanation in Fuller L. L. 1978, p. 369.

[18] Greene A. Emergency Powers in a Time of Pandemic. Bristol: Bristol University Press, 2021, p. 30.

Specifically, modern states have already established legislative extraordinary regimes for various situations that do not threaten the survival of the order but that do threaten the regular functioning of the order and certain values that the order protects. The examples are legislative extraordinary regimes for situations of natural disasters, such as floods and fires, for situations of mass influx of people across state borders or for situations that threaten health.[19] These regimes regulate the said emergency situations in such a way that they prescribe the rules for the activation and termination of the legal regime and the rules for the consequences when the regime is activated. Among these consequences are the rights and obligations of persons subjected to these regimes. The fact of legislative regulation of emergency situations does not mean that this process is necessarily valuable.[20] However, this fact should be considered by the conceptions on emergency situations.

Thus, the first shortcoming of all conceptions is that they do not deal with the classification of emergency situations with regard to the existence of legislative emergency regimes. Additionally, the possibility of the existence of such regimes shakes the realistic conception more strongly. The realistic conception does not cover these legislative emergency regimes. According to Schmitt, as interpreted by Tracy B. Strong, "no pre-existing set of rules can be laid down to make explicit whether this situation "is" in actual reality an exception".[21] And in emergency situation, it is not possible to prescribe which measures should be taken. An emergency situation, according to a realistic conception, refers only to the constitutionally prescribed rule of establishing an emergency regime that endangers the state and the rule on the consequences of activating such a regime that enables the suspension of rights and the strengthening of the executive power for effective management.

On the other hand, legalistic and mixed conceptions are confirmed by the examples of legislative emergency situations that manifest the possibility of legally regulating all or at least some aspects of emergency situations. In addition, advocates of mixed conception can argue with concrete examples that some elements of these regimes are still in practice considered political. For example, the rules for activating at least some legal regimes in practice seem to be a matter of political decision. The response of the proponents of the legalistic conception on such issues can be to accept such a limit but at the same time not to give up their fundamental premise that everything can be regulated by law if the legislator so desires. It is the responses of these two conceptions to the *prima facie* "political questions" of legal regimes that point to the second theoretical shortcoming.

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[19] See Christian M. Gunther on regulating COVID-19 crisis through existing legal framework. Gunther C. M. Legal vs Extra-Legal Responses to Public Health Emergencies. European Journal of Health Law, 2022, Vol. 29, p. 142.

[20] See: Fatovic C. Emergencies and the Rule of Law. Oxford Research Encyclopaedias, Politics, 2019.

[21] Strong T. B. 2005, p. xiv.

The second shortcoming stems from the lack of respect for different types of legal reasoning in different legal orders. None of the three conceptions recognises the possibility of the existence of constitutionalised orders. Legal reasoning in this type of order includes the position that constitutional norms can be applicable to any aspect of social life, regardless of the specific statutory content.[22]

The realistic conception again suffers most from establishing the possibility of the existence of constitutionalised legal reasoning. This conception is based on the suspension of the constitution or the limited application of constitutional rules. Conversely, legalistic and mixed conceptions do not have a problem with the application of constitutional norms in emergency situations. However, they are more focused on rules while ignoring or weakening the application of constitutional principles to emergency situations. For example, the decision on the activation or non-activation of the extraordinary regime can be regulated by the rule on the establishment of the regime in such a way as to determine the legal authority empowered to establish such a regime, but without precisely determining the conditions for activation that would allow a regular legal assessment of the justification of activation or omission to activate. The EU, with its Member States, established this type of an activation norm for a temporary protection extraordinary regime.[23] This state of positive law could convince advocates of a legalistic or mixed conception that, in that case, one cannot legally reason about the decision or failure to activate. The former could argue that the law does not regulate this decision in a way that is legally controlled even though it could, while the latter would argue that it should not have been regulated in such a way because it is a political issue. However, in constitutionalised orders, these decisions can be evaluated by legal reasoning on the basis of constitutional principles, such as the principle of the rule of law or the principle of equality, and by applying the doctrine of statutory reasonableness and the doctrine of balancing.[24] Similar to this idea on constitutionalised reasoning,[25] as opposed to purely legalistic reasoning, is the thinking of Dyzenhaus when he claims that Kelsen's identity thesis does not include the concept of a substantive rule of law that contains constitutional principles.[26]

The mixed conception is not interested in the expansion of law into the realm of politics, because it accepts the natural division of political and legal. By contrast, the proponents of a legalistic approach do not oppose this expansion, but they

[22] See: Guastini R. La sintassi del diritto [The Syntax of Law]. Seconda edizione. Torino: Giappichelli, 2014.

[23] See reconstruction of this norm in: Kresic M. A Refugee Crisis at the Doorstep and a Neglected Solution. Three Misconceptions about the Temporary Protection Directive. Croatian Academy of Legal Sciences Yearbook, 2021. Vol. XII, No. 1, pp. 153–157.

[24] Kresic M. 2021, p. 157.

[25] For the structure of attitudes in constitutionalized legal reasoning see: Kresic M. Process, Consequences and Means of (de)constitutionalization: a Reconstruction of Guastini's Concept of Constitutionalization. Diritto & Questioni Pubbliche, 2019, Vol. XIX, No. 2, pp. 107–132.

[26] Dyzenhaus D. 2006, pp. 2010 and 2018.

believe that the relationship between law and politics depends on set legal rules. They can easily accept that due to existing legal texts, constitutional norms and constitutionalising doctrines are not consistently applicable to emergency regimes, especially with regard to the general provisions on constitutional emergency regimes. Following this line of thinking, an interesting point is that Dyzenhaus believes that "Kelsen's legal positivism offered no legal resource which could be used to resist a fascist seizure of power in Germany".[27] The consistent application of legal reasoning in constitutionalised orders does not allow legislation to evade the constitution; therefore, the doctrines necessary for judging decisions always remain available during judicial review. Likewise, the legalistic conception, which is not complemented by views on the constitutionalised order, remains within the framework of thinking about constitutional norms as constitutional limitations and fails to think about these norms as constitutional guidance for the legislator.

3. Theoretical advancements of conceptions and comprehensive theory of emergency situations

The aforementioned dissatisfaction with the existing theoretical framework for the explanation of emergency situations requires a more precise clarification of concepts and an explanation of the influence of the constitutionalised order on emergency situations. The proposal for improving all three conceptions is, as follows: to make a classification of legal regimes and types of orders, and to consider the potential of constitutionalised legal reasoning in emergency situations.

The concept of an emergency situation is not sufficiently clear. To better understand the various normative arrangements, a more convenient approach is to first define extraordinary regimes in contrast to regular regimes and then, among extraordinary regimes, make a distinction between the constitutional institute of a state of emergency and the legislative institutes of emergency situations in a narrow sense.

The concept of legal order should recognise the difference between certain types of order, especially constitutionalised and non-constitutionalised types. Extraordinary regimes in constitutionalised orders are subject to constitutional norms on the fundamental values of the order. Legal reasoning based on these values and specific doctrines on reasonable statutes and balancing should always be used to assess the legality of decision-making during crises caused by emergency situations.

The realistic conception can retain its place in the debate if it is limited to the constitutional institution of the state of emergency in orders that are not constitutionalised. Legalist and mixed conceptions can retain their places in the debate in relation to all kinds of extraordinary regimes in non-constitutionalised orders. All three conceptions should recognise the possibility

[27] Dyzenhaus D. 1997, p. 5.

of a specific influence of law on emergency situations in constitutionalised orders. In this way, the creation of a more comprehensive theory of emergency situations is possible, in which each of the three elaborated approaches has its place, and the fourth one is added.

The first advantage of this comprehensive theory is that it points to the limited place of each of the three conceptions presented in the debate on emergency situations. Another advantage is that the comprehensive theory better reflects the situation in modern states in which legislative emergency regimes already exist and constitutionalising trends mark at least some orders. The third advantage is that this theory indicates the possibility of a fourth approach that is possible in constitutionalised legal orders. The approach of constitutional reasoning enables a *de lege lata* analysis that differs from analyses based on the three presented conceptions. Namely, the realistic conception rejects the influence of law on politics, while the mixed one partially accepts it. The legalistic conception accepts that political questions can be regulated by law. However, without adopting constitutionalising positions, it does not apply constitutional principles and specific doctrines to all extraordinary regimes. It does not do so when formulated legal norms seemingly give priority to politics over law. In contrast to all three conceptions, the approach of constitutional reasoning permeates politics with law and interprets every situation through law. In addition, constitutionalised legal reasoning enables a better *de lege ferenda* analysis, because starting from constitutional values and specific doctrines, it can better point out the possible shortcomings of existing regimes in future emergency situations. The peculiarity of this type of *de lege ferenda* analysis is that constitutionalised legal reasoning looks at constitutional norms not only as limitations but also as guidance for the legislator.

Finally, the fourth advantage of the comprehensive theory is that it indicates how different conceptions of law reflect on the understanding of emergency situations. The existence of this type of connection is true for the debate of legal theorists and it is probably also true for the debates of legal practitioners and citizens, although they might be unaware of this connection. For this reason, awareness of this connection enables a better approach to solving practical problems. It makes our descriptions of reality better. It also focuses legal practitioners and citizens on a search for deeper roots of their prescriptive statements on emergency situations. These statements are conditioned by attitudes towards emergency situations, and these attitudes are conditioned by beliefs we have about emergency situations. These attitudes and beliefs are presented in the political arena as part of commitments to certain values. Part of making "any package of commitments viable is the explanation and justification of each as forming part of a coherent whole".[28] No coherent whole can exist without some conception of law.

[28] Dyzenhaus D. 1997, p. 5.

Conclusions

In the previous sections, the author of the article first demonstrated the possibility of understanding the emergency situation through three conceptions of law, constructed by using some insights from legal theorists. The author then pointed out the shortcomings of these conceptions and suggested how their position in the debate on emergency situations can be improved. Realistic, legalistic and mixed conceptions suffer from the lack of consideration of some already existing emergency regimes and the possibility of the existence of constitutionalised orders. The discussion on emergency situations should start with the classification of emergency regimes and legal orders and should recognise the possibility of constitutionalised legal reasoning. In this way, the creation of a more comprehensive theory of emergency situations is possible in which each of the three elaborated approaches has its place and the fourth one can be added. The comprehensive theory of the emergency situation has many theoretical and practical advantages: it indicates the place of each conception in the consideration of reality, it better corresponds to reality, it introduces a new conception which can be useful for cognition of reality and it brings awareness to the connection between the conception of law and the understanding of specific legal institutes.

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PENAL POPULISM AND (AB)USE OF CRIMINAL LAW[1]

Key words: criminal justice, (over)criminalisation, trust, juveniles, criminal response

Summary

Over the last decades, it has been recognized that criminal law in some jurisdictions is used by governments in response to crises with a view to regain citizens' trust. COVID-19 pandemic required prompt reaction, and many governments resorted to the criminal law to implement restrictive measures, to define new crimes within the legislation in order to combat pandemic, and to endanger the procedural rights of defendants to ensure fast-track procedure. Similarly, the mass shooting in Belgrade primary school in May 2023 triggered discussion on amending criminal legislation to prevent minors from committing similar crimes in the future, but also to provide an immediate response to public request. The discussions included the possibility of lowering the age of criminal responsibility from 14 to 12, restricting civilian gun ownership and introducing stricter sanctions for violation, but also introducing death penalty or more severe penalties for certain crimes.

The subject of this paper is the effectiveness analysis of the overcriminalisation, especially as the prompt reaction to crises. Discussion will include comparative experience, especially from European countries, such as reaction of Norwegian authorities after the Utoya attack and response to crimes committed by juveniles.

Bearing in mind the aforementioned previous experience, the authors start from the assumption that rapid changes of the criminal law, without proper identification of needs and impact assessment lead to failure of reforms. In order to give recommendations for reducing the risks, the authors analyse the comparative response to crises and the extent of criminal law revision.

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Introduction

Tim Newburn in his book "Criminology" has stated that penal populism is a term that refers to the rise of new crime control policies that emerged in the 1990s. It consists of the increased politicisation of crime control and the increase in efforts by politicians to adapt decision-making in the area of crime suppression to public attitudes. This is a political strategy, whereby politicians advocate for tough-on-crime policies and implement them to gain popularity and public support. This often involves advocating for harsher penalties[2], stricter law enforcement measures, increased incarceration rates, and overcriminalisation.[3] This results in an expansion of criminal law in size and scope.[4]

Penal populism tends to prioritise punitive measures over more nuanced and evidence-based approaches to criminal justice. According to the authors, the development of criminal populism is influenced by numerous factors, such as socio-economic changes, the media, the public attitude towards crime, which is formed mostly on the basis of media reports, as well as the politicization of criminal law. Socio-economic changes and the transition to a market economy contributed to social insecurity, while new technologies exacerbated physical insecurity in various social areas.[5] It seems that the focus has shifted from determining the risk of criminal behaviour and taking preventive measures towards controlling crime through application of retributive measures.

As stated by Ignjatovic, penal populism usually begins with panic legislation, increasing the severity of the respective sanctions, imposing restrictions on the freedom of courts in sentencing, introduction of a ban concerning mitigation of sentences for some criminal acts, as well as a ban on granting conditional release to the perpetrators of certain crimes. This usually results in the public calling out of the courts for decisions that are not in accordance with the perception of crime presented in the media. This approach can lead to the implementation of policies that may be popular in the short term, while not necessarily being effective or just in addressing the complexities of crime at its causes. Furthermore, this has a negative impact on the increase in the prison population, thereby exceeding the capacity of penal institutions, although according to research results, it can be observed that there has not been a large increase in crime, which would justify penal expansionism.[6]

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[2] Ignjatovic D. Kazneni populizam [Criminal populism]. In: Kaznena reakcija u Srbiji [Punitive reaction in Serbia], Ignjatovic D. (ed.), Belgrade: University of Belgrade, Faculty of Law, 2017, p. 12.

[3] Husak D. Overcriminalization: The Limits of the Criminal Law. Oxford: Oxford University Press, 2008, p. 3.

[4] Matic Boskovic M., Nenadic S. Impact of COVID-19 Pandemic on Criminal Justice Systems Across Europe. EU and Comparative Law Issues and Challenges Series (ECLIC), 2021, No. 5, p. 271.

[5] Sokovic S. The Contemporary Penal Populism: The Global Trends and the Local Consequences. In: Law in the process of globalisation. Collection of papers contributed on the occasion of 40th anniversary of the Faculty of Law of the University of Kragujevac, Kragujevac: Faculty of Law of the University of Kragujevac, 2018, p. 158. DOI: 10.46793/LawPG.155S.

[6] Ignjatovic D. 2017, p. 28.

Critics argue that penal populism can contribute to the overuse of imprisonment, disproportionately affect marginalised communities, and undermine efforts to implement more rehabilitative and restorative justice practices. It is important to balance public safety concerns with evidence-based policies that address the root causes of criminal behaviour and promote a fair and just criminal justice system.

1. Criminal law expansionism

Although the concept of restorative justice began to develop since the 1970s through various practical programmes, international documents, campaigns and projects, it seems that it is often neglected in practice. However, it should be remembered that the aforementioned concept represents a constructive response to criminality, whereby the main goal is not to punish the perpetrator and retaliate, but to compensate for damage and repair relationships that have been damaged by the commission of a criminal act. At the centre of the concept of restorative justice is the victim and her/his needs, as well as seeking a way to eliminate harmful consequences by "returning justice to the social community".[7]

Instead of finding the most adequate solution by applying not only retributive measures, but, above all, by employing preventive measures, it seems that modern criminal law is characterized by criminal expansionism, which results in prescribing a large number of new criminal acts and, as the authors state, deviating from some basic principles of criminal law, as well as using criminal law as a *solo ratio,* instead of *ultima ratio*.[8] Criminal law expansionism refers to an approach in which lawmakers, policymakers, or legal system progressively broaden the scope of criminal laws, increasing the range of behaviours that can be classified as criminal offenses. This expansion can occur in terms of the types of conduct considered criminal, the severity of penalties, or the introduction of new criminal offenses.

Several factors may contribute to criminal law expansionism, including changes in societal values, responses to perceived treats, political considerations, and public opinion. Policymakers may enact new laws or amend the existing legislation to address emerging issues, public concerns, or changing social norms. However, the expansion of criminal law can have significant implications for individuals, communities, and the overall criminal justice systems.

Critics argue that criminal law expansionism may lead to overcriminalisation, where individuals can unintentionally and unknowingly violate laws due to their complexity or ambiguity. This trend may also result in disproportionate penalties

[7] Copic S. Restorativna pravda i krivicnopravni sistem: teorija, zakonodavstvo i praksa [Restorative justice and the criminal justice system: Theory, legislation and practice]. Belgrade: Institute of Criminological and Sociological Research, 2015, p. 17.

[8] Grujic V. Z. Life Imprisonment as an answer to Contemporary Security Challenges. The (IN) Adequacy of the Retributive Approach. Teme, 2019, Vol. XLIII, No. 4, p. 1110, DOI: https://doi.org/10.22190/TEME191018066G.

for certain offenses and contribute to the overburdening of the criminal justice system.

Amendments to the Criminal Code of the Republic of Serbia from 2019 introduced the sentence of life imprisonment into the Serbian legislation, and at the same time the sentence of long-term imprisonment of 30–40 years was abolished.[9] The aforementioned changes were preceded by harsher penalties for existing crimes, tightening of requirements for conditional release of convicted persons, but also general expansion of the retributive approach to punishment. Amendments from 2019 within the framework of the general provisions stipulate the prohibition of parole for the crimes of aggravated murder, rape, abuse of a vulnerable person, abuse of a child and abuse of position, and there is also a narrowing of the number of crimes for which it is possible to impose a suspended sentence, as well as prescribing restitution as mandatory under aggravating circumstances.[10] It should be highlighted that abovementioned amendments were introduced on the initiative of a foundation established by the fighter on behalf of a sexually abused and murdered teenager in 2014. The public pressure was high and the requirements for stricter punishment were advocated. As a result, the Criminal Code was amended in 2019, without proper assessment whether stricter sanctions would have a deterrent effect and result in general prevention of this type of crime.

Some of the newly introduced criminal acts reflect the harmonization of criminal legislation with the legal standards of the European Union and relevant conventions of the Council of Europe. However, the change in legislation was not influenced only by international legal acts, but also, as Professor Stojanović states, by some (un)justified reasons and needs at the national level. However, it seems that they even approached the fulfilment of obligations stipulated by international documents without reviewing the criminal-political justification of the new solutions.[11] Therefore, we agree with the opinion of those authors who point out that during every amendment of the criminal legislation, it is necessary to re-examine the border between the excessive spread of incrimination and the need for the state to react in an effective way to new forms of crime.[12]

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9 Grujic V. Z. 2019, p. 1121.

10 Bodrozic P. I. Kontinuirani krivicnopravni intervencionizam na raskrscu politike i prava [Continuous criminal law interventionism at the intersection of politics and law]. Srpska politicka misao [Serbian Political Thought], 2020, Vol. 68, No. 2, p. 389, DOI: https://doi.org/10.22182/spm.6822020.17.

11 Stojanovic Z. Da li je Srbiji potrebna reforma krivicnog zakonodavstva [Does Serbia need criminal legislation reform]? Crimen, 2012, Vol. 4, No. 2, p. 120.

12 Stojanovic Z. & Kolaric D. Savremene tendencije u nauci krivicnog prava i krivicno zakonodavstvo Srbije [Contemporary tendencies in the science of criminal law and the criminal legislation of Serbia]. Srpska politicka misao [Serbian Political Thought], 2015, Vol. 49, No. 3, p. 113, DOI: https://doi.org/10.22182/spm.4932015.

2. The role of the media and criminal law reaction

The relationship between the media and criminal law reactions is complex and multifaced. Media plays a significant role in shaping public perceptions, influencing legal proceedings, and even impacting the development and enforcement of criminal laws. Sensationalised or biased reporting can contribute to the amplification of certain crimes, creating an atmosphere of fear and anxiety.

Sometimes, the choice of news and the way crime is reported serves to divert public attention from real social problems, such as unemployment, poverty, economic crisis or other important topics. The tactic often involves emphasising or sensationalising crime stories to draw attention away from other, potentially more pressing issues. Mainly in this way, certain political elites strive to maintain social peace and realize the interests of those who possess social and political power.[13]

Based on the research of media reports, the authors conclude that the media does not operate in a vacuum. Creation of various information is primarily influenced by many interest groups and lobbying groups, and to the greatest extent – by members of the political elite, to justify their policies and create certain convictions among citizens.[14] Media attention to specific cases can lead to calls for criminal justice reforms, such as changes in sentencing laws, parole policies, or the handling of certain offenses.

Stewart Hall and his colleagues analysed the creation of moral panic from street robberies in Great Britain in the early 1970s. Their conclusion was that it was no coincidence that this panic occurred at a time of severe economic crisis and lack of employment, which contributed to social horrors being taken as a justification for police actions against the unemployed, the young poor and blacks to distract the working class from the common actions. According to the conclusion of Hall and his associates, the moral panic was used by the ruling elite to divert attention from the crisis of British capitalism.[15]

The authors believe that the exaggeration of the crime problem is characteristic of all world media. However, they are only a means to realize different, and most often, political interests that often collect political points by advocating for zero tolerance of crime and propose solutions whose effectiveness and reasoning can be justifiably doubted.[16] The same authors state that one of the common pre-election promises of various political options is the fight against crime. An integral part of

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[13] Ilic A. Mediji i kriminalitet – kriminoloski aspekt [Media and crime – criminological aspect]. Doctoral thesis, Belgrade: University of Belgrade, Faculty of Law, 2017, p. 42. Available: https://nardus.mpn.gov.rs/handle/123456789/9158 [viewed 03.12.2023.].

[14] Philo G. (ed.). Message Received: Glasgow Media Group Research, 1993–1998. New York: Wesley Longman, 1999, cited according to: Suput J. Mediji i kriminalitet [Media and crime]. In: Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja [The State of Crime in Serbia and legal means of response], III part, Ignjatovic D. (ed.), Belgrade: University of Belgrade, Faculty of Law, 2009, p. 450.

[15] Tompson K. Moralna panika [Moral panic]. Belgrade: Clio, 2003, p. 25.

[16] Ilic A. 2017, p. 46.

the campaign is the story about the necessity of strong opposition to various forms of criminality. In this sense, the interests of the authorities can be presented as the interests of the people, with the increase of crime and citing 'alarming' data to argue their position. This is precisely the factor that can influence individual judges to make certain judgments that would please the representatives of the current political elite.[17] Furthermore, intense media coverage can create trial by media scenario, potentially influencing the fairness of legal proceedings.

3. (Ab)use of criminal law in the crisis situation

Criminal law is often perceived as a tool for showing that state is taking initiative and responding to crises in the society. During the pandemic caused by the COVID-19 virus, in many countries criminal law was (ab)used by public authorities. In the Republic of Serbia, at the time of the pandemic, judiciary conducted trial via video conference. Although the Code of Criminal Procedure of Serbia did not prescribe a trial via video conference, except in certain cases (Article 104 of the Criminal Code), the Government of Serbia issued a decree according to which, during the state of emergency, the judge could decide that the participation of the accused could be secured through video links (Regulation on the manner of participation of the accused in the main trial in criminal proceedings held during the state of emergency declared on 15 March 2020). Apart from the lack of legal basis, this measure is compatible with the practice of the European Court of Human Rights. According to the jurisprudence of the aforementioned court, telephone and video conference as an alternative to hearing and other procedural actions can only be used, if they are based on the law, time-limited and proved to be necessary and proportionate to local circumstances. In addition, the use of the aforementioned methods must not prevent the confidential communication of a person with their lawyer.[18]

Apart from this example, in the Netherlands there was also concern about the possibility of jeopardizing the right to a fair trial and the quality of justice during the pandemic, because the prosecution announced the intention to increase the use of its powers to decide on certain criminal cases itself.[19] This could have a negative impact on the right to a fair trial, if citizens are not adequately informed.

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[17] Ilic A. 2017, p. 183.

[18] Kostic J. & Boskovic Matic M. How COVID-19 Pandemic Influences Rule of Law Backsliding in Europe. In: Regional Law Review, Reljanovic M. (ed.), Belgrade: Institute of Comparative Law, 2020, p. 87, DOI: https://doi.org/10.18485/iup_rlr.2020.ch6. See: ECHR judgment of 10 January 2012 in Case Vladimir Vasilyev v. Russia (application No. 28370/05); ECHR judgement of 14 February 2001 in Case Riepan v. Austria (application No. 3511/97 and ECHR judgement of 5 October 2006 in Case Marcello Viola v. Italy (application No. 45106/04).

[19] 2020 Rule of Law Report – Country Chapter on the rule of law situation in Netherlands, Brussels, 30.09.2020, SWD(2020) 318 final, p. 6.

In France, during the pandemic, certain measures started a discussion. Those measures related to the functioning of the judicial system and included early release of certain categories of detainees and automatic extension of the duration of pre-trial detention.[20] The application of the measure of automatic extension of detention could threaten the realization of the right to freedom. Based on the lawsuit challenging the legality of the extension, the Court of Cassation decided that the court that would otherwise decide on the extension of custody should urgently review the validity of the decision regarding the extension.[21]

In the Republic of Serbia, after the mass murder of nine students and a security guard in an elementary school by a thirteen-year-old boy in May 2023, the idea of lowering the limit of criminal responsibility from 14 to 12 years appeared in public, whereas in comparative legislation, the position on decreasing or considering to lower the threshold of criminal responsibility is influenced by international standards and the views of the United Nations Committee on the Rights of the Child. The Handbook published by the United Nations Children's Fund in 2007, which is substantial for interpretation of the provisions of the Convention on the Rights of the Child, contains a position that invoking the limit of criminal responsibility below 12 years of age is not acceptable at the international level, and countries are invited to raise this limit over 12 years, while those with a higher age limit of criminal responsibility should not lower that limit. Furthermore, according to the position expressed in the aforementioned document, it is recommended that no exceptions be prescribed at the national level regarding the limits of criminal responsibility, even for perpetrators of very serious criminal acts.[22] No country that has ratified the Convention on the Rights of the Child should lower the threshold of criminal responsibility to 12 years of age. In the same document, the solution that exists in England and Wales, according to which the lower limit of criminal liability is 10 years, has been criticized, and it is recommended to raise it.[23]

In Finland, the Juvenile Offenders Act of 1940 defined that children under the age of fifteen cannot be held criminally responsible, taking into account the level of their intellectual, emotional and social development at that age. Moreover, there is also an attitude that a child can be considered sufficiently mature to assume criminal responsibility when he is capable of establishing an employment relationship. Any child who commits a criminal offense and is younger than that age, enters the social protection system. Therefore, the authors state that Finnish children are perceived as 'victims' of their own social circumstances in need of help, and not as criminals or immoral persons. In Finland, the persons who commit crimes between the ages of 15 and 17 are considered young offenders.

[20] 2020 Rule of Law Report. Country chapter on the rule of law situation in France, Brussels, 30.09.2020, SWD(2020) 309 final, p. 4.

[21] Ibid.

[22] Implementation Handbook for the Convention on the Rights of the Child, United Nations Children's Fund, 2007, p. 605. Available: https://www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf [viewed 03.12.2023.].

[23] Ibid., p. 617.

Such young people are subject to care and the measures ensured by the Finnish social protection system and the justice system.[24]

Criminal justice cannot achieve the reduction of violent crimes, if it is not accompanied by other measures in the area of social support, family issues and the application of adequate prevention mechanisms. Therefore, the focus should be on rehabilitation rather than retribution, and the goal should be to create a more tolerant social environment by establishing an adequate mechanism for conflict resolution.

It is important to note that despite the retributivist concept that is increasingly present in criminal law, the research results confirm the exact opposite. Thus, in the United States of America, 69% of people who were released from prison were rearrested within three years after their release. In England and Wales, 66% of young people and almost half of ex-prisoners committed a criminal offense within a year after completing their prison sentence.[25] An opposite approach is taken in Norway. An extreme example to present here is Utoya attack in 2011, where, as a result of mass shooting in the youth camp, 69 people were dead. The Oslo District Court sentenced attacker to 21 years in prison, which could be extended if he was deemed to constitute a threat to society. It should be stressed that Norwegian approach is rehabilitation, not retribution.[26] Implementation of punishment in Norway seeks to change an individual's offending behaviour with the goal of preventing a return to prison upon their release. Impact of such approach is that the rate of re-offending in Norway is among the lowest worldwide– 20 percent in comparison to 62.7 percent in Serbia.[27]

Conclusions

The differences in re-offending rate across countries (i.e. Norway, the USA, Serbia) that have diverse approaches in criminal policy confirm that criminal law and criminal justice cannot reduce violent crimes, if it is not accompanied with other measures in the area of social support, family matters, and prevention mechanisms.

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[24] Mhuirneacain O. N. The Young Offenders: A Comparison of the Criminal Justice System for Juveniles under Finnish and Irish Law, 26 June 2020. Available: https://lawreview.elsa.org/the-young-offenders-a-comparison-of-the-criminal-justice-system-for-juveniles-under-finnish-and-irish-law [viewed 03.12.2023.].

[25] Aaron B. Prisons are failing. It's time to find an alternative. World Economic Forum, 09.01.2019, cited according to Ilic A. The analysis of some problems in achieving the rehabilitation purpose of punishment. Review of Criminal Law and Criminology, 2023, No. 1, p. 94.

[26] Labutta E. The prisoner as one of us: Norwegian Wisdom for American Penal Practice. Emory International Law Review, 2016, Vol. 31, Issue 2, p. 332.

[27] Stevanovic I., Mededovic J., Petrovic B. and Vujicic N. Expert research and analysis on re-offending in Serbia. Belgrade: Organization for Security and Co-operation in Europe – Mission to Serbia, 2018.

Furthermore, expansionism of criminal law can lead to excessive criminalization, which results in legal uncertainty. Individuals may unwittingly and unknowingly break laws because of their complexity and ambiguity, while disproportionate sentences for certain crimes can overburden the criminal justice system.

Reforms of the criminal legislation should be based on review of the effects brought about by excessive spread of incriminations and the need for state to react effectively to suppress crime. One of the examples demonstrating lack of proper prior assessment of the legislative changes was the amendment of the Criminal Code of the Republic of Serbia introduced in 2019. The Code was adopted without a proper assessment of whether stricter sanctions would have a deterrent effect and result in a general prevention of the respective type of crime, but the process was driven by the public pressure to react on violent crime against children and vulnerable groups. Based on the available statistical data, there is no evidence that amendments of the Criminal Code resulted in prevention of crimes against children.

Therefore, in most cases, the focus should be on rehabilitation, instead of retribution, while, above all, efforts should be made to establish a more tolerant social environment and introduce adequate mechanisms for conflict resolution. Hence, society should, first of all, focus on precluding the causes and crime prevention, instead of repressive measures.

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THE PRINCIPLE OF LEGALITY AND GENERAL CRIMES – THE PARTICULAR CASE OF ABUSE IN SERVICE OF PUBLIC OFFICER

Key words: principle of legality, predictability of the law, accessibility of the law, clarity of criminal law, criminal responsibility, public officer, clause of subsidiarity

Summary

The principle of legality is a fundamental part of the criminal law system and a rule that is a part of the positive legislation in most of the countries. One of its components – the law – should state clearly, in a predictive and comprehensible manner, what actions or inaction constitute crimes. Many countries including Romania attempt to regulate and penalize, as precisely as possible in accordance with this principle, by the means stipulated in criminal law, the actions of public officers who fulfil their duties improperly, or fail to fulfil them, with the intention to cause damage to others. The current article considers the crime of abuse of office, – an incrimination that aims to define all types of conduct of a public officer that are not regulated by law as more specific crimes. However, such a general incrimination invariably is on the edge of the principle of legality. The aim of this article is to analyse the ways how the crime of abuse of office has been regarded in Romania in the latest years, in connection with the principle of legality.

Introduction

Specific and clear wording should be used when criminalizing a conduct by the legislator. This is an important rule, directly derived from the principle of legality – a core and fundamental rule of the continental and the common-law system. Crimes should be regulated in a clear manner, to enable every citizen to understand what they should do or refrain from doing, and what actions engender criminal liability. Definitions of crimes should not be excessively narrow, in order to avoid a situation when dangerous conduct, which could not be penalized by other branches of law, remains outside of the scope defined in the law (notably, in criminal law, an interpretation by analogy is only permitted if it is in the favour

of the defendant, hence the types of conduct which are not expressly stipulated by law cannot be penalized by using analogy). At the same time, the regulated conducts should not be defined excessively broadly or generally, aiming to punish a person for every action or inaction, instead of defining specific types of conduct which are considered dangerous for the society.

These guidelines have as a goal to protect, in the end, the freedom of the citizens, who should not have to live thinking all the time whether their conducts can make them criminally liable or not.

In Romania, an extensive discussion has taken place during the past 10–15 years, regarding a crime which was considered, by many, to be very general, and which remained on the edge of the rules concerning the principle of legality. Article 297 of the Romanian Criminal Code penalizes the abuse of office of a public officer. This crime was punishable previously, in the Criminal Code of 1969, Articles No. 246–248. Several times in the past ten years, the legislator tried to modify the content of this crime, and occasionally the Constitutional Court of Romania was questioned with regard to the predictability of the law. However, the last 10–15 years have showed, since the fight against corruption has been intensified, that many prosecutors have sought conviction for any harmful conduct of a public officer under the crime of abuse of office[1]. In this article, the author will analyse some of the problems pertaining to predictability of this crime from the perspective of the principle of legality.

1. What is an abuse of office?

Abuse is defined by Black's Law Dictionary as "a departure from legal or reasonable use"[2], while abuse of power is defined by the same dictionary as "the misuse or improper exercise of one's authority, the exercise of statutorily or otherwise duly conferred authority in a way that is tortious, unlawful, or outside its proper scope".[3]

The social value protected by punishment entailed by the crime of abuse of office is a beneficial development of work relations involving public officers[4]. In some authors' opinion[5], the social value protected thereby is represented by

[1] Bogdan S., Serban D. A. Drept penal. Partea speciala. Infractiuni contra patrimoniului [Criminal Law. The Special Part. Crimes Against Patrimony]. Universul Juridic, 2020, p. 364. For the same opinion, see also Pasca V. Cum a devenit abuzul in serviciu cea mai frecventa infractiune de corputie. Available: https://www.universuljuridic.ro/cum-devenit-abuzul-serviciu-cea-mai-frecventa-infractiune-de-coruptie/ [viewed 05.12.2023.].

[2] Garner A. B. Black's Law Dictionary. Thomson Reuters, 2009, p. 12.

[3] Ibid., p. 13.

[4] Rotaru C., Trandafir A.-R., Cioclei V. Drept penal. Partea speciala II. Curs thematic [Criminal Law. Special Part II. Thematic course]. C. H. Beck, 2021, p. 289.

[5] Udroiu M. Sinteze de drept penal Partea speciala [Syntheses of Criminal Law. The special part]. C. H. Beck, 2020, p. 767.

the legitimate interest of all persons to be safeguarded from the abuse of office by public officers.

Before 2023, the abuse of office was penalized in Romania according to three different crimes defined in Articles 246, 247, 248 of the former Romanian Criminal Code. Article 246 stated: "the public officer which, in exercising their duty of service, does not fulfil an act or fulfils it incorrectly, thereby causing an injury to the legal interest of a person, is punishable by 3 months to 7 years of imprisonment". Article 247 stated: "the restriction of the rights of a citizen by a public officer, based on race, nationality, sex or religion, is punishable from 6 months to 5 years of prison". Article 248 stated: "the public officer which, in exercising their duty of service, does not fulfil an act or fulfils it incorrectly, thereby causing a problem in the development of an organization as stipulated in Article 145 or bringing about a damage to the public resources, is punishable with imprisonment from 6 months to 5 years". In the new Criminal Code in force since 2014, the abuse of office has been regulated in Article 297, establishing a prison sentence from 2 to 7 years to the public officer who, in exercising their duty of service, does not fulfil an act or fulfils it incorrectly, thereby causing an injury to the legal interest of a person.

It was shown by some authors that this crime gives rise to serious problems with regard to the principle of offensive criminal law[6], and derisory scenarios can fall under the criminal law. One of the main analysed problems is whether any action or inaction of the officer, which turns out to be damaging to a person, can be viewed as the crime of abuse of office, as the law does not provide a clear distinction between criminal and disciplinary liability[7]. It has been demonstrated through an example of public officer who closes its office five minutes earlier than scheduled, thereby preventing a person X from paying their taxes, and causing X to pay one day of penalty for failing to pay their taxes on time[8] – this would constitute a typical conduct involving abuse of office. It would also be a crime if a salesperson of a small store closed the store 2 minutes before the closing time, and thereby preventing a person from buying something (therefore causing a material damage to the store)[9].

As a theoretical argument, it was invoked that criminal law should not penalize every damaging conduct of a public officer, as there are other (civil, administrative, disciplinary) forms of liability. Ultimately, criminal responsibility is the last resort, as it has the most detrimental effect upon individual freedom. In another opinion[10], it was appreciated that by its decision No. 405/2016, the court implicitly stated that

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6 Bogdan S., Serban D. A., Zlati G. Noul Cod penal. Partea speciala. Analize, comentarii, explicatii [The New Criminal Code. The Special Part. Analysis, Comments, Explanations], 2014, p. 441.

7 Ibid., p. 293.

8 Ibid., p. 441.

9 Ibid.

10 Udroiu M. 2020, p. 775.

the facts that lacked importance or could incur disciplinary liability could not be considered an abuse of office. The author will explore this decision below.

2. Interpretations and attempts to modify the crime of abuse of office

It took several years since the fight against corruption was declared a national priority and the crime of abuse of office began to be used by the prosecutors before the decision No. 405/2016 of the Constitutional Court of Romania[11]. This decision considered the predictability of Article 297(1) of the Romanian Criminal Code, and analysed its compatibility with the principle of legality in the light of the European Convention of Human Rights.

The Court showed that a person could not be penalized for failure to comply with a duty which was not regulated at a normative level. The reason for this, the Court argued in its decision, was that solely the legislator could establish the conduct that the subject of the law was obliged to respect. If the faulty actions of the public officer were not compared to the standards imposed by the law, this would mean that the content of the crime of abuse of office would be regulated both by the legislator and by the Government or other persons (including private persons – for acts that fall under the labour law). Such situation could not be accepted under the Romanian legal system. In Romania, only the legislator can establish the conduct that the public officer is obliged to comply with, under the threat of the criminal penalty, as the criminal liability is the most serious form of liability, and the consequences of applying the criminal law are the most severe. Therefore, it was concluded that "inadequate compliance with the duties" is to be interpreted as "breaking the law".

It would seem that this decision represented a guarantee of the principle of legality concerning Article 297 of the Criminal Code (although it generated other problems, for instance, if this standard could apply in the case of manslaughter, where generally the rules of conduct of professionals are stipulated in an act inferior to an organic law).

After this decision of the Constitutional Court, two directions of interpretation emerged in practice: according to the first one, of the strict interpretation of the decision, the abuse of office would exist only if the attributions of the public offer were regulated by primary legislation. According to the second direction, of the broad interpretation of the decision, it is considered that, in order to discuss a typical fact, it is sufficient to identify the violation of a legal provision, even if it is very general, which regulates the activity of the public officer at a level of

[11] Judgement of the Constitutional Court of Romania, No. 405/2016, published in Official Monitor No. 517 of 8 July 2016.

principle[12]. In the actual event, the prosecutors generally identified very broad, generic rules applicable to the public officer and then invoked that the public officer, by breaking those rules, had committed the crime of abuse of office. The Supreme Court of Romania also argued at the time, in several decisions, that, if the primary legislation contained fundamental duties or principles of the public officer, it constituted sufficient grounds for a conviction for abuse of office, even if public officer's particular duties were regulated through secondary legislation.

This direction was criticized according to the doctrine[13], as it actually represented an attempt to return to the times before the Decision No. 405/2016. This was because, as it was argued, for every public officer it was possible to identify, at the level of the law that regulates their activities, the rules of conduct, generic dispositions regarding the public officer's domain of activity defined in the primary legislation.

Admittedly, it seems that in the recent years the Supreme Court of Justice has changed its direction of reasoning, and has recognized that solely a general regulation of a principle or of a duty of conduct in the primary legislation is not sufficient to convict a person for abuse of office[14].

In a following decision[15] of 2017, the Constitutional Court of Romania once again analysed the possible constitutional breach of Article 297 of the Romanian Criminal Code, and showed that in order to make a delimitation to differentiate between the forms of liability, the only criterion used, according to positive legislation, was the value of the act whereby the duties of the public officer were regulated (in primary or secondary legislation). Or, in order to make a proper distinction, the Court argued, that a threshold of the damage should be established in order to better appreciate the necessity of a criminal penalty.

In the same year, after this decision, an attempt to modify[16] Article 297 was made by the legislator. The intention was to introduce a monetary threshold: the definition of the conduct by public officer remained the same, but the legislator wanted to introduce a damage amount – the conduct would have attracted a criminal responsibility only if the damage surpassed 200 000 RON. This attempt of modification (made by Governmental decision, not by law – an exception of ruling in Romania), and adopted during the night, generated massive protests in the Romanian society (around 300 000 in Bucharest only[17]).

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[12] See, as an example, Judgements No. 4/A of 10 January 2017, No. 227/RC of 21 June 2918, No. 220/RC of 6 of June 2019 of the Supreme Court of Romania. Available: www.scj.ro [viewed 05.12.2023.].

[13] Bogdan S., Serban D. A. 2020, p. 379.

[14] See, for instance, judgement No. 338/A/13.11.2023 of the Supreme Court of Romania.

[15] Judgement of the Constitutional Court of Romania, No. 392 of 6 June 2017. Public Monitor No. 504 of 30 June 2017.

[16] Governmental Order of Emergency No. 13/2017.

[17] See, for instance, Cinci ani de la "Noaptea, ca hotii": cei care au emis OUG 13/2017 sunt la putere [Five years since "At night, like thieves": those who issued GEO 13/2017 are in power]. Available: https://defapt.ro/cinci-ani-de-la-noaptea-ca-hotii-cei-care-au-emis-oug-13-2017-sunt-la-putere/[viewed 05.12.2023.].

The protesters contested not only the modification itself, but it was considered that the modification was made with a particular intention, as the prime minister of Romania at that time, Liviu Dragnea, was being accused of abuse of office, and would have escaped prison if the modification would have entered into force. After a week of protest, the Government abandoned the project[18].

A new attempt of modification was made in 2023, when the legislator tried again to introduce a new threshold of value for this crime. Initially, the Parliament tried to introduce a limit of 250 000 RON, but this decision repeatedly caused a big scandal in the Romanian society. A second proposal put forth a limit of 9000 RON (around 2000 EUR), which again generated protest[19]. Ultimately, by Law No. 200/2023[20], the only modification that was introduced – the content of the crime was modified to expressly state that by acting inadequately, the officer is breaking a primary norm of the legislation.

The Supreme Court of Justice of Romania asked, this time, the Constitutional Court of Romania whether this type of modification is in accordance with the Constitution. By decision No. 283 of 17 May 2023[21], the Constitutional Court of Romania was called to analyse, once again, whether a threshold was necessary to consider abuse of office a crime, and the answer of the court, was, surprisingly, that there was no need for a monetary limit when it came to abuse of office (thus contradicting its previous decision).

It remains a crime which has been subject to many socially political and juridical controversies[22]. It was argued that this formulation of a crime made it very easy to substantiate a conviction, and very difficult for a judge to motivate an acquittal. All the elements of stability of an accusation are affected in this case by the generality of the incrimination: the conduct is very generically described, the fact is commissive or omissive, the legislation which indicates the fault of the public officer is very complex, and the result is also very generically described, and making it very challenging to identify a conduct whereby the public officer does not respect their duties of service, but an injury of the interests of a person does not appear[23].

[18] Liviu Dragnea was convicted later – see Liviu Dragnea a fost condamnat definitiv la trei ani si jumatate de inchisoare [Liviu Dragnea was definitively sentenced to three and a half years in prison]. Available: https://www.hotnews.ro/stiri-esential-23166668-breaking-news-liviu-dragnea-afla-sentinta.htm

[19] Curtea Constitutionala: Abuzul in serviciu poate incriminat si fara prag valoric / Interceptarile SRI nu pot fi folosite ca probe [Constitutional Court: Abuse in the service can be criminalized even without a value threshold / SRI intercepts cannot be used as evidence]. Available: https://www.hotnews.ro/stiri-esential-26272368-fara-prag-valoric-pentru-incriminarea-abuzului-serviciu-decizie-ccr.htm, [viewed 05.12.2023.].

[20] Official Monitor, No. 616 of 6 July 2023.

[21] Official Monitor No. 488 of 6 June 2023.

[22] Bogdan S., Serban D. A. 2020, p. 363.

[23] Ibid., pp. 367–368.

Conclusions

1. With regard to a very similar instance from the Estonian Criminal Code, the European Court of Human Rights has already showed that the interpretation and application of the article regarding the abuse of office has implied very broad notions and general criteria, stating that the incrimination is not respecting the standard of clarity and predictability impose by the Convention[24].
2. Therefore, it can be concluded, that the necessity of this incrimination can (and should) be subject of a serious evaluation, although at present there is a major reticence of the actors from the judicial system to lower the importance of this incrimination in practice[25].

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7. ECHR judgement of 25 June 2009, Case Liivik v. Estonia, 25 of June 2009.

Court practice. National courts

8. Judgement No. 4/A of 10 January 2017 of the Supreme Court of Romania. Available: www.scj.ro [viewed 05.12.2023.].
9. Judgement No. 227/RC of 21 June 2918 of the Supreme Court of Romania. Available: www.scj.ro [viewed 05.12.2023.].

[24] ECHR judgement of 25 June 2009, Cauze Liivik v. Estonia, 25 of June 2009.

[25] Bogdan S., Serban D. A. 2020, p. 367.

10. Judgement No. 220/RC of 6 June 2019 of the Supreme Court of Romania. Available: www.scj.ro [viewed 05.12.2023.].
11. Judgement No. 338/A/13.11.2023 of the Supreme Court of Romania. Available: www.scj.ro [viewed 05.12.2023.].
12. Judgement of the Constitutional Court of Romania No. 405/2016, publish in Official Monitor No. 517 of 8 July 2016.
13. Judgement of the Constitutional Court of Romania No. 392 of 6 June 2017, published in Public Monitor No. 504 of 30 June 2017.

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14. Curtea Constitutionala: Abuzul in serviciu poate incriminat si fara prag valoric / Interceptarile SRI nu pot fi folosite ca probe [Constitutional Court: Abuse in the service can be criminalized even without a value threshold / SRI intercepts cannot be used as evidence]. Available: https://www.hotnews.ro/stiri-esential-26272368-fara-prag-valoric-pentru-incriminarea-abuzului-serviciu-decizie-ccr.htm [viewed 05.12.2023.].
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16. Noaptea, ca hotii": cei care au emis OUG 13/2017 sunt la putere [Five years since At night, like thieves": those who issued GEO 13/2017 are in power]. Available: https://defapt.ro/cinci-ani-de-la-noaptea-ca-hotii-cei-care-au-emis-oug-13-2017-sunt-la-putere/ [viewed 05.12.2023.].

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CORRELATION BETWEEN EXPANDING THE LIMITS OF PERSONAL FREEDOM AND THE RISKS OF SOCIAL EXCLUSION: FREEDOM OF EXPRESSION AS AN EXAMPLE

Key words: freedom of expression, the risks of social exclusion, information society, fundamental rights

Summary
One of the most essential fundamental human rights is the freedom of expression. The progress of science, first and foremost – the development in information technologies, gives contemporary society new possibilities for communication, and the development of fundamental and human rights continues to expand the limits of the freedom of expression. It is the growing importance of the digital environment in communication, turning into the main space of societal communication, that creates the risk of exclusion for some social groups: persons in need, partly – persons with special needs, and seniors. The state has the obligation to be aware of this risk of social exclusion with respect to the very essential fundamental right to the freedom of expression, and develop a policy to prevent it.

Introduction

Although every person is born as a social being, humanness is not innate, it has to be mastered by living in society.[2] Aristotle (384–322 BC) in his work "Politics" reached the conclusion that a man was a social animal, endowed with a special gift – language.[3] Language is the key to inclusion in society, since it gives the possibility to understand others and to be understood.

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[2] Eriksens T. H. Mazas vietas – lieli jautajumi. Ievads socialantropologija [Small places – big questions. Introduction to Social Anthropology]. Riga: LU Akademiskais apgads, 2010, p. 68.

[3] Aristotle. Politics. Oxford translations series. Oxford: Aeterna Press, 2015, p. 12.

A human is a cultural creature whose personality develops throughout a lifetime of interaction with other people, *inter alia*, fulfilling one's place and role in society. Communication or interaction is essential both for the existence of the entire society and in the life of every individual, as it ensures inclusion in society, at present, *inter alia*, in the political nation,[4] as well as individual improvement, by gaining ever-new knowledge and experience. Therefore, one of the most important fundamental human rights is the freedom of expression, which includes not only the freedom of speech but also the right to access information and the freedom to disseminate information, *among other things,* the freedom of the press.[5] The state must examine the establishment of restrictions on the freedom of speech with particular care, since these must be interpreted narrowly, and the legislator must provide appropriate and sufficient justification for each restriction of the kind.[6] Freedom of expression is a negative fundamental right, i.e., the state may not intervene in its exercising without special grounds; however, at the same time, the state must ensure that every person could enjoy the freedom of expression and would be a full member of society. Thus, whether and how a person's inability to access the information field, in which contemporary society and, more often, the state itself operates, i.e., the Internet environment, affects the person's freedom of expression requires special assessment. This study explores the correlation between expanding the limits of the freedom of expression with the possibilities to communicate in the digital environment, offered by new technologies, and the fact that for a part of society, with society transferring communication to the digital environment, participation is restricted.

1. Expanding the limits of the right to freedom and equality in the course of the 20th century

Each culture creates original models of human interaction, a singular formation of society, typical only of it, clearly defining every person's place in society, the scope of their rights and obligations.[7] Historically, whether a person

4 The Constitutional Court of the Republic of Latvia has reviewed this matter in its judgement of 13 November 2019 in Case No. 2018-22-01 on determining the official language as the main language of instruction in the state. "The ability of all persons belonging to ethnic minorities to communicate freely on any matter in the official language is invaluable in the context of retaining the democratic order and is equally important for the persons belonging to ethnic minorities themselves and for society in general because, thanks to this ability, all members of society would be able to communicate freely among themselves and, also, to communicate with the state." Available: https://www.satv.tiesa.gov.lv/cases/ [viewed 25.10.2023.].

5 Smith S. A. Freedom of Expression. Foundation Documents and Historical Arguments. Oxbridge Research Associates, 2018, p. 631.

6 The judgment of the Constitutional Court of the Republic of Latvia of 2 July 2015, in Case No. 2015-01-01. Available: https://www.satv.tiesa.gov.lv/cases/ [viewed 25.10.2023.].

7 Durkheim E. Regeln der soziologischen Methode [Rules of the sociological method]. Neuwied und Berlin: Luchterhand, 1965, S. 165–175.

was vested with full rights was determined by gender, age, origins, occupation, and other personal traits.[8] Personal freedom was limited and equality was recognised only among those who were alike, whereas full rights were enjoyed only by a small part of society.

However, since the end of the 18th century, the very foundations of Western culture have changed. The changes were facilitated, *inter alia*, by the school of natural law and Enlightenment philosophy, which recognised human freedom as a natural inalienable right of every person because human beings possess reason.[9] Human dignity as an inviolable value is the foundation of the modern state.[10] Contemporary Western democracies are states, governed by the rule of law, in which, since the end of World War II, the fundamental rights of a person have been expanded dynamically, placing special emphasis on every person's equal rights and freedoms, first and foremost, as the right to self-determination.

Likewise, in the founding acts of the Republic of Latvia, freedom has been highlighted as a protected value and it included requirements regarding equality of persons.[11] However, the understanding of what exactly a person's freedom and equality comprises, in enjoying this freedom, has changed significantly in the course of the 20th century, because the limits of personal freedom, determined in law, have been expanded rapidly. Expanding the limits of personal freedom was influenced both by significant changes in society's consciousness and practical benefits brought by the development of science, namely, the provision of unprecedented goods and services to the members of society, first of all, in the field of information technologies.[12] This new freedom intervened in all areas of a person's life: providing new possibilities in choosing one's occupation because new professions were created, freedom in private life because, with the church's influence diminishing, the freedom to divorce expanded, as well as more and more persons were cohabiting without entering into marriage, broader opportunities to travel appeared, facilitated both by the increasing offer of new means of transportation, as well as aligned and simplified system of visas for entering

[8] Luhmann N. Rechtssoziologie [Legal sociology]. Munchen: Rowohlt, 1972, Bd. I., S. 148.

[9] Hepse F. Freiheit und Vernunft im Spannungsfeld des Naturrechts Feyerabend und der Grundlegung [Freedom and reason in the area of tension between Feyerabend's natural law and the foundations]. In: Auf dem Weg zur Kritische Rechtslehre [On the way to critical legal theory]. Hrs. D. Huning, S. Klingner, G. S. Bordoni. Leiden, Boston: Brill, 2021, S. 131–133.

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[11] Both gender equality in political rights and the protection of ethnic minorities are included in the Political Platform of the People's Council of 17 November 1918. In: Latvijas valsts tiesibu avoti. Valsts dibinasana – neatkaribas atjaunosana. Dokumenti un komentari [Sources of Latvian state law. Founding of the country – restoration of independence. Documents and comments]. Riga: Tiesu Namu agentura, 2015, p. 54.

[12] Banisar D. The right to information in the age of information. In: The human rights in the global information society. Jorgensen R. F. (ed.). Cambridge, Massachusetts…: The MIT Press, 2006, pp. 73, 74.

another country. Namely, since the end of World War II, extension of the limits of personal freedom grew dynamically, through the synergy of possibilities offered by science and technologies with the consolidation of liberal legal thought in sources of law. The freedom of expression also acquires another form because the ways and means for disseminating information change, which, in turn, leads to essential changes in society itself.

At the beginning of the 20th century, scientists were studying the industrial or the industrially producing society, in the second half of the 20th century, however, they were writing about the next stage in society's development – the post-industrial society, in which individuals mainly were not engaged in production but in inventions and provision of services. Among the first to define the concept of post-industrial society was Alain Touraine (1925–2023)[13] who, in a series of publications, by using historical analysis, analysis of documents, interviews and observations, studied the processes of industrial society transforming into the post-industrial one. He conducted in-depth studies, inquiring how, with features of post-industrial society becoming more pronounced, the formation of civil society turned increasingly more multi-layered and complicated and how, accordingly, the possibility of conflicts increased in it.[14] Other authors call it also "the knowledge society".[15] Daniel Bell (1919–2011), studying features of the post-industrial society, wrote that post-industrial society was knowledge society or information society. D. Bell believes that, with the increasing amount of information, speed of its circulation and importance in the life of society, it turns into information society, in which each of its members extensively uses the new possibilities provided by technologies. D. Bell underscores that societal changes are not caused by the new possibilities offered by technologies, but by the ways how society adapts to using these new possibilities, transforming itself and turning into technocratic society. Information and knowledge, as well as the duties and positions related to their collection, accumulation, storage, processing and dissemination are becoming increasingly more significant and valuable in technocratic society[16]. Clearly, in society like this, the ability to access information and disseminate it is an essential precondition for exercising personal freedom, first and foremost, a precondition for the freedom of expression.

Changes in the understanding of equality and the prohibited grounds for discrimination, occurring in the course of the 20th century, have not been less significant. Over time, new features have been added to this range of grounds again and again. Thus, Article 1 in the United Nations Universal Declaration of

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[13] The first appearance of the idea is found in the work: Touraine A. La societe post-industrielle. Paris: Denoel, 1969.

[14] Wieviorka M., Dubet F. Alain Touraine and the Method of Intervention. In: Clark J., Diani M. (eds). Alain Touraine. London: Routledge, 2013, p. 55.

[15] For example, Sakaiya, T. The Knowledge-Value Revolution or A History of the Future. New York: Kodansha International, 1991, pp. 57–58, 267–287.

[16] Bell D. The Coming of Post-Industrial Society: A Venture in Social Forecasting. Basic Books, 1976, p. 37.

Human Rights of 1948 set out the requirement of human dignity and freedom for all persons, whereas Article 2 defined the features, on the grounds of which a person could not be discriminated against: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[17] These were the prohibited grounds for discrimination, which, in the middle of the 20th century, were considered to be exhaustive, to ensure the equality of all human beings. Article 15 of the European Convention of Human Rights, which was adopted only a couple of years later, established the prohibition of discrimination: "…on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status,"[18] i.e., in 1970, the following were defined as additional grounds: national minority and status of birth. Although they could have been read into the text of the UN Declaration, they, however, are foregrounded *expressis verbis*. Article 21 of the Charter of Fundamental Rights of the European Union, which was drafted in the turn of the 20th and 21st centuries (the Charter was proclaimed on 8 December 2000), in turn, adds to all the above prohibition to discriminate against a person on the grounds of genetic features, disability, age or sexual orientation.[19] The Council of Europe Convention on preventing and combating violence against women and domestic violence of 2011, which has caused many reflections in Latvia and not only in Latvia, adds additional grounds to prohibition of discrimination: "gender".[20] This research will not provide in-depth analysis of the new grounds, which have been constantly included in the international documents on human and fundamental rights. In the context of the study, the fact that, over time, new criteria that hinder the attainment of true equality and the creation of inclusive society are identified and included in legal acts again and again is important. In each of the documents referred to above, the legislator, by defining the prohibited grounds for discrimination, in the framework of the prevalent understanding of its time, has attempted to include exhaustively all the stereotypes and prejudices prevailing in society, which deny every person's right to equality, by stigmatising[21] and excluding a societal group. This was facilitated both by more nuanced

[17] 09.12.1948. Universal Declaration of Human Rights. Available: https://www.un.org/en/about-us/universal-declaration-of-human-rights [viewed 23.11.2023.].

[18] European Convention of Human Rights. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [viewed 23.11.2023.].

[19] The Charter of Fundamental Rights of the European Union (2016/C 202/02). Available: https://www.europarl.europa.eu/charter/pdf/text_en.pdf [viewed 25.10.2023.].

[20] Council of Europe Convention on preventing and combating violence against women and domestic violence of 2011. Available: https://rm.coe.int/168008482e [viewed 25.11.2023.].

[21] Stigma is a person's trait, behaviour or occupation, considered by society, in accordance with the prevalent stereotypes, as being improper or shameful, which is the basis for restricting a person's full rights legally or in daily life. From: Goffman I. Stigma – zametki ob upravleniji isporchennoj identichnostju [Stigma – notes on managing spoiled identities]. Available: https://www.hse.ru/data/2011/11/15/1272895702/Goffman_stigma.pdf [viewed 29.09.2023.].

understanding of the importance of each person's human dignity, which, *inter alia*, was consolidated also in the judgements by national constitutional courts and international human rights courts,[22] as well as the fast development of science, which made deeper studies of societal life possible.

2. Freedom of expression in the age of new technologies and the risks of social exclusion

Exercise of the freedom of expression is clearly linked to a person's inclusion in the process of information circulation, implemented by society. Examination of the concept "information" allows concluding that, within information society, it has three meanings, i.e., information as news or knowledge, information as a process, in which news are obtained, information as a thing, a document or property, which is valued not only according to its content but also its amount. The concept of "information" has the substantive side and also the procedural side, which characterises the circulation of information.[23]

Since the beginning of the 21st century in Latvia, like elsewhere in Europe, the benefits, jointly created by the contemporary post-industrial information society, have turned into essential goods and items of daily use, first and foremost, access to the internet and smart devices, the acquisition of which demands material resources, but their use – certain skills, linked not only to the mental ability to use them but also to purely physical ability. These factors determine certain risks of social exclusion because, for a person to exercise in full their freedom of expression and be included in the societal circulation of information, both material resources and skills, as well as the ability to use these skills are required.

The fact that, without a smartphone, even basic daily services can be hard to receive is proven by the fact that, during COVID-19 pandemic, many catering companies abandoned printed menus and started using codes, which had to be "scanned" – they became visible only if a smartphone or another smart device was used. The situation is similar in other areas: in museums, nature trails, etc. part of or even entire information can be obtained only by using smartphones. Namely, those who have created this system trust that all visitors will have both the required smart device and the skills to use it. Such difficulties in accessing information may have an impact on all areas of a person's life, *inter alia*, receiving consumer services both on-site, if information can be obtained only by using a special device, and on the internet because large part of advertising and also provision of services has been moved to the internet environment, irrespectively of whether it is shopping or applying for service, or registering for a visit to a doctor.

[22] For example, in the matters of gender equality, see Alkiviadou N., Manoli A. The European Court of Human Rights Through the Looking Glass of Gender: An Evaluation. Gottingen Journal of International Law, Vol. 11, 2021, pp. 191–211.

[23] Buckland M. Information and Society. Cambridge, London: The MIT Press, 2017, pp. 22, 23.

However, to use the internet and smart devices, first and foremost, access to the source of energy – electricity – is needed. Notwithstanding the European living standard of Latvia's inhabitants, there are still households without connection to electricity in the country.[24] Installation of a new connection to electricity, however, is an expensive service, in particular, if the house is located far from the already existing connections to electricity.[25] The state of Latvia was aware of it and, on 30 August 2017, the Cabinet Regulation No. 483 "The Procedure for Financing the Installation of a Connection for a Protected User" was adopted, providing that the costs of electricity connection should be covered by the state budget to persons in need and low-income persons, who are using electricity for their household needs. The approved procedure allowed the state and the operator of the distribution system to cover the costs of installing an electricity connection to non-electrified households.[26] However, with Amendments to the Electricity Market Law of 11 February 2020[27], it became void. Responding to a question, posed by a large family after the adoption of these amendments, on how to receive state support for an electricity connection, the Ministry of Economics answered in the portal LV: "Currently there is no valid regulation that would envisage state support for installing a connection. However, we are working on this issue: we are revising the provisions of the Cabinet Regulation No. 483 "The Procedure for Financing the Installation of a Connection for a Protected User" and examining various possible solutions to provide state support for covering the costs of installing a connection from the state budget to non-electrified houses of protected users. It is planned to complete this work by the end of the year; we suggest following information posted on our webpage."[28] Although it seems quite absurd to suggest a household without electricity to follow information on the website, instead of providing a concrete answer, even following the link, the promised information is not found, it leads to the ministry's webpage, comprising very extensive information…

Thus, persons in need, who lack resources, and persons with special needs, who are unable to master the skills needed for using devices, without which it is

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[24] Dzedulis D. Latvija joprojam ir vismaz 30 apdzivotas lauku majas bez elektribas [There are still at least 30 inhabited rural houses without electricity in Latvia]. LA.LV, 23.01.20. Available: https://www.la.lv/maja-bez-elektribas [viewed 23.10.2023.].

[25] The relevance of this issue was foregrounded by the civil society's platform mana balss.LV, on which people publish initiatives to proceed with submitting them as legislative initiatives to the *Saeima*.

[26] 16.08.2017. Ministru kabineta noteikumi Nr. 483. Kartiba, kada finanse piesleguma ierikosanu aizsargatajam lietotajam [Regulations of the Cabinet of Ministers No. 483. The procedure for financing the connection installation for the protected user]. 16.08.2017. Available: https://likumi.lv/ta/id/293132-kartiba-kada-finanse-piesleguma-ierikosanu-aizsargatajam-lietotajam [viewed 25.10.2023.].

[27] 2020. gada 11. februara Grozijumi Elektroenergijas tirgus likuma [11 February 2020 Amendments to the Electricity Market Law]. Available: https://likumi.lv/ta/id/312482-grozijumi-elektroenergijas-tirgus-likuma [viewed 25.10.2023.].

[28] Par valsts atbalstu piesleguma ierikosanai neelektrificetajiem majokliem [On state support for installation of connection to non-electrified dwellings]. LV Cilveks, valsts, likums. Available: https://lvportals.lv/e-konsultacijas/20792-par-valsts-atbalstu-piesleguma-ierikosanai-neelektrificetajiem-majokliem-2020 [viewed 25.10.2023.].

impossible to become fully included in public life, first and foremost, electronic means of communication, are subject to the risk of social exclusion.

This causes a paradox, – the greater freedom in communication is offered to members of society, the deeper the social gap that might appear in society because part of society is unable to participate in communication at all. Therefore recently both the area of scientific research and the political agenda include the issue of how to decrease risks of social exclusion, which have appeared due to science offering to persons new horizons of freedoms, opened up by technologies.[29] Already now some states solve this issue with the help of fundamental rights, i.e., defining a new fundamental right – the right to access to the internet, deriving it from the freedom of expression. The Council of Europe also has called for the recognition of this fundamental right of a person already in 2014.[30] Digital devices help persons to communicate with each other and with the state, to access the information space in the broadest meaning and be a full participant in the circulation of information, ongoing in society, i.e., to be a full member of society.

The State of Latvia is transferring more and more of its communication with inhabitants, public registers and public services, *inter alia*, legal proceedings to the digital environment. However, it should be taken into consideration that these services are not accessible to all, in terms of both availability of technological devices and personal skills. This issue cannot be solved solely by the internet connections in libraries as, currently, the right to access to the internet has been ensured in Latvia.[31] It was calculated in 2016 that the annual costs of the state for the free-of-charge internet in rural libraries were EUR 400 000[32], because a librarian will not be the one to give advice to an elderly person with trembling hands on the issue of recovery of overpaid tax through the webpage of the State Revenue Service, or help to obtain information from the digitalised Land Register, or analyse test results, delivered via e-mail. Likewise, with the transition to remote schooling of children during COVID-19 period, the state found out that all

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[29] Nguyen A. Digital Inclusion: Social Inclusion in the Digital Age. In: Handbook of Social Inclusion, Research & Practices in Health and Social Care. Liamputtong P. (ed.), Publisher: Springer, 2021, Available: https://doi.org/10.1007/978-3-030-48277-0_14-1 [viewed 23.10.2023.], and Tsetoura A. Technological Inequality and Social Exclusion of Older People during the COVID-19 Pandemic. The International Journal of Social Quality, Vol. 12, No. 2, 01 Dec 2022. Available: https://www.berghahnjournals.com/view/journals/ijsq/12/2/ijsq120205.xml [viewed 23.10.2023.].

[30] Jasmontaite L., De Hert P. Access to the Internet in the EU: a policy priority a fundamental, a human right, or a concern for e-Government? In: Research Handbook on Human Rights and digital technology. Wagner B. (ed.), Cheltenham, Northampton: Edward Elgar Publishing, 2019, p. 178.

[31] Plasaka informacija ir pieejama. Latvijas publiskas bibliotekas un internets: tehnologijas, pakalpojumi un ietekme. Biblioteku vaditaju aptauja 2011. gada oktobris – novembris [More information is available in Latvian public libraries and the Internet: technologies, services and impact. Survey of library managers October–November 2011]. Available: https://culturelablv.files.wordpress.com/2009/04/bibliotekas2011_bibliotekuvaditaji.pdf [viewed 25.10.2023.].

[32] Cigane I. Bezmaksas internets lauku bibliotekas valstij izmaksa ap 400 000 eiro gada [Free internet in rural libraries costs the state around 400 000 euro per year]. LSM. Available: https://www.lsm.lv/raksts/zinas/latvija/bezmaksas-internets-lauku-bibliotekas-valstij-izmaksa-ap-400-000-eiro-gada.a194874/ [viewed 25.10.2023.].

households did not have computers; moreover, – not every child had a computer to participate in the study process. The decision was to grant state support to families in the amount of EUR 500 to every child.[33] However, this state support was not targeted, i.e., no differentiation was made to understand whether a family was in need, whether a child had or did not have a computer and, in general, whether a computer, fit for study process, could be purchased for EUR 500… The state, being aware of the need for computers in the process of education, intends to provide the computers to children from families in need and low-income families also in the future. The current plan is to purchase 26.6. thousand portable PCs by the end of 2023, with support from the European Union Recovery Facility.[34]

Conclusions

1. One of the most essential fundamental human rights is the freedom of expression, which includes not only the right to freedom of speech but also the right to access information and the freedom to disseminate information. Exercising the freedom of expression depends both on restrictions established in law and the person's possibilities to become included in the models of communication, existing in society, i.e., to use all possibilities that the particular society uses in communication.
2. Since the progress of science, first and foremost, development in the area of information technologies, gives contemporary society new possibilities for communication and the development of fundamental and human rights continues to expand the limits of the freedom of expression, part of society, i.e., those who have the skills and access to digital technologies, expand considerably their freedom to communicate, also on the global level.
3. The importance of the digital environment grows in societal communication and, thus, in exercising the freedom of expression. Not only persons belonging to certain age groups (first and foremost, the younger generation), but also mass media, trade and catering companies, and even the state transfer their communication to the digital environment. Therefore, access to the internet, which is the key to the digital environment, and the skills needed to function in it, turn into important preconditions for exercising not only the freedom of expression but also other fundamental rights.

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[33] 23.02.2021. Latvijas Republikas Saeimas grozijumi Covid-19 infekcijas izplatibas seku parvaresanas likuma [23.02.2021 Amendments by the *Saeima* of the Republic of Latvia to the Law on Overcoming the Consequences of the Spread of the COVID-19 Infection]. Available: https://likumi.lv/ta/id/321173-grozijumi-covid-19-infekcijas-izplatibas-seku-parvaresanas-likuma [viewed 25.10.2023.].

[34] IZM uzsaks datoru nodrosinasanu investiciju programmu sociali neaizsargatiem skoleniem [The Ministry of Education will launch an investment programme for providing computers for socially vulnerable students]. Available: https://www.izm.gov.lv/lv/jaunums/izm-uzsaks-datoru-nodrosinasanas-investiciju-programmu-sociali-neaizsargatiem-skoleniem [viewed 25.10.2023.].

4. It is the growing importance of the digital environment in communication, turning into the main space of societal communication, that creates the risk of exclusion of some social groups, first of all, persons in need, partly – persons with special needs, and of seniors. Persons in need might not have the resources to obtain the digital tools, the internet connection or even electricity, which are the necessary preconditions for communication in the digital environment, whereas seniors and some groups of persons with special needs often are unable to master and use the new technological tools.
5. The state has the obligation to be aware of this risk of social exclusion with respect to the very essential fundamental right to the freedom of expression and develop policy to prevent them, so that every person would be able to become included in civil society, exercising the full right to receive information, to express and disseminate one's own opinion.

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"COMMON GOOD" AND "LOYALTY TO THE STATE" SECTION: DISCUSSIONS ABOUT BORDER CLAUSE TO FUNDAMENTAL RIGHTS AND FREEDOMS IN ESTONIAN CONSTITUTION OF 1937

Key words: 1937 Estonian Constitution, Fundamental Rights and Duties, "common good", "loyalty to the state" section, authoritarian regime of Konstantin Pats

Summary

In comparison to the Estonian Constitution of 1920, in the Estonian of 1937, the basic rights were restricted to a greater extent, in particular through its general orientation and attitude. A particular part in it was performed by the "loyalty to the state" section (§ 8), being a general border clause. The article analyses the contemporary discussions at the drafting of the section. Firstly, it contained a "common good" clause, which was at the time used in Nazi Germany to restrict person's rights and interpret law. Despite of the authoritarian state, the desire to limit arbitrariness of the state as much as possible is eminent in the debates.

Introduction

The drafters of the 1920 Constitution believed in the rule of law and the possibility of democracy. They tried to do everything possible to distance themselves from the legacy of Tsarist Russia and to be accepted into the family of European democracies. The Constitution and its dissemination as widely as possible was seen as a means of raising awareness of the existence of the new

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Estonian Republic, equal to other democratic states.[2] Estonia's new Constitution was considered to be very liberal and democratic, *inter alia*, because of its chapter on fundamental rights.[3] Although there where discussions in the Constituent Assembly in 1919 and 1920 about the necessity of including the basic rights in constitution at all, both the right-wing and left-wing parties demanded that the basic rights should be enshrined in the pre-constitutional acts, as well as the Constitution.[4]

This article explores the discussions about the restrictions of fundamental rights in the most important law in a modern constitutional state – namely, constitution – during the Estonian interwar period. There are different possibilities for legal restriction of fundamental rights and freedoms. Some of them are typical to the democratic constitutions as legal reservations (German: *Gesetzesvorbehalt*), where the constitutional provision contains a possibility to limit its application by law, or the prohibition of certain conduct in constitutional norm itself (German: *Grundrechtsschranke*). Naturally, the exercise of personal freedoms and rights is restricted by the rights and freedoms of others. There is also a possibility of fundamental duties that arise from the needs of the society that person belongs to – for instance, the obligation to pay taxes.[5]

In the authoritarian states, often vague and undefined clauses in constitutions have been and still are used to enable a broad interpretation, while restricting

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[2] E.g. Estonian lawyers and officials of the Ministry of the Interior, Eugen Maddison and Oskar Angelus published the text of the constitution with commentary: Maddison E., Angelus O. Das Grundgesetz des Freistaats Estland vom 15. Juni 1920. Uebersetzt und mit Erlauterungen und Sachregister [The Constitution of the Republic of Estonia of 15 June 1920. Translated and with explanations and subject index]. Berlin: Carl Heymanns Verlag 1928. Palvadre A. [review:]. Prof. Dr. Stephan v. Csekey: Die Verfassungsentwicklung Estlands 1918–1928. Oigus [The Law], 1929, No. 1, pp. 24–27.

[3] Clark R. T. Baltic Politics: the Esthonian Constitution. New Europe, 12.08.1920, p. 109. Clark R. T. The Constitution of Estonia. Journal of Comparative Legislation and International Law, 1921, No. 4, pp. 249–250. Headlam-Morley A. The New Democratic Constitutions of Europe. A Comparative Study of Post-War European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, The Kingdom of The Serbs, Croats and Slovenes and the Baltic States. London: Oxford University Press, 1929, pp. 149–150.

[4] Laaman E. Isik ja riik Eesti pohiseadustes [Person and state in Estonian Constitutions]. Oigus, 1937, No. 3, pp. 102–103, 106 (in Estonian); Siimets-Gross H. Social and Economic Fundamental Rights in Estonian Constitutions Between World Wars I and II: A Vanguard or Rearguard of Europe? Juridica International, No. 10, 2005, pp. 136–137; about historical context Luts-Sootak M; Siimets-Gross H. Die "menschenwuerdige Existenz" im Grundrechtskatalog des Grundgesetzes von 1920 der Estnischen Republik [The "existence in accordance with human dignity" in the catalog of fundamental rights of the Basic Law of 1920 of the Estonian Republic]. In: Wege zur Rechtsgeschichte: Die rechtshistorische Exegese. Wien-Koeln: Boehlau, 2022, pp. 204–210; and about establishing the first fundamental rights in general Siimets-Gross H, Leppik M. Estonia: First Landmarks of Fundamental Rights. In: First Fundamental Rights Documents in Europe. Cambridge-Antwerp-Portland: Intersentia, 2015, pp. 295–308.

[5] See for the general theory and for the constitutional restrictions Hofmann H. Grundpflichten und Grundrechte. Handbuch des Staatsrechts [Fundamental duties and fundamental rights. Handbook of Constitutional Law]. Vol. 9, 3rd edition. Heidelberg: Muller, 2011, pp. 699–730. Wildhaber L. Limitations on Human Rights in Times of Peace, War and Emergency: A Report on Swiss Law. In: The Limitation of Human Rights in Comparative Constitutional Law. Yvon Blais, 1968, p. 55.

person's rights and freedoms. Furthermore, authoritarian regimes have borrowed strategies and ideas from each other – contemporary political scientists call it "authoritarian learning".[6] In Estonia, this borrowing concerned, *inter alia*, two concepts: "common good" and "loyalty to the state". In a most radical and elaborate way the "common good" principle was used in Germany.[7] For both concepts, the direct example for the Estonian Constitution of 1937 was the Polish Constitution of 1937.[8] Estonian authoritarian State Elder, Konstantin Pats, went to Poland himself specially to study it.[9] The section about loyalty to the state in the Polish Constitution was formulated in following manner: "It is the duty of the citizens to be loyal to the State and faithfully to discharge obligations imposed upon them by it" (Art 6)[10]. It was preceded by the border clause of "common good": "The limit of these liberties [of citizens] is the common good".

The desire to restrict citizens' rights for the benefit or good of the state or, what seems to be even less harmful, for the common good, once more emerges today, one example being the so-called "common good constitutionalism" of "classical tradition" by Adrian Vermeule to combat the "legitimate societal threat of modern liberal individualism" and reintroduce the "spiritual common good".[11]

On the basis of Estonian constitutions of interwar period, the author in the present paper analyses, first of all, the title of the basic rights chapter as the first indicator of the fundamental rights policy of the relevant constitution. Secondly, she exemplifies the risks of such a constitutional provision on the basis of the formulations of the drafts of "common good" and "loyalty to the state" section of the Estonian Constitution of 1937, as well as on the contemporary discussions.

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6 See for further references and background Veski L. Interwar transnational authoritarianism and the case of "social solidarity". Peripheral Histories. 2023. Available: Interwar transnational authoritarianism and the case of "social solidarity" (peripheralhistories.co.uk) [viewed 27.11.2023.].

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8 See a thorough analysis of the similarities and differences with further references: Siimets-Gross H. Duty of Loyalty to the State or the 'Polish Section' in the 1937 Estonian Constitution. Miscellanea Historico-Iuridica, 2021, Vol. XX, z. 2, pp. 113–128.

9 01.05.1935. Laamani paevik 1922–1940 [Laaman's Diary 1922–1940]. Akadeemia 2004, Vol. 2, p. 2777.

10 Translation into English used here and afterwards from: Constitution of the Republic of Poland 1935. Available http://libr.sejm.gov.pl/tek01/txt/kpol/e1935-r1.html [viewed 25.10.2023.]. A provision that "Fidelity to the Republic of Poland is the first duty of a citizen" existed already in Article 89 of Poland's 1921 Constitution. The text of the Polish Constitution of 1921 has been used here and afterwards from: Constitution of the Republic of Poland, 17 March 1921. In: The new constitutions of Europe, Garden City-New York: Doubleday, Page & Company 1922, pp. 405–425. Available: http://libr.sejm.gov.pl/tek01/txt/kpol/e1921.html [viewed 06.11.2023.].

11 Vermeule A. Common Good Constitutionalism. Medford, MA: Polity Press 2022. The short presentation of arguments and counterarguments with further references see Casey C., Vermeule A. Myths of Common Good Constitutionalism. Harvard Journal of Law and Public Policy, Vol. 45, No. 1, 2022, pp. 103–146, Harvard Public Law Working Paper No. 22–09, Available at SSRN: https://ssrn.com/abstract=4030763 [viewed 28.11.2023.].

1. Title of the Fundamental Rights Chapter as a litmus test

While the title of a constitutional chapter does not *prima facie* seem to be of the paramount importance, it actually yields the first hint concerning the role of fundamental rights and their relationship with restrictions or obligations in a concrete document. The author illustrates this with an example of the Estonian Constitution of 1920[12], where the chapter was entitled: "About Fundamental Rights", which was very characteristic of the general aim and essence of it. Basic duties were not mentioned, although some of them were provided in later chapters.

The word "duties" was left out from the title quite by chance: almost at the final stage of the procedure of adopting the Constitution, during the second reading of the text at the plenary session in the Constituent Assembly, the Labour Party member and an advocate, Karl August Baars, proposed that the word "duties" – which was then included into the text – should be deleted:

> *I think that the word "duties" in the title of this chapter is completely superfluous. The whole chapter is only about the rights that citizens of the Republic of Estonia have, and, if I am not mistaken, the manuscript issued by the first and second commission did not contain this word. My proposition it to leave this word "duties" out.*[13]

Karl A. Baars was correct, there were no obligations listed in the chapter. At first, there were some counterarguments, e.g., that any concept of a right contains within itself a concept of obligation as well. After discussing the chapter to the end, the proposal of Baars was accepted.[14]

At that time, such a title of the fundamental rights chapter was quite unique[15] and characterises the overall liberal orientation and emphasis of that constitution. Just a few examples. In the Fundamental Laws of the Russian Empire

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[12] Riigi Teataja [State Gazette; hereinafter – RT]. RT 1920, 113/114, 243. English translation in: The Constitution of the Esthonian Republic (passed by the Constituent Assembly on 15 June 1920). Tallinn (Reval): Uhiselu 1924.

[13] Sitting of the Constituent Assembly 03.06.1920. Minutes No. 136. In: Asutawa Kogu protokollid nr. 120–154. IV. istungjark [Minutes of the Constituent Assembly No. 120–154. 4. Session]. Tallinn: Taht, 1920, rows 712–713.

[14] Ibid., row 713.

[15] Of the states that got their independence after the First World War, the Finnish Constitution or Form of government (as it was called) of 1919 stressed the legal protection of citizens in the chapter "General Rights and Constitutional Protection of Finnish Citizens". Text used from: The new constitutions of Europe. Garden City-New York: Doubleday, Page & Company 1922, pp. 468–486. Also the Constitution of Lithuania of 1922 did not mentioned the obligations in the title of the fundamental rights chapter: "The Lithuanian Citizens and their Rights". Available Verfassung des Litauischen Staates (1922) (verfassungen.eu) [viewed 25.11.2023.].

of 23 April 1906[16] the chapter was called: "Rights and Obligations of Russian Subjects" in which the obligations were listed first. The importance of duties was even bigger in the Polish Constitution of 1921, where the chapter had the following title: "General Duties and Rights of the Citizen" and after two articles about the citizenship stated six duties before citizen's rights. First of them was fidelity to the Republic of Poland (Art. 89). The German Weimar Constitution had a chapter called "Fundamental Rights and Duties of Germans".[17]

In the context of the same Weimar constitution, Joachim Rueckert, Professor Emeritus at the University of Frankfurt am Main, draws attention to the "Janus-face" of such a regulation technique. In a case where the rights and duties stand next to each other, the problem arises, how to determine the cases when do the rights apply, and when the obligations do – and which of those were to be preferred in legal practice. Both cannot be preferred at the same time. Whether to give preference to obligations or rights as judge is weighing them, will remain for him to decide and it will only become clear in hindsight.[18] However, if rights – and only rights – have the priority, it is much more difficult to restrict fundamental rights using the obligations. Nevertheless, if both are equal, the scope of rights, as well as obligations and their relationship remains unclear and depends on the personal conviction of the court or judge.[19] In conclusion, this seemingly quite unimportant aspect gives a lot of information about the general aim and trend of the fundamental rights policy.

At the time of the second Constitution of Estonia of 1937, the political and social situation was quite different. On 12 March 1934, the authoritarian coup d'etat had taken place under the leadership of the State Elder Konstantin Pats.[20]

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16 27805. In: "Polnoe sobranie zakonov Rossijskoj Imperii" [Full collection of laws of the Russian Empire], Sob 3, T. XXVI, Otdelenie 1, Sankt Peterburg 1906. It was actually the redaction of the constitutional laws of 1832 ("Osnovnyye Gosudarstvennyye Zakony Rossiyskoy Imperii" [The main State Laws of the Russian Empire]) that were published in Svod Zakonov Rossiyskoy Imperii. Tom pervyi. Osnovnyye Gosudarstvennyye Zakony. Sankt Peterburg. I could use the edition of 1857, pp. 1–20. See about the constitutional history of Russia of 20th century: Schulz L. Das Verfassungsrecht Russland [The constitutional law of Russia]. In: Russlands Aufbruch ins 20. Jahrhundert, Freiburg: Walter-Verlag 1970, p. 47.

17 Constitution of the German Reich of 11 August 1919. In: The new constitutions of Europe, Garden City-New York: Doubleday, Page & Company, 1922, pp. 176–212 (here p. 198).

18 Rueckert J. Weimars Verfassung zum Gedenken [In memory of Weimar's Constitution]. Rechtshistorisches Journal 1999, No. 18, p. 218.

19 Siimets-Gross H. Pohioiguste ja pohikohustuste vahekord Eesti ja Poola pohiseadustes – paralleelne voi vastandlik areng? [The Relationship between Basic Rights and Basic Duties under the Estonian and Polish Constitutions: Parallel or Divergent Development?]. Riigioiguse Aastaraamat [Annual Book of Constitutional Law], 2021, No. 2, p. 62.

20 Kasekamp A. I. The Rise of the Radical Right, the Demise of Democracy, and the Advent of Authoritarianism in Interwar Estonia. In: War, Revolution, and Governance: The Baltic Countries in the Twentieth Century, Boston: Academic Studies Press, 2018, pp. 76–100. See also Luts-Sootak M., Siimets-Gross H. Eine rechtmaessige Diktatur? Estlands Verfassungsentwicklungen in der Zwischenkriegszeit des 20. Jahrhunderts [A legitimate dictatorship? Estonia's constitutional developments in the interwar period of the twentieth century]. Parliaments, Estates and Representation, 2021, Vol 41:2, pp. 201–225, DOI: 10.1080/02606755.2021.1928863.

When the Constitution was proclaimed on 17 August 1937, the change brought by State Elder's politics was also reflected in the changed title of the chapter on basic rights and it now contained obligations as well: "Rights and Duties of Estonian Citizens".[21] One of the main authors of the first drafts of the constitution, Johannes Klesment proudly noted:

> *For the first time the duties are stressed in our Constitution and they are not left hidden in comparison with the large scope of the rights of citizens.*[22]

The Constitution of 1937 is characterised generally by the restriction of fundamental rights and the increase of fundamental obligations, but the most unpredictable clause of the Constitution was the section about the loyalty to the state or common good, which was to affect the whole chapter by its very nature, because it was formulated as a general border clause on fundamental freedoms.

2. Common good and loyalty to the state: Struggles about the wording in the committees

K. Pats first set up an informal committee to draft the Constitution, three members of which were lawyers and had a quite close relationship with State Elder. State Elder Pats demanded that the new constitution of Poland of 1935 should serve as the model.[23] In December 1936, the six members of the Committee on the Development of the Official Draft Constitution were appointed by State Elder and that included all three members of the informal committee. One of the members in both committees, lawyer and Editor-in-Chief of the Vaba Maa newspaper, Eduard Laaman[24], turned out to be one of the biggest critics of common good clause and its wording. The draft was essentially completed by mid-February 1937.

In the beginning, the idea was to formulate the section in a very short and "imperative mood": "[citizens] are loyal to the state and will fulfil [the duties]". After another member of the committee, lawyer and Counsellor of the Ministry of

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[21] RT 1937, 71, 590. Constitution of the Republic of Estonia with the Decision of the Estonian People for convening the National Constituent Assembly and the Law for the Transition Period. Official edition, Tallinn 1937.

[22] Minutes No. 4. The meeting of the General Committee to review the draft Constitution of the First Chamber of the National Assembly, on 5 Mai 1937. In: Rahvuskogu Esimese Koja pohiseaduse eelnou labivaatamise uldkomisjoni koosolekute protokollide arakirjad [The copies of the minutes of the meetings of the General Committee to review the draft Constitution of the First Chamber of the National Assembly]. In: National Archives, (further "NA") ERA.4408.1.91, p. 12.

[23] See more Siimets-Gross H. Duty of Loyalty to the State or the 'Polish Section' in the 1937 Estonian Constitution. 2021, pp. 117–118.

[24] See about Laaman and his ideas in 1930s: Veski L. Towards stronger national unity: statist ideas in Estonian nationalism during the "Era of Silence" (1934–1940). Journal of Baltic Studies, 2023, pp. 16–17. DOI: 10.1080/01629778.2023.2190991; thoroughly – Veski L. Towards a stronger national unity: organic-statist ideas in 1930s Estonia. Doctoral Theses. Glasgow: University of Glagow, 2021 [manuscript used with permission of author], pp. 185–186.

Justice, Johannes Klesment, compared the wording to Hitler's order: "*Die deutsche Frau raucht nicht*" [A German lady does not smoke][25], propositions were made to formulate the article in a milder way.

Firstly, the emphasis was on obligations imposed by the state:

> *§ 9. It is the supreme duty of Estonian citizens to be loyal to the state and to fulfil all the obligations imposed on them by the state. Estonian citizens exercise their freedoms and rights in accordance with the common good of the state and the people.*[26]

According to this, freedoms and rights could also be exercised only if they were in accordance with the common good[27], which actually opens a gateway to arbitrariness. The questions what the content and scope of the "common good of the state and the people" is and which exercise of freedoms and rights is in accordance with them are left open (German: *Generalklausel*[28]). Accordingly, those questions are left to the state officials or courts to decide on the basis of values or "guiding principles"[29] – as was in Nazi-Germany. In reality, it will be the question of the power of the state to rule without restriction over citizen's rights and freedoms.[30]

From the discussions in the committees, one can see that Pats was not the only one who favoured restricting rights and freedoms and an authoritarian type of constitution – even if this stance was denied openly.[31] The first discussions were described by Laaman in his diary on 26 January:

> *I [Laaman] propose that the clause on the common good of § 8 be omitted altogether from the basic rights of a citizen, or that it would be defined more concretely, because otherwise it will render the Constitution authoritarian. Kukke and Klesment got upset. Kukke says that without the imposition of duties, there will be a disorder, Klesment says that if this § [section] is to be deleted, then the whole Constitution must be redone. Also Palvadre thinks there is no staying with the liberalist constitution. Klesment notes that they*

[25] Minutes No. 14. The meeting of the Committee for the Elaboration of the Draft Constitution, appointed by the State Elder, midweek on 30 December 1936 at 5 p.m. in the meeting room of the State Chancellery. In: NA ERA.31.3.735, p. 83.

[26] Minutes No. 22. The meeting of the Committee for the Elaboration of the Draft Constitution, appointed by the State Elder, on Saturday 9 January 1937 at 5 p.m. in the meeting room of the State Chancellery. In: NA ERA.31.3.735, p.125. This is also the case in the minutes of 17.1.1937, p. 155.

[27] See for the common good clauses Stolleis M. 1974.

[28] About the general clauses and methodology of using them in private law see, with further references, Haferkamp H.-P. On the German History of Method in Civil Law in Five Systems. German Law Journal, 2016, Vol. 17, No. 4, pp. 543–578.

[29] For "guiding principles" see Haferkamp H.-P. 2016, p. 560 ff.

[30] About the use of "*Generalklauseln*" as back-doors see Stolleis M. 1974, pp. 87–93. About the methods of interpretation in national socialist time: Ruethers B. Die Unbegrenzte Auslegung [The Unlimited Interpretation]. 9. Aufl. Tuebingen: Mohr Siebeck, 2022.

[31] About discussions at the period see Veski L. Towards stronger national unity: statist ideas in Estonian nationalism during the "Era of Silence" (1934–1940). 2023, pp. 1–23.

did not think of an authoritarian order but agrees with me that this [wording of the section] recalls Nazi [principle] Gemeinnutz vor Eigennutz (the good of community has priority over the good of individuals).[32]

The Estonian word *huvang* used in those drafts generally means "welfare", "well-being", "prosperity", but in the context of state and people it is translated into English as "benefit" or "common good". It seems to me that Laaman intentionally called the section "common good" section, in order to draw the attention of others to the similarity of the clause to Nazi-German *Gemeinwohl*.

In 1936/37, there were steady awareness and comparison with the Nazi Germany and the will to avoid it. The aim was to have an "guided democracy", which should be an illiberal democracy with firm authority of the state based on democracy and human rights, not a national-socialist or fascist state.[33]

How the transformation of private interests into the public happen was described by Michael Stolleis: "All activities of the state, organised groups and individuals find their reason and justification in the orientation towards the "good of the nation". Where this link cannot be established, legitimacy is missing and therefore the possibility of public enforcement".[34] At the time when the Nazis came to power, they did not want to change much the legal structures, so the "common good clauses" were used in Germany as non- and anti-legal categories for restricting or cancelling those clauses of the norm that protect an individual (normative *Schutzbereiche*). So, the legal order in force with its articles of law was still hindering the direct enforcement of the "common good" clauses.[35] In the case of the "common good" clause as constitutional norm, according to the hierarchy of norms the normal legislation would not hinder its influence and applicability. Even more, it could be seen as "highest principle of law" that derogates all other norms in force. Both principles, the "loyalty" and "common good" were identified as "core" values of Nazi-Germany.[36]

Due to some contra-arguments, "again by Mr. Laaman", the wording was changed and the imposition of obligations by law was added. As a consequence,

[32] 26.01.1937, Laamani paevik 1922–1940, p. 459. See the *Gemeinnutz vor Eigennutz* in National Socialist Programme (25-Punkte-Programm). Available: http://www.documentarchiv.de/wr/1920/nsdap-programm.html [viewed 28.11.2023.].

[33] See for the "guided democracy" ideas and debates more in Veski L. Towards stronger national unity: statist ideas in Estonian nationalism during the "Era of Silence" (1934–1940). 2023, pp. 14–17. For the official attitude about the Fascism: Napolitano R. Italian cultural diplomacy in Estonia during the interwar period: from the de jure recognition to the Molotov-Ribbentrop pact (1921–1939). Journal of Contemporary Central and Eastern Europe, 31.10.2023. DOI: 10.1080/25739638.2023.2275889, pp. 6–10 [viewed 28.11.2023.].

[34] Stolleis M. 1974, p. 301.

[35] Stolleis M. 1974, pp. 295–305, esp p. 301.

[36] So Lange H. Mittel und Ziel der Rechtsfindung im Zivilrecht [Means and goal of legal determination in civil law]. Zeitschrift der Akademie fuer Deutsches Recht, 1936, p. 924.

some reference to the requirements of the rule of law was introduced and the previous restriction on the exercise of freedoms and rights has been deleted:

> *It is the supreme duty of Estonian citizens to be loyal to their state and to fulfil all obligations imposed on them by law in the interest of the state and society, and to contribute to the benefit of the state and of the people*[37].

Although the formulation was softened, there was still the risk of arbitrary use of means by the state, if the supreme duty "to contribute to the benefit of the state and of the people" was not fulfilled. The cases when this consideration comes up, are decided by the state – the officials or courts. In fact, under the pretext of anti-statism, it could make the exercise of fundamental rights impossible.

Finally, the common good clause was still included in the draft presented to the State Elder on 29 January 1937. After that, State Elder Pats himself with Klesment and state secretary Karl Terras worked on the draft and it became "corrected and complemented according to the instructions" of State Elder.[38] On 8 February 1937, it was formulated, as follows:

> *§9: It is the supreme duty of Estonian citizens to be loyal to the state and to conduct their entire activities in accordance with the benefit of the state and the people.*[39]

Before the draft was presented to National Assembly, the government worked on the draft for four days and "more than 30 hours".[40]

3. Without "common good" clause: Discussions in the National Assembly

As State Elder presented the draft to the National Assembly on 23 February 1937, the section no longer included the "common good", but only contained "loyalty to the state":

> § 8. *It is the duty of Estonian citizens to be loyal to the state, to defend the state and to contribute to the development of the state. Every citizen must bear the obligations imposed on him or her by law. Any act detrimental to*

[37] Minutes No. 41. The meeting of the Committee for the Elaboration of the Draft Constitution, appointed by the State Elder, on Thursday 28 January 1937 at 5 p.m. in the meeting room of the State Chancellery. In: NA ERA.31.3.735, p. 237.

[38] Klesment J. to Mr. State Elder on 8 February 1937. In: Eesti Vabariigi pohiseaduse eelnou [Draft of the Constitution of Estonian Republic]. NA ERA.31.3.735 [not paginated]. The author thanks Hannes Vallikivi for the reference.

[39] Eesti Vabariigi Pohiseadus [Constitution of the Republic of Estonia]. In: NA ERA.31.3.735. (not paginated, p. 1 of the draft).

[40] Klesment J. Uue pohiseaduse algeelnou [The intial Draft of new Constitution]. In: Pohiseadus ja Rahvuskogu [The Constitution and the National Assembly]. Tallinn: Rahvuskogu 1937, p. 83. The author thanks Hannes Vallikivi for the reference.

> *the state and its development shall be prevented by the state by means of legal remedies*[41].

After a referendum about drafting the new constitution, bicameral Estonian National Assembly convened between 18 February 1937 and 17 August 1937. On the election of 80 members of the First Chamber, the opposition parties were not allowed to participate. The Second Chamber consisted of 40 representatives of corporate chambers.[42]

According to E. Laaman, the introduced changes still could not hide the fact that this section was similar to

> *the section 10 of the new Polish Constitution, which gives normative shape to the declaration in section 5(3) of the same Constitution that the limits of citizens' freedoms are determined by the general interest, thus making the governmental power authoritarian*[43].

Compared to the previous, more declaratory version proposed by Laaman, this wording has been aimed directly at restricting the exercise of basic rights or preventing any detrimental conduct that could be harmful to the state. Since the prevention of harmful acts is in the same section as the duty to bear obligations and the duty of the loyalty to the state, non-fulfilment of those obligations can be easily interpreted as an act which is detrimental to the state, as it is again vague and left open to interpretation.

Eduard Laaman also criticised the third phrase of this draft: "Any act detrimental to the state and its development is hindered by the state power by means of legal remedies." His following remark shows that Estonian lawyers of the time were well aware of contemporary German theory and practice. Laaman argued that "the general interest, the common good of the state and the people [...] is one of the high moral norms", but not legal, since the legal content of the norm includes both obligation and "demand". According to Laaman, the problematic question is who determines the general interest, who is justified to demand for the implementation of the general interest and what the general interest is. It should be done by the government or a parliamentary majority. However, "this clause stands in authoritarian constitutions, and there it has a definite point. The authoritarian principle itself is expressed here. An authoritarian government is

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[41] Laaman E. Kodaniku põhioigused ja kohused [Fundamental rights and obligations of a citizen]. In: Pohiseadus ja Rahvuskogu [The Constitution and the National Assembly]. Tallinn: Rahvuskogu, 1937, p. 358. In depth with similar conclusions – Veski L. Towards a stronger national unity: organic-statist ideas in 1930s Estonia. Doctoral Thesis, pp. 184–202.

[42] See about the referendum and National Assembly more Luts-Sootak M., Siimets-Gross H. 2021, pp. 218–221.

[43] Laaman E. 1937, p. 358.

at every moment empowered to explain what the general interest is"[44]. In Laaman's opinion, in the case of a democratic regime, this is not possible.

According to the journalist Eduard Salurand, the loyalty to the state section "stresses [...] only the obligation of citizens against the state and is therefore one-sided and should be complemented by the phrase stating the obligations of the state." [45]

> *It cannot [...] be accepted that citizens' duties have the priority over all, so that the state as an abstraction can absorb all the rights of the citizen. After all, the state is there for the sake of the citizens, not the citizens for the sake of the state.*[46]

He did not consider the final phrases of loyalty to the state section concerning the fulfilment of obligations imposed by law and the prevention of harmful activities necessary.[47] Likewise, the Chairman of Workers Union, Eduard Riisna remarked that such a clause in constitution "is lowering of our own value, if [...] we have to underline it", and proposed to delete the first phrase.[48] Laaman and Professor of International Law and Representative of the University of Tartu at the National Assembly Ants Piip voiced a warning about the consequences of the in such manner formulated section during the discussions in the National Assembly and asked to reconsider its inclusion in the constitution.[49]

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[44] Second joint meeting of the Committees on draft parts of the Constitution of the First and Second Chambers of the National Assembly. On 2 March 1937. In: Rahvuskogu uldkoosolekute ja pohiseaduse eelnou-osade komisjonide uhiste koosolekute stenograafilised aruanded [Stenographical reports of the general meetings of the National Assembly and of the joint meetings of the Committees on draft parts of the Constitution]. Tallinn, 1938, p. 35. See similarly, later – Schubert G. The public interest, a critique of the theory of a political concept. Glencoe, Ill: Free Press, 1960, p. 200f.

[45] Salurand E. Kodanike põhiõiguste ja kohustuste kusimusi [Issues of citizen's basic rights and obligations]. ERK, 1937, Vol 2., p. 31.

[46] Ibid.

[47] Ibid., p.34.

[48] Riisna E. II reading in the National Assembly. Rahvuskogu. Esimene koda. Stenograafilised aruanded [The National Assembly. First Chamber. Stenographic reports]. From 19 February to 13 August 1937. Tallinn, 1938, p. 88.

[49] Laaman E. Rahvuskogu Esimese ja Teise Koja Pohiseaduse eelnou-osade komisjonide 2. uhine koosolek. 2. martsil 1937 [Second joint meeting of the Committees on draft parts of the Constitution of the First and Second Chambers of the National Assembly. On 2 March 1937]. In: Rahvuskogu uldkoosolekute ja pohiseaduse eelnou-osade komisjonide uhiste koosolekute stenograafilised aruanded [Stenographical reports of the general meetings of the National Assembly and of the joint meetings of the Committees on draft parts of the Constitution], Tallinn: Rahvuskogu 1938, p. 35 and Piip A. Rahvuskogu Esimese ja Teise Koja Pohiseaduse eelnou-osade komisjonide 3. uhine koosolek. 3. martsil 1937 [Third joint meeting of the Committees on draft parts of the Constitution of the First and Second Chambers of the National Assembly. On 3 March 1937], ibid., p. 46.

The so-called "Loyalty to the State Section" was not entirely excluded from the 1937 Constitution, ultimately remaining worded, as follows:

> § 8. *The supreme duty of every citizen is to be loyal to the Estonian State and to its constitutional order. Legal obligations and duties devolve upon the citizen in consequence of his membership in the Commonwealth. This membership also gives rise to the citizen's legal rights and freedoms.*

Conclusions

1. During the debates in different committees and the National Assembly the wording of "the Loyalty to the State Section" became more precise. Firstly, the "best" ideas of Polish and Nazi-German law were introduced into the Estonian Constitution of 1937. Apparently, during the sittings of government, before the draft was presented to National Assembly on 23 February 1937, the vague clause "for the benefit of the state and the people" was omitted.
2. In addition, the possibility for the state to use legal remedies in the event of damage to the state and its development was deleted from the section. As such, it would have given the courts and the executive power a free hand to interpret the damage to the state and its development broadly.
3. It is this part of the provision that changed the most during the discussions and, once again, the rights and obligations arising from the national society were added for the sake of balance. Although the possibility to interpret the expression "loyalty to the state and to the constitutional order" as restricting the basic rights remained, the wording of Section 8, which was finally included in the Constitution, gave far fewer possibilities for abuse of power than the earlier versions, which used the concept of the common good of the state and of the people. However, there was still an emphasis on obligations, which clearly had been given an advantage over rights. Nevertheless, how the Section 8 as a whole was applied in practice has not yet been examined and, in any case, the period of application was too brief.
4. The "common good" or "loyalty to the state" section was one of the most debated fundamental rights clauses of the 1937 Constitution – in the committees, as well as in the National Assembly. Both were largely trying to avoid arbitrariness of the state and authoritarian governance, which could be exercised on the basis of this section. One of the main critics of the clause was journalist and lawyer Eduard Laaman who actually belonged to the inner circle State Elder Konstantin Pats. Taking into account his closeness to State Elder, this is surprising. However, it seems to indicate that within the trusted circle of people – when opposition was excluded – a free discussion was possible and even influential. The omission of the "common good" part of the section could be explained by the desire to create the impression that that

Konstantin Pats' authoritarian regime was intent on abandoning authoritarian rule.[50] At the same time, without direct pressure from State Elder, the debates followed his general guidelines and wishes, e.g. regarding the amendment of the chapter on fundamental rights.

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[50] This claimed, e.g., Laaman in his diary of 30.12.1936. Laamani paevik 1922–1940, p. 457.

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LIMITING THE RIGHT TO FREEDOM OF MOVEMENT AS ONE OF THE INSTRUMENTS OF POWER IN CZECHOSLOVAKIA IN THE 20TH CENTURY – "BEHIND CLOSED BORDERS – RESTRICTIONS IN 1945–1989 CZECHOSLOVAKIA"

Key words: emigration, borders, human rights, citizenship, passport, criminal law

Summary
The current article is dedicated to the subject of restrictions on the freedom of movement of citizens during the latter half of the past century as a result of the totalitarian communist regime. Unlike the usual purpose of borders, which is to protect the population from the enemy, in this case, the function of borders is different, namely, to prevent the population from leaving the state territory. This restriction on freedom of movement was a key tactic in maintaining control over the population, stifling opposition, and enforcing ideological conformity. The article summarizes the ways how these restrictions were legally addressed in constitutional, administrative and criminal law.

Introduction

The movement of people is one of their most important needs that have shaped humanity since the dawn of history. By moving from place to place, people have gained sustenance, fled from danger, whether in the form of natural disasters, diseases or enemies, or, conversely, acquired wealth. The restriction of this freedom has always been regarded as an extraordinary occurrence, contrary to the very nature of man. There are usually three (often intertwined) phenomena involved in this issue. The first is emigration – leaving the "mother" country, the country of origin or, literally, the homeland. Secondly, it is immigration that is connected with this matter, as it deals with the movement of people from one country to another with the intention of settling in the new country. Finally,

under certain circumstances, we can also identify the process of simple return of citizens to their country of origin. One of the main aspects pertaining to limiting the movement of the state population is the existence of borders. The idea of forming barriers between countries is as old as history itself. It has often taken on the form of natural borders, meanwhile, human-erected walls built to keep away the enemy or neighbour were known even in ancient times. Unsurprisingly, this phenomenon has survived until modern times. Borders constitute the opposite to freedom of movement. Over the last century, even if with some simplification, several periods can be distinguished, that determined the freedom of movement in Czechoslovakia.

1) The period between the creation of the new state in 1918, when the state borders were established on the basis of post-war international agreements (and the various national and cultural minorities that were in the original Austro-Hungarian confederation (Italians, Germans, Poles etc.) and the adoption of the Munich Agreement[1]. During this period, emigration was seen as a means of forming new communities abroad in order to strengthen the Czechoslovak economy in the world. Such communities emerged in France, Argentina, and Canada, and expanded the previously established communities in the USA. In this process, the economic crisis naturally played a significant role. This period also saw the immigration of people of diverse nationalities, especially after the Russian Revolution in 1917. In total figures, about 230 000 residents left the Czech lands during the period from 1920 to 1939.
2) The next period can be defined as the period of transfer of the population, which was based on the Munich Agreement from border areas to the hinterland after the occupation of the Sudetenland by the Nazi Germany and the establishment of the Protectorate of Bohemia and Moravia.
3) The third period is determined by the end of the WWII and 1948 – the return of the people to their homeland. After World War II, the reshaping of national borders and population exchanges further contributed to population movement in Europe. During 1945–1947 some 2 820 000 Germans were transferred from Czechoslovakia to Germany or Austria in three (organised as well as spontaneous) waves. The whole displacement of the German and Hungarian population took place on the basis of international and subsequent national agreements. The gradual emigration of the Jewish population to the newly established state of Israel is not considered in the current article.
4) The fourth phase is represented by the long period from 1948 to 1989, with various stages of liberalisation and, conversely, the tightening of control of individual freedoms by the communist regime.

[1] See Lukes I., Goldstein E. The Munich Crisis, 1938: Prelude to World War II. Psychology Press, 1999. Available: https://www.britannica.com/event/Munich-Agreement [viewed 03.04.2024.].

1. Citizenship and passports

Of crucial importance in terms of the free movement of people is the question of citizenship, which has gradually become a necessary pre-condition for obtaining the travel document needed for legal travel and subsequent return to the country of origin.[2] Citizenship serves as a foundational element of a person's relationship with their home country and its society. To simplify this concept to the core, it testifies who we are, where we belong.

The legal concept of state citizenship was established in the Czech lands by the Austrian General Civil Code, Patent No. 946/1811. It regulated citizenship within the framework of personal rights of individuals. Considering the events of the last century, it should be stressed that the outbreak of the WWI marked a turning point in passport policy on a global scale. New requirements for this document emerged, more closely specifying the person of the bearer. The passport was required for security reasons when crossing borders ("protection against espionage"), and was a part of the control mechanisms regulating the migration of the workforce out of the monarchy, and later – ensuring the prevention of soldiers' defection from the front abroad or to the enemy lines. After the establishment of Czechoslovakia, citizenship was regulated by the Constitution of 1920 in Art. 4. Travel issues and the passport agenda were regulated by the newly adopted Government Decree No. 215/1921 Coll. on Provisional Regulations and Passports, which was succeeded by Act No. 55/1928 Coll. on Passports. The latter exhaustively specified the conditions (§ 7) under which the issuing of a travel document could be refused (e.g. the applicant's incapacity, criminal proceedings against the applicant involving a prison sentence of more than 14 days or a fine of more than 5 000 Kc). Obtaining a travel document was otherwise possible. Emigration was regulated by Act No. 71/1922 Coll., on Emigration, which contained a fairly liberal regulation declaring that emigration is free within the limits of the law. It is necessary to emphasise that emigration did not, in itself, result in the loss of citizenship and therefore in the subsequent impossibility to return to the Republic. It is remarkable that this legal provision, although interpreted and applied differently, remained in force until 1965, i.e. for more than thirty years. The first restrictions on the issuing

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[2] Rychlik J. Prekracovani hranic a emigrace v Ceskoslovensku a vychodní Evrope ve 20. století [Border Crossing and Emigration in Czechoslovakia and Eastern Europe in the 20th Century]. Securitas Imperii, 2016, No. 29, pp. 10–72; Polnar S. Nedovolene opusteni republiky v kontextu bezpecnostního prava [Illegal leaving of the Republic in the context of security law]. Securitas Imperii, 2019, No. 1, pp. 224–253; Rychlik J. Ceskoslovensko v obdobi socialismu 1945–1989 [Czechoslovakia under Socialism 1945–1989]. Praha: Vysehrad, 2020; Kratka L., Mucke P. (eds). Za hranice sluzebne. Pracovni cesty z Ceskoslovenska do zahranici v letech 1945 az 1989 [Abroad on business. Work trips from Czechoslovakia abroad between 1945 and 1989]. Praha: Karolinum a Ustav pro soudobe dejiny AV CR, 2021; Kratka L., Mucke P. (eds). Turisticka odysea, Krajinou soudobych dejin cestovani a cestovniho ruchu v Ceskoslovensku v letech 1945 az 1989 [A Tourist Odyssey, Through the Contemporary History of Travel and Tourism in Czechoslovakia between 1945 and 1989]. Praha: Karolinum, 2018; Hanzlik J. Ceskoslovenska emigrace ocima tajnych materialu [Czechoslovak emigration as seen through the secret materials]. Securitas Imperii, 2002, No. 9, pp. 269–306.

of travel documents appeared in connection with the events of the Spanish Civil War and then with the crisis of 1938, when a government decree prohibited persons subject to military conscription from travelling abroad. During March 1939, fundamental changes were introduced in the direction of restricting the free movement of people within the established Protectorate Protectorate of Bohemia and Moravia and the Reich. Residents of the Protectorate were subject to Reich legislation, and the issue of travel documents soon became the responsibility of the German administration.[3] The regaining of independence of the Republic in 1945 theoretically meant the return of freedom of travel in the former extent, but this freedom was very relative. During this period, Sec. 7 of the Act No. 55/1928 Coll. was given a new content in the sense that travel was permitted only in certain specific cases (national interest, etc.). The entire problem must be viewed in the broader historical context of the political events of the time. As the consequence of the communist seizure of power in the country on 25th February 1948, the so-called Ninth-of-May Constitution was adopted. It replaced the former democratic Constitution of 1920. Part one of this constitution defined the freedom of movement in the scope of Sec. 7: "(1) Every citizen may take up domicile or sojourn anywhere within the territory of the Czechoslovak Republic. This right may be restricted only in the public interest on the basis of the law. (2) The right to emigrate abroad may be restricted only on the basis of the law."[4] Although this provision superficially appeared democratic, the reality was different – both as regards the movement within the national territory and the travel abroad. The fear of a greater brain drain to other countries, as well as the manpower shortage caused by the war and post-war events, gradually led to radical restrictions on travelling abroad and the subsequent criminalisation of travelling without the appropriate state permission.[5] Initially, this problem was regulated by the Act on the Protection of the People's Democratic Republic, No. 231/1948 Coll. Sec. 40 entitled "Unauthorised leaving of the territory of the Republic and failure to obey a summons to return": "A Czechoslovak citizen who, with the intention of harming the interests of the Republic, leaves the territory of the Republic illegally or, with the same intention, fails to obey a summons from the authorities to return to the territory of the Republic within a reasonable period of time to be determined by the authorities, shall be punished for the crime by a heavy prison sentence of between one and five years". Very closely related to this was the following Sec. 41 "Damaging the interest of the Republic abroad". At the beginning of 1949, a new Act No. 53/1949 Coll. on Passports was adopted, and the subsequent Decree of the Ministry of the Interior No. 439/1949 Coll. stipulated in Sec. 2: "Czechoslovak passports shall in principle be issued for the period of time strictly necessary

[3] The passport agenda was regulated by Reich Decree of Ministry of the Interior Verordnung fuer Bohmen und Mahren, 1939, No. 20, pp. 139–141.

[4] Constitutional Act of 9 May 1948, Constitution of the Czechoslovak Republic. Available: http://czecon.law.muni.cz/content/en/ustavy/1948/ [viewed 04.04.2024.].

[5] Kuklik J. Available: https://www.bookport.cz/e-kniha/czech-law-in-historical-contexts-1336641 [viewed 04.04.2024.].

for residence abroad, for a maximum period of 5 years...". Sec. 5 explicitly stated that "There is no legal right to the issuance, extension of time and extension of the territorial validity of the Czechoslovak passport". This Act still considered illegal crossing of the state border an offence, which was penalized by a fine. The reasons for emigration were mainly the fear of political repression against former members of the RAF, the army, political opponents, etc. At the same time, concern for family and friends who would remain behind the curtain was often a motive for conformity. Many people emigrated before the onset of communism and soon afterwards. Gradually, restrictions of administrative nature which precluded free travel were adopted. As the opportunities to legally leave the state diminished, there was an increase in illegal border crossings – either accomplished or curbed in the phase of preparation. The emigration of unwanted individuals was encouraged with a certain purpose. Between 1948–1950, Biannual Legal Plan to rewrite and codify the entire legal order on new socialist principles was adopted. The legal system served the interests of the ruling party, and legal principles were applied in a way that protected the regime.

2. Total restriction of freedom of movement and its subsequent criminalisation

After the Communists came to power, there was a gradual change in society in connection with its already obvious focus on the Soviet Union. Soviet advisers were involved in the drafting of legislation, which thus acquired an anti-democratic character. The Ministry of Justice drafted a new Criminal Code No. 86/1950 Coll., Criminal Administrative Code No. 88/1950 Coll. and related procedural regulations (Criminal Procedure Code No. 87/1950 Coll., Criminal Administrative Code No. 89/1950 Coll.). The Criminal Code in Sec. 95 specified the offence of leaving the state, as follows: "(1) Whoever leaves the territory of the Czechoslovak Republic without permission shall be punished by imprisonment for one to five years. (2) A Czechoslovak citizen who fails to obey an official summons to return to the territory of the Czechoslovak Republic within a specified period of time shall be punished in the same way."[6] The act of illegally crossing the border into a country of the so-called socialist bloc (Hungary, Poland) was usually treated as a misdemeanour.[7] The definition of this offence was contained in Title I of the Penal Code and therefore classified as a crime against the foundations of the Republic, which shows that this offence was clearly assigned a political character. In this context, the influence of Soviet criminal law is manifest. Sec. 58 of the RSFSR Penal Code, from 1927, included counter-revolutionary

[6] Zakon o trestnim rizeni soudnim (trestni rad) [Criminal Procedure Act (Criminal Code)], 01.08.1950. Available: https://www.psp.cz/sqw/sbirka.sqw?cz=87&r=1950 [viewed 04.04.2024.].

[7] Criminal Administrative Code No. 88/1950 of 12 July, section 100, punishes illegal crossing of state border without a valid travel document (unless it is a criminal offence) with a fine of up to 50,000 CZK or imprisonment of up to 2 months.

activities, espionage, terrorism, and various forms of anti-Soviet agitation.[8] Penal Codes of other republics of the Soviet Union also had articles of similar nature. It was seen as politically necessary to adopt a special Act No. 69/1951 Coll. on the Protection of the State Borders, that in Sec. 1 stated: "In order to ensure the peaceful construction of socialism in our country, it is necessary to effectively protect the State borders against the penetration of all enemies of the camp of progress and peace. The protection of the State frontiers is therefore the duty of every citizen."[9] Gradual changes and a certain liberalization in this area occurred in connection with de-Stalinization, when passport policy was slightly liberalized. In 1956, the most controversial legal norms from the period of criminal repression, personified by staged political trials, were repealed (including the Criminal Code and the Code of Criminal Procedure), or amended so as not to allow blatant illegality within the law. Citizens were progressively allowed to travel without a special permission visa to the countries of the socialist bloc. A new period of historical development began with the adoption of the so-called socialist constitution in 1960. The Constitution of the Czechoslovak Socialist Republic (Constitutional Act 100/1960 Coll.), was the third constitution of Czechoslovakia, and the second of the Communist era, declaring "Socialism has triumphed in our country!" Sec. 4 claimed: "The guiding force in society and in the State is the vanguard of the working class, the Communist Party of Czechoslovakia, a voluntary militant alliance of the most active and most politically conscious citizens from the ranks of the workers, farmers and intelligentsia"[10]. In light of this theory, the right to freedom of movement is no longer enshrined in the constitution, nor is the right to leave the country. The new Criminal Act No. 140/1961 Coll. elaborated the definition of this offence in Sec. 109(1): "Whoever leaves the territory of the Republic without permission shall be punished by imprisonment for six months to five years or by corrective measures or by forfeiture of property. (2) A Czechoslovak citizen who remains abroad without permission shall be punished in the same way. (3) A person shall be liable to imprisonment for a term of three to ten years or forfeiture of property who (a) organises the act referred to in paragraph 1 or 2, (b) commits such an act although he has been subject to a special order to keep a state secret, (c) transports across the border a group of persons or re-exports persons who leave the territory of the Republic without authorisation, (d) commits an act referred to

[8] Ugolovnyj Kodeks RSFSR redakcii 1926 [Criminal Code of the RSFSR 1926]. Edition 01.11.1956. Available: https://ru.wikisource.org/wiki/%D0%A3%D0%B3%D0%BE%D0%BB%D0%BE%D0%B2%D0%BD%D1%8B%D0%B9_%D0%9A%D0%BE%D0%B4%D0%B5%D0%BA%D1%81_%D0%A0%D0%A1%D0%A4%D0%A1%D0%A0_%D1%80%D0%B5%D0%B4%D0%B0%D0%BA%D1%86%D0%B8%D0%B8_1926/%D0%A0%D0%B5%D0%B4%D0%B0%D0%BA%D1%86%D0%B8%D1%8F_11.01.1956 [viewed 04.04.2024.].

[9] Zakon o ochrane statnich hranic [Law on the Protection of State Borders], 31.07.1951. Available: https://www.psp.cz/sqw/sbirka.sqw?cz=69&r=1951 [viewed 04.04.2024.].

[10] Vladni navrh trestniho zakona [Draft Criminal Law]. Narodni shromazdeni Ceskoslovenske socialisticke republiky, 1960–1964 National [Assembly of the Czechoslovak Socialist Republic, 1960–1964]. 01.01.1962. Available: https://www.psp.cz/sqw/sbirka.sqw?cz=140&r=1961 [viewed 04.04.2024.].

in paragraph 1 or 2 in a state of national emergency"[11]. This offence is also referred to in Sec. 167, which concerns the issue of failure to prevent the offence. The threat of criminal punishment upon return to the republic was undoubtedly the reason why, in the past, there were very few returns of nationals back to the republic, even if they were potentially interested in returning. Emigration was not only a political problem but also a social issue throughout the Communist regime. The individual periods differed particularly in terms of the possibilities to emigrate. If a citizen emigrated, proceedings were held against him *in absentia*, and consequently that person lost the possibility of returning to his native country without risking arrest.[12] This so-called "strictness" of the criminal law was several times remedied or amended by amnesties granted by the President[13], of the 13 that have been promulgated, only 4 were not related to the matter in question; 5 concerned the pardoning of the sentence without further conditions; 4 linked the pardoning of the sentence to further conditions, in particular – the return to the native country within a certain period of time.[14]

3. The border

One of the principal reasons for building a boarder is to ensure the safety of the inhabitants of the specific country by limiting the possibility of enemies to occupy or take over the country. In the case of the countries of the Socialist bloc, the purpose was different, namely, precluding the emigration of their own population from the state. Borders were heavily guarded and monitored to prevent defections, espionage, and infiltration by enemy agents. This led to the establishment of extensive border control measures, including checkpoints, patrols, and surveillance systems. After the Communist takeover in 1948, the most common direction of crossing the border was to the south towards Austria and Germany, which was often done on foot across the so-called "green border" with the help of local smugglers who knew the area. Gradually, various barriers were created in the form of a customs and later a border zone, which was guarded by the Border Guard. Act No. 286/1948 Coll. "On National Security" in Sec. 1(1) established the obligation of the national security authorities to protect the people's democratic establishment, to guard the state borders, to ensure the safety of persons

[11] Ibid. Available: https://www.psp.cz/sqw/sbirka.sqw?cz=140&r=1961 [viewed 04.04.2024.].

[12] Case No. 3, Tk 107/51: Sb. NS in issue number (volume) 3, 1952, p. 79: "Proceedings against a fugitive can be held only in such cases where the accused cannot be brought to trial because he is evading prosecution by staying abroad or by hiding. The following conditions must be fulfilled for such proceedings to be held: such proceedings may be held only against the person against whom the action has been brought, and only where that person cannot be brought to trial for one of the reasons mentioned above".

[13] Case No. 1, Tor 27/69Sb. NS in issue number (volume) 6, 1970 p. 277. Type: decision (Rt) of 25.02.1970.

[14] Rokosky J. Amnestie 1960 [Amnesty in 1960]. Pamet a dejiny, 2011, No. 1, pp. 36–54.

and property, etc. Act No.69/1951 Coll. "On the Protection of the State Borders" determined the legal framework for the service of the Border Guard, which it placed on an equal footing with members of the National Security Corps (SNB) and the army. Detailed regulations specified the occasions when officers could use weapons. At the same time, work began on closing the border with engineer-technical security devices. Within two years, triple-walled wire barriers were built, the middle roadblock was under high voltage and the surrounding terrain was mined. The border was guarded by well-armed and trained units of the Border Guard, composed of politically reliable and qualified individuals determined to prevent refugees from reaching the free part of Europe by any means. The Border Guard maintained longitudinally ploughed and softened strips of earth along the wire barriers to reveal the footprints of trespassers. The roads in the vicinity of the checkpoints were secured with concrete spikes connected by steel cable, and anti-tank barriers were erected in some locations. These measures were aimed at preventing the attempts to break through the wire barriers by heavy trucks and various fortified vehicles. Apart from a brief period after the intervention of Warsaw Pact troops in Czechoslovakia as the result of the Prague Spring in August 1968, when security authorities at border crossings took a benevolent approach towards citizens, other legal and sub-legal norms restricted the freedom of travel. Government Decree No. 114/1969, which responded to the emigration wave after the army intervention, adopted further provisions that restricted freedom of travel and, by refusing or withdrawing travel documents, prevented Czechoslovak citizens from visiting relatives who had emigrated. Organised tourist tours abroad or work trips were used for emigration. However, the number of emigrations effected in this way was not substantial. Likewise, illegal border crossing was classified as a criminal offence in the Criminal Code No. 140/1961 Coll. until 1989. Between 25 February 1948 and 17 November 1989, the members of the National Security Corps and the Border Guard killed at least 286 civilians by shooting, electrocuting them on electric wire barriers, exploding landmines, tearing them apart with service dogs and executing other interventions on all sections of the Czechoslovak border.[15] Thousands more were detained or injured by border guards and handed over for prosecution. As of 1976, this criminal conduct was in direct violation of Article 12, Part III of the International Covenant on Civil and Political Rights, which was legally binding for Czechoslovakia. Gradual changes occurred in connection with the so-called *perestroika* in the USSR and the leadership of A. Gorbachev. The right to leave the territory of the republic and to return to it at any time was to be included in the forthcoming constitution[16]. However, this did not happen as a result of the collapse of the communist regime in 1989.

[15] Vanek P. Pohranicni straz a pokusy o prechod statni hranice v letech 1951–1955 [Border Guard and attempts to cross the state border in 1951–1955]. Praha: Ustav pro studium totalitnich rezimu, 2008.

[16] Rychlik J. Prekracovani hranic a emigrace v Ceskoslovensku a vychodni Evrope ve 20. stoleti [Border Crossing and Emigration in Czechoslovakia and Eastern Europe in the 20th Century], Securitas Imperii, 29, 02/2016. p. 44.

Czechoslovakia lost approximately some 420 000–440 000 people between 1948 and 1990, 500 000 in total (hence, including persons with authorization to leave and emigrate).[17]

Conclusions

1. Due to mobility restrictions in Czechoslovakia, emigration was tightly controlled and used as a tool of power during the Communist era to maintain political control over the population, as well as constituting a means of eliminating the opposition. The Communist Party played an unquestionable role in the whole process of state administration. To this end, administrative, constitutional, and especially criminal law was used to provide sanctions for those who did not comply with the system. The interpretation of legal norms was often extensive and led to harsher punishment of individuals
2. To exercise its power, the Party used not only the legal system but the police force, army and border guards, but above all – the organs of State Security[18], which played a key role in controlling and surveilling the population. Passport controls were an essential part of any travel, even within the socialist bloc. Illegal means of emigration were the only possible ways of escape. As punishment these emigrants (in case of successful escape) automatically lost citizenship, private property that was in the country, and were usually subject to prison sentence.
3. The empirical experience of restrictions on freedom of movement and general surveillance of the population were typical features of totalitarian rule. The society had gradually come to terms with these restrictions and, in some cases, had learned to bypass them.
4. Despite various efforts of the regime to isolate the society from the rest of the developed world, it ultimately failed. The fall of the Iron Curtain marked a new stage in the development of the society.

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ADMINISTRATIVE EXPULSION CASES BEFORE THE SUPREME COURT OF ESTONIA 1920–1934

Key words: administrative expulsion, Supreme Court of Estonia, state of emergency

Summary

The Republic of Estonia inherited administrative expulsion law from the Russian Empire. During 1920–1934 (no expulsion cases were reviewed after 1934), the Supreme Court of Estonia reviewed 16 complaints involving foreigners and 36 complaints involving citizens. Foreigners were expelled for alleged sedition, disturbing the peace, hiding fugitives, smuggling or bootlegging, or constituting a burden to the economy recovering from the war. The Supreme Court upheld only one complaint because the authorities failed to provide reasons for the continuing banishment. Otherwise, the court accepted the unlimited discretion of the Interior Minister to expel foreigners.

The 1920 Constitution guaranteed citizens the freedom of movement and residence which could be curbed by administrative authorities for the protection of public health. Therefore, administrative expulsion of citizens was only possible as an emergency measure. Nationwide state of emergency lasted in Estonia from 1918 to 1922, after the attempt of the Communist coup from 1924 to 1926, briefly in 1933, and from 1934 until the occupation of Estonia in 1940. In between, there was state of emergency in certain parts of the country: in the capital city of Tallinn, its neighbouring municipalities, railways, and municipalities along the Estonian-Russian border. Citizens were banished from the areas under a state of emergency for alleged sedition, speculation, liquor smuggling, bootlegging, and brothel-keeping. The Supreme Court upheld complaints when the expulsion decision had no legal ground (in four cases) or was unreasoned or the authorities failed to prove the factual basis for the allegations (in another four cases). The court left the administrative authorities a wide margin of appreciation and accepted expulsion beyond clearly political reasons.

Introduction

Many stories, both real and fictional, tell of people often labelled as "politically untrustworthy" forced into administrative exile in Siberia by the Russian Empire. Unsurprisingly, similar methods were later adopted by Stalin and other

Soviet rulers to deal with those they considered "national enemies". What is more unexpected is that this practice of expelling people the government found troublesome continued outside Russian borders, in the democratic Republic of Estonia.

Fifty-two case files relating to administrative expulsion can be found in the archives of the Supreme Court of Estonia from the period before 1940. Expulsion decisions were adopted by the Interior Minister and complaints on ministerial decisions were reviewed by the Administrative Chamber of the Supreme Court as the first and only instance. In most of those cases, the court interpreted and applied legal norms Estonia inherited from Russia. In November 1918, the Estonian Provisional Government declared that all Russian laws that were in force in Estonian territory before 24 October 1917 continued to be in force until repealed or amended, provided they did not conflict with the Estonian constitutional acts. This paper aims to analyse, based on some of those cases, the legal grounds for expulsion and adherence by the Supreme Court to the principle of the rule of law that was part of the Estonian legal order at the time.

The Supreme Court of Estonia was established at the end of 1919 and started reviewing complaints in January 1920. The judgements examined here date between 1920 and 1934. In November 1934, the acting Head of State, Konstantin Pats, excluded complaints on the state of emergency measures from judicial review. Since expulsion was primarily an emergency measure (altogether, 32 examined cases were of such kind), expulsion matters were not judicable after November 1934.

1. Statistical overview of the examined cases

Thirty-six of the examined cases were brought to the court by Estonian citizens, while sixteen – by either foreign nationals or stateless persons (see Figure 1). The latter were mostly former Russian citizens who settled in Estonia from other parts of the former Russian Empire as the result of the Bolshevik Revolution and the Russian Civil War.

The court dismissed two expulsion complaints on formal grounds, upheld nine complaints, partially upheld four complaints, and fully rejected 37 complaints. The partially positive decisions, however, revoked administrative measures other than expulsion (e.g. police surveillance) or revoked expulsion of just some of the applicants. Therefore, those four judgements are deemed rejections, too. Two out of three complaints were upheld by the Supreme Court in both 1920 and 1921, two out of five in 1925, and one complaint every year during 1926–1928. The success rate was thus relatively modest: 17% on average and was in decline.

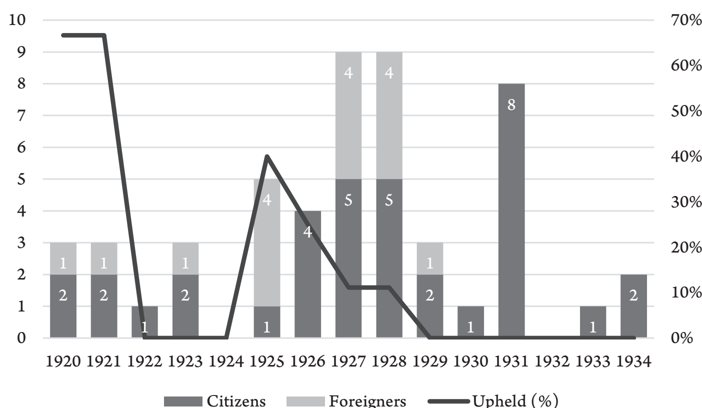

Figure 1. **Complaints to the Supreme Court of Estonia in expulsion matters and the outcome** (Source: case files in the National Archives of Estonia)

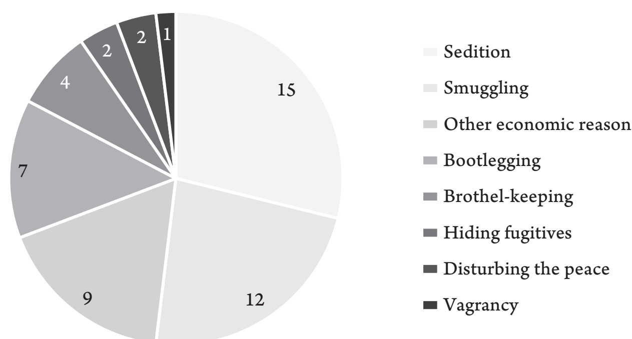

Figure 2. **Reasons for the expulsions challenged in the Supreme Court (number of cases)** (Source: case files in the National Archives of Estonia)

Reasons for challenged expulsions varied considerably (see Figure 2). Alleged sedition and agitating against the democratic government produced the largest number but still only 29% of the reviewed cases. People accused of smuggling (mostly shipping liquor to the Gulf of Finland on merchant vessels and then transporting it to the coast) and bootlegging (selling illegal alcohol) constituted the second and fourth largest groups (23% and 13%, respectively). The third largest group (17%) contained expellees for speculation and other similar economic reasons. Few cases were brought to the Supreme Court by people expelled for alleged brothel-keeping, hiding of fugitives, disturbing the peace or being vagrants.

2. Early case law

The very first complaint on an expulsion decision was submitted to the Supreme Court by Emma Kuusk, a former prostitute, and a keeper of a disorderly house. She was expelled from Tartu to Parnu where she had to stay under police surveillance. The Interior Minister referred to Articles 121–125 of the Law of Decency and Security as the legal basis of his decision.[1]

The referred provisions codified the infamous 1881 Ordinance on the Measures for the Protection of the State Order and of Public Tranquillity.[2] The Ordinance that Richard Pipes has called the "real constitution of Russia" stipulated the procedure for declaring a state of emergency and authorised police to take emergency measures in the territories under the state of emergency.[3] The last Chapter of the Ordinance contained provisions regulating administrative expulsion.[4] Administrative expulsion was not dependent on the state of emergency and could be applied at any time and anywhere in the territory of the Russian Empire.[5]

The Supreme Court upheld Emma Kuusk's complaint and declared her expulsion void. The court argued that the 1881 Ordinance had been repealed already by the Russian Provisional Government in July 1917 and even though the provisional government's decree was temporary, the emergency measures were likewise temporary, and such measures had not been renewed since 1917.[6]

Notably, in July 1917 the Russian Provisional Government suspended the validity of the Ordinance together with the provisions of police surveillance (in Russian: *policejskij nadzor*) (altogether Articles 99–166 of the Law of Decency and Security).[7] The suspension decree expired upon the convention of the Russian Constituent Assembly in January 1918. It is also true that any state of emergency

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1 Interior Minister's 22 March 1920 letter to the Supreme Court. NAE, ERA.1356.2.318, 18–18v. Ustav Blagocinija i Bezopasnosti [The Law of Decency and Security]. Svod Zakonov Rossijskoj Imperii. Tom XIV (Petrograd: B. i., 1916).

2 Polozenie o merax k oxraneniju gosudarstvennogo porjadka i obscestvennogo spokojstvija [Ordinance on the Measures for the Protection of the State Order and of Public Tranquillity] (14.08.1881). Polnoe Sobranie Zakonov Rossijskoj Imperii: Sobranie Tret′e. Tom I, Sankt-Peterburg: Gosudarstvennaja tipografija, 1885, pp. 261–266.

3 Pipes R. Russia under the Old Regime. 2nd ed. Harmondsworth: Penguin Books, 1995, p. 305.

4 The Chapter began with the following norm (Art. 121 in the codified version, as amended): "The expulsion (vysylka) by administrative order of persons harmful to the state and public tranquillity to any designated area of European or Asian Russia, with the obligation of continuous stay for a designated period, can take place only if the following rules are observed."

5 Gessen V. M. Iskljucitel′noe polozenie [State of Emergency]. Sankt-Peterburg: Pravo, 1908, p. 39, 41 and pp. 233–234; Szeftel M. 1958, pp. 17–18.

6 Judgement of the Administrative Chamber of the Supreme Court of Estonia of 16 April 1920 in the Emma Kuusk Case No. 141. NAE, ERA.1356.2.318, 23–23v.

7 Postanovlenie Vremennogo pravitel′stva o porjadke rassmotrenija del o licax, arestovannyx vo vnesudebnom porjadke [Decree of the Provisional Government on the Procedure for Considering Cases of Persons Arrested Extrajudicially] (16.07.1917). Vestnik Vremennogo pravitel′stva [Bulletin of the Provisional Government], 20 July 1917, No. 109.

authorised by the Ordinance lasted either six or twelve months depending on the type and had to be renewed thereafter. However, as the expulsion provisions were not linked to a state of emergency, one could argue that when the suspension decree expired, the expulsion provisions of the Ordinance re-entered into force.

The next expulsion case related to the 2 August 1917 Decree of the Russian Provisional Government.[8] The Decree gave the Minister of War and the Interior Minister acting together extraordinary powers to require especially dangerous persons to leave Russia or else keep them in custody. In December 1919, the Interior Minister ordered to expel an Estonian citizen Aron Rogovski to Soviet Russia under that Decree for trading precious metals. Rogovski's lawyer, renowned Jaan Teemant furiously argued against the application of irrelevant law. He explained that his client was a merchant employed by a jewellery company and not a speculator. The Supreme Court declared the expulsion void because the Minister of Defence had not expressed his opinion on the expulsion and the Interior Minister alone had no authority to expel Estonian citizens.[9] The court thus deemed the 2 August 1917 Decree valid and part of Estonian legal order.

The first case involving a foreigner was decided by the Administrative Chamber on the same day as Rogovski's. An alleged bootlegger Michael Schmidt was arrested in order to be expelled to Latvia for illegally re-entering Estonia. Schmidt argued that even though he was born in Riga, he would qualify for Estonian citizenship, he had lived in Estonia for over 40 years and would be alien in Latvia. The Supreme Court rejected his complaint and stated that the Interior Minister had "full right" to expel a foreign national under Article 365 of the Law of Decency and Security.[10] The court did not examine the justification of the expulsion. Legitimate reasons for the expulsion of foreigners were very broad.[11] The outcome of this case could have been different if Schmidt had managed to

[8] Postanovlenie Vremennogo pravitel'stva o prinjatii mer protiv lic, ugrozajuscix oborone gosudarstva, ego vnutrennej bezopasnosti i zavoevannoj revoljuciej svobode [Decree of the Provisional Government on Taking Measures Against Persons Threatening the Defence of the State, Its Internal Security, and Freedom Won by the Revolution] (02.08.1917). Vestnik Vremennogo pravitel'stva, 10 August 1917, No. 127.

[9] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 29 October 1920 in the Aron Rogovski Case No. 165. NAE, ERA.1356.2.328, 35–35v.

[10] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 29 October 1920 in the Michael Schmidt Case No. 512. NAE, ERA.1356.2.331, 15. Article 365 of the Law of Decency and Security read: "The removal abroad (udalene za granicu) of foreigners staying in Russia, with a ban on returning to its borders, is carried out, except for cases specifically specified in the law, at the discretion and order of the Interior Minister [...]."

[11] Such reasons were not defined in Chapter XIII (Art. 365–379) of the Law of Decency and Security, but could be derived from Article 1 of the same law, reading: "Governors, local police and in general all places and persons having civil or military authorities are obliged, by all means within their power, to take measures to preserve due respect for faith, or public tranquillity (obscestvennogo spokojstvija), order, decency and personal and property security. The rights, duties and procedures of the said authorities are determined both by the orders and instructions given to them, and by the rules set forth in this Law, as well as in the General Act on the Governorates, [...]."

prove his Estonian citizenship (he claimed that his identity document had gone lost in the Interior Ministry).[12]

After the War of Independence, in the economically difficult year of 1920, the Interior Minister, "considering the shortage of foodstuffs and housing in the country" threatened to expel all foreigners who had settled in Estonia after 1 January 1915.[13] The foreigners who did not voluntarily leave the country within one month from the Regulation would have been either issued residence permits or expelled at the discretion of the Interior Minister.

Sometime in the spring of 1920, the Interior Minister, this time "considering the shortage of foodstuffs and housing in Tallinn", ordered 81 individuals who allegedly had settled in Tallinn from Narva during the last two years to move back to Narva.[14] Judging by the names, all or most of the listed people were ethnic Jews. One of them, a shopkeeper Simon Meier Goldmann protested the order and argued that he was an Estonian citizen and was free to choose his place of residence. The Supreme Court upheld his complaint and found the order legally groundless.[15]

These and other measures were intended to limit the immigration of ethnic Russians, Germans, and Jews, avoid their settlement in Tallinn, Tartu, and border areas, and expel disloyal and economically harmful persons from the country.[16] Although the Interior Minister had denied discrimination against Jews, police were given secret instructions to limit the freedom of residence of foreigners with Russian and Jewish ethnicity.[17]

Estonia's Constitution which entered into force on 20 December 1920 guaranteed the freedom of movement and residence. Interference in that freedom

[12] According to the first Citizenship Act, all citizens of former Russian Empire who had been registered as residents of Estonian territory by the former Russian authorities and who were residing in Estonia at the time the Act entered into force (i.e. on 4 December 1918) were entitled to Estonian citizenship. Maanoukogu maarus Eesti demokratlise vabariigi kodakondsuse kohta [Decree of the Provisional Assembly on Citizenship of the Democratic Republic of Estonia] (26.11.1918). Riigi Teataja, 4 December 1918, No. 4, 5. For the development of citizenship right in Estonia after 1918, see Rohtmets H. The Significance of Ethnicity in the Estonian Return Migration Policy of the Early 1920s. Nationalities Papers, 2012, No. 6, pp. 895–908.

[13] Siseministri maarus valjamaalaste Eesti vabariigist valjasaatmise kohta [Regulation of the Interior Minister about the Expulsion of Foreigners from the Republic of Estonia, 17.02.1920. Riigi Teataja, 21 February 1920, No. 26/27, 209–210. The expulsion decree was followed by a threat to detain illegal foreigners. Siseministri maarus vaajamaalaste interneerimise kohta [Regulation of the Interior Minister about the Internment of Foreigners] (24.08.1920). Riigi Teataja, 1 September 1920, No. 133/134, pp. 1057–1058.

[14] Copy of an undated Decree, Estonian National Archives, ERA.1356.2.303, pp. 9–10.

[15] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 18 March 1921 in the Simon Meier Goldmann Case No. 79. NAE, ERA.1356.2.303, p. 36.

[16] For the immigration restrictions on non-ethnic Estonians, see Rohtmets H. 2012, 898ff.

[17] Th, Valjamaalaste valjasaatmine ja jutud juutide tagakiusamisest [Expulsion of Foreigners and Rumours about Persecution of Jews], Paevaleht, No. 242, 25.10.1920, 1. Top secret circular to police chiefs by the Head of Police Department dated 8 October 1921. NAE, ERA.1.1.7075, 29. See also Rohtmets H. Suletud uksed: Eesti Vabariigi sisserandepoliitika 1920. aastatel [Closed Doors: Estonian Immigration Policy during the 1920s]. The Estonian Historical Journal, 2013, No. 1, pp. 55–78.

was only possible by court judgment, except for imposing quarantine or other restrictions for health reasons.[18] The Constitution did not specify whether fundamental rights applied only to citizens or foreigners as well. Soon it became evident that foreigners did not enjoy equal protection. The Supreme Court rejected several other complaints by foreigners who had been exiled by the administrative authorities under Article 365 of the Law of Decency and Security and confirmed the consistency of that provision with the Constitution.[19] Legal scholars concurred that foreigners enjoyed equal fundamental rights with the citizens to the extent not restricted by the law.[20]

While Article 365 of the Law of Decency and Security was formally a law, there was another ground for restricting the freedom of residence of foreigners enacted by the Government.[21] Orders expelling foreigners sometimes referred to both Article 365 and the Regulation, sometimes to only one of them. With few exceptions, the Supreme Court referred to Article 365 as the legal basis for the expulsion even when the expulsion order referred to the Regulation alone. In two Semen Bushin cases, the court deemed the Regulation sufficient legal basis for the expulsion.[22]

Administrative expulsion of citizens was still possible under the emergency legislation. The Constitution allowed extraordinary restrictions on fundamental rights and freedoms in the case of emergency. A state of emergency (in Estonian:

[18] Article 17 of the Constitution reads: "Movement and change of residence is free in Estonia. This freedom may not be restricted or impeded except by the judicial authorities. For reasons of public health, this freedom may also be restricted or impeded by other authorities in the cases and in the manner prescribed by the relevant legislation." Eesti Vabariigi pohiseadus [Constitution of the Republic of Estonia], 15.06.1920. Riigi Teataja, 9 August 1920, No. 113/114, p. 243.

[19] Judgements of the Administrative Chamber of the Supreme Court of Estonia of 27 January 1921 in the Haim Sametschik Case No. 199. NAE, ERA.1356.2.569, p. 17; and of 7 December 1923 in the Adolf Pilar von Pilchau Case No. 954-II. NAE, ERA.1356.2.566, pp. 32–34.

[20] Maddison E. Eesti kodanikud ja nende pohioigused [Estonian Citizens and Their Fundamental Rights]. In: Eesti. Maa. Rahvas. Kultuur. Tartu: Eesti Kirjanduse Selts, 1926, pp. 1189–90; Csekey S. Die Verfassungsentwicklung Estlands 1918–1928. In: Jahrbuch des offentlichen Rechts der Gegenwart. Tuebingen: Mohr, 1928, pp. 168–269, 178–79; Maddison E., Angelus O. Das Grundgesetz des Freistaats Estland vom 15. Juni 1920. Berlin: Carl Heymanns Verlag, 1928, p. 17.

[21] Article 8 of the Government Regulation provided: "The Interior Minister has the right to prohibit foreigners to stay in certain locations and towns of the Republic and authorities to issue residence permits to certain foreigners." The same Regulation revoked the above-mentioned 1920 Regulation of the Interior Minister about the Expulsion of Foreigners. Vabariigi Valitsuse maarus vabariigi piirides viibivate valjamaa alamate elamislubade kohta [Government Regulation about the Residence Permits of Foreigners Located in the Territory of the Republic], (18.01.1921). Riigi Teataja, 28 January 1921, No. 7, p. 50. Article 8 (as replaced by a similar provision) was revoked in 1930. Vabariigi Valitsuse maarus ule vabariigi piiri liikumise ja valismaalaste Eestis peatumise kohta [Government Regulation about the Crossing of the State Border and Stay of Foreigners in Estonia] (11.07.1930). Riigi Teataja, 15 July 1930, pp. 54, 362.

[22] The Judgements of the Administrative Chamber of the Supreme Court of Estonia of 3 November 1925 in the Semen Bushin I Case No. 103-II. NAE, ERA.1356.2.298, 19–19v; and of 30 March 1928 in the Semen Bushin III Case No. 219-II. NAE, ERA.1356.2.300, 17–17v.

kaitseseisukord) was declared by the Government, was approved by the *Riigikogu* (Estonian parliament), and was supposed to be temporary.[23]

The first case relating to administrative expulsion as an emergency measure was brought to the Supreme Court by a Baltic German lawyer, spy, and former officer of the Yudenich Army, Hermann Kromel. Kromel was expelled from Tallinn to live in Parnu County under police surveillance for allegedly belonging to a Russian Monarchist organisation and thereby endangering the state order and public safety.[24] The expulsion order was based on paragraphs 16 and 17 of Article 19 of the Annex to Article 23 of the General Act on the Governorates.[25] Kromel's lawyer Werner Hasselblatt argued that the Interior Minister lacked powers to adopt emergency measures because giving him the Governor-General's authority was unconstitutional.[26] The Administrative Chamber upheld the expulsion from Tallinn but "due to lack of respective law" revoked the order to live in Parnu County under police surveillance.[27] By "lack of respective law" the court most likely meant that the police surveillance regulation in the Law of Decency and Security (Articles 127–166) had been suspended in 1917 (see above).

The Supreme Court made similar decisions in the Boris Agapov and Vladimir Chumikov cases.[28] Russian Monarchists Agapov and Chumikov both argued that only criminal courts could punish for the incitement of hatred between ethnic

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23 Article 26(2) of the Constitution read: "Exceptional restrictions on citizens' freedoms and fundamental rights will enter into force in accordance with the law, based on and within the limits set by the relevant laws, in the event of a state of emergency declared for a specified period." Article 60 of the Constitution read: "The Government of the Republic [...] 5) announces a state of emergency in individual parts of the country as well as in the entire country and submits it to the *Riigikogu* for approval; [...]".

24 The 15 April 1921 Order No. 1216 by the Interior Minister. NAE, ERA.1356.2.311 (not paginated).

25 Paragraphs 16 and 17 of Article 19 of the Annex to Article 23 of the General Act on the Governorates read: "Governors-General or persons vested with their authority have the right: [...] 16) to prohibit persons from staying in places declared under martial law; 17) to expel (vysylat′) persons to the inner provinces of the Empire, with notification to the Interior Minister, and establish police surveillance over them for a period not exceeding the duration of martial law, and to expel foreigners abroad as well; [...]". Obscee Ucrezdenie Gubernskoe [General Act on the Governorates]. Svod Zakonov Rossijskoj Imperii. Tom II, Petrograd: s.n., 1915. Annex to Article 23 of the General Act on the Governorates codified the twenty-five articles of Russian 1892 martial law. Pravila o mestnostjax, ob″javljaemyx sostojascimi na voennom polozenii [Regulation on the Places Declared under Martial Law] (18.06.1892). Polnoe Sobranie Zakonov Rossijskoj Imperii: Sobranie Tret′e. Tom XII (Sankt-Peterburg: Gosudarstvennaja tipografija, 1895), pp. 479–483.

26 Werner Hasselblatt's 16 April 1921 complaint to the Supreme Court. NAE, ERA.1356.2.311 (not paginated).

27 Judgement of the Administrative Chamber of the Supreme Court of Estonia of 31 October 1922 in the Hermann Kromel I Case No. 146. NAE, ERA.1356.2.311 (not paginated).

28 Judgement of the Administrative Chamber of the Supreme Court of Estonia of 30 April 1923 in the Boris Agapov Case No. 603. NAE, ERA.1356.2.296, p. 19; Judgement of the Administrative Chamber of the Supreme Court of Estonia of 30 April 1923 in the Vladimir Chumikov Case No. 604. NAE, ERA.1356.2.336, p. 19.

groups and administrative expulsion for such activity was illegal.[29] Although the court did not address this question, it seemed to concur with the defendant's representative Jaan Teemant that expulsion was not a punishment and that the Interior Minister had unlimited discretion to decide on the need for someone's expulsion.

3. Turning point in the case law

In July 1925, the Interior Minister prohibited Theodor Viliberg and his adult children Hilda and Evald from living on the Island of Naissaar. Minister stated in the expulsion order that Vilibergs' presence in the vicinity of the Tallinn Fort "harmed national interests".[30] However, he did not explain in what way the harm was incurred. Most likely, the family was engaged in liquor smuggling. Vilibergs' lawyer Jaan Teemant complained to the court that the lack of motives in the Minister's order would not allow the legality of the order to be verified. The Supreme Court agreed with Teemant and revoked the order.[31] The court dismissed the defendant's argument that only the powers of the Minister could be verified by the court while justification of the Minister's decision was subject to political control of the *Riigikogu*. The court affirmed that the existence of a situation endangering the state order and public safety was subject to judicial review, too.

The change in the court's opinion and putting restraints on the administrative authorities was that much more surprising, because on 1 December 1924, as a result of the attempt of a Communist coup, a new nation-wide state of emergency had been declared and the importance of emergency measures had become evident. The reason for the court's stiffer approach could be the Interior Minister's refusal to explain to the court the reasons for the expulsion of the Vilibergs and the claim by the Minister that he had unlimited discretion to apply emergency measures.

The court confirmed the requirement to justify expulsion orders again in the Ernst Turmann case in September 1926. A Baltic German businessman and a tennis champion Turmann was exiled from Tallinn to the Island of Vormsi. The Interior Minister stated in the order: "Having reviewed the materials and reports submitted to me and taking into account the facts I personally know about him, I find that Ernst Turmann has committed acts that endanger public tranquillity and are harmful to the security and state interests".[32] There were no

[29] Minutes of the Hearing of the Administrative Chamber of the Supreme Court of Estonia dated 30 April 1923 in Case No. 603. NAE, ERA.1356.2.296, pp. 16–17. Minutes of the Hearing of the Administrative Chamber of the Supreme Court of Estonia dated 30 April 1923 in Case No. 604. NAE, ERA.1356.2.336, 16–17v.

[30] The 9 July 1925 Order No. 540/1253 by the Interior Minister. NAE, ERA.1356.2.340, p. 2.

[31] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 3 November 1925 in the Vilibergs Case No. 1143-II. NAE, ERA.1356.2.340, pp. 21–23.

[32] The 3 April 1926 Order by the Interior Minister. NAE, ERA.1356.2.338, p. 5.

hints of such facts in the order and by referring to secrecy and national interests, the Minister refused to disclose the facts to the Supreme Court.[33] According to the newspapers, Turmann had spread slanderous rumours about life in Estonia amongst foreigners visiting Estonia.[34] The Supreme Court revoked Turmann's expulsion. The court explained it had the right and duty to assess whether the threat to state order and public safety existed, and whether the adoption of emergency measures was therefore justified.[35]

A few months later, the General Assembly of the Supreme Court admitted that the court's opinion in the Vilibergs and Ernst Tumann cases diverged from previous case law (i.e. Sametschik, Kromel, Agapov and Chumikov cases). The General Assembly approved the Administrative Chamber's new approach.[36]

Later the same year, the Administrative Chamber upheld a complaint on substantive grounds. Alleged keepers of a brothel and speakeasy Marie Kuus and her daughter Analie Kuus were expelled from Tallinn. Marie Kuus argued in her complaint that she had not been accused of any wrongdoing; she was not a tenant of the apartment in question but just lived together with her daughter.[37] The court found that the police file that was the basis for the expulsion order contained no facts supporting the allegations against Marie Kuus and revoked her expulsion.[38]

In two cases of the same period, the Supreme Court revoked the refusal by the Interior Minister to reverse expulsion after criminal charges against the expellees had been dropped. The court deemed the Minister's endorsement "To reject" insufficient, and wished to see at least some justification for the refusal. In the first case, a shopkeeper in the Nina village, Soviet Russian citizen Semen Bushin had been accused of selling goods smuggled from the Soviet Union across Lake Peipsi. He was prohibited from living in municipalities along the coast of Lake Peipsi that were declared under a state of emergency, including in the Nina village.[39] In the second case, already mentioned Analie Kuus had been acquitted of several brothel-keeping charges by the criminal court.[40] Bushin's case was the only expulsion case with a positive outcome for a foreigner and Analie Kuus' case was the last positive decision of the Supreme Court in expulsion matters. Both Bushin

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[33] The Interior Minister to the Administrative Chamber of the Supreme Court, 15 June 1926. NAE, ERA.1356.2.338, p. 10.

[34] Moot on tais [Enough is Enough]. Postimees, No. 92, 07.04.1926, p. 1.

[35] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 21 September 1926 in the Ernst Turmann Case No. 961-II. NAE, ERA.1356.2.338, pp. 19–20.

[36] Judgement of the General Assembly of the Supreme Court of Estonia of 31 January 1927 in Case No. 88. NAE, ERA.1356.1.696, pp. 5–6.

[37] Marie Kuus' 3 August 1927 complaint to the Supreme Court. NAE, ERA.1356.2.317, 2–2v.

[38] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 11 October 1927 in the Marie Kuus Case No. 734-II. NAE, ERA.1356.2.317, 16–16v.

[39] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 27 November 1925 in the Semen Bushin II Case No. 739-II. NAE, ERA.1356.2.299, 22–22v.

[40] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 27 April 1928 in the Analie Kuus I Case No. 284-II. NAE, ERA.1356.2.316, 14–14v.

and Kuus were eventually banished (Bushin on new grounds and Kuus – because she was sentenced on one account). The Administrative Chamber rejected their last complaints.[41]

4. Supreme Court's retreat?

The court's intervention in the Interior Minister's discretion was criticised in legal literature by some law enforcement officials. Eugen Maddison, a clerk of the Interior Ministry and frequent representative of the Ministry at the Supreme Court, wrote that the protection of state order and public safety would require maximum flexibility in selecting emergency measures and unlimited discretion of the Interior Minister in applying such measures.[42]

Military prosecutor Konstantin Trakmann wrote in 1931 that the Supreme Court practice would hinder the government's ability to adopt effective emergency measures in truly serious situations.[43] He analysed in the article whether, after the Russian martial law (Annex to Article 23 of the General Act on the Governorates) had been replaced with the State of Emergency Act,[44] it was possible to abolish the partial state of emergency.

Abolition of the state of emergency was a constant topic in the *Riigikogu* when the renewal of the state of emergency or the State of Emergency Bill was discussed. The Government had tried to replace the Russian martial law with a new law already in 1922, but the bill met resistance from left-wing, as well as some centrist political parties. In those debates, the member of the *Riigikogu*, Social Democrat Anton Palvadre criticised the use of the state of emergency as an ordinary governing measure and its abuse in restricting the fundamental rights of citizens, especially the extensive use of administrative expulsion and submission of civilians to military courts.[45] The Social Democrats continued criticising the practice of administrative expulsion.[46] Ironically, Palvadre became a member

[41] Judgements of the Administrative Chamber in the Semen Bushin III Case in 1928 and of 2 October 1928 in the Analie Kuus II Case No. 488-II. NAE, ERA.1356.2.315, pp. 13–14.

[42] Maddison E. Valjasaatmisest ja elamise keelust sojaseisukorra maksvuseajal [About the Expulsion and Restrictions on Residence under the Martial Law]. Eesti Politseileht, 5 January 1926, No. 1, pp. 2–3. Maddison expressed his dissent with the new approach even after the General Assembly had expressed its opinion. Maddison E. Asja sisuline arutamine administratiiv-kohtu korra seisukohalt [Merits Review the in the Administrative Courts]. Eesti Politseileht, 20 May 1927, No. 20, p. 298.

[43] Trakmann K. Kaitseseisukorra aramuutmise tingimustest [The Conditions for Termination of the State of Emergency]. Part I. Õigus, 1931, No. 1, p. 31.

[44] Kaitseseisukorra seadus [State of Emergency Act] (10.07.1930). Riigi Teataja, 5 August 1930, No. 61, Art. 423.

[45] Minutes No. 124 of the VI session of the I composition of the *Riigikogu*, 23.05.1922, pp. 260–268 and 285–288. Minutes No. 148 of the VIII session of the I composition of the *Riigikogu*, 22.09.1922, pp. 259–260.

[46] Minutes No. 98 of the IV session of the III composition of the *Riigikogu*, 28.10.1927, 308; Minutes No. 30 of the III session of the IV composition of the *Riigikogu*, 05.02.1930, p. 562; Minutes No. 46 of the III session of the IV composition of the *Riigikogu*, 01.04.1930, pp. 833–834.

of the Administrative Chamber of the Supreme Court of Estonia in October 1923 and with him on the bench, the court rejected many expulsion complaints.

When a new State of Emergency Bill was read in the *Riigikogu* in 1930, a right-wing politician General Jaan Soots proposed to narrow down the scope of judicial review of emergency measures. He suggested limiting review to the formal questions of (i) whether the Commander of Internal Protection (in Estonian: *sisekaitse ulem*) (equivalent to the Governor-General under Russian law) was authorised to adopt emergency measures and (ii) whether the measures had been adopted within the limits of the Commander's powers. Soots justified the amendment with the Vilibergs and Ernst Turmann cases where, according to him, the Supreme Court had erroneously reviewed the substance of emergency measures.[47] His opponents deemed the proposed limits of judicial review obvious and already captured in the legal order. Probably convinced by these arguments, the majority of the *Riigikogu* voted against the Soots' proposal.[48]

The State of Emergency Act entered into force on 15 August 1930. The emergency measures available to the administrative authorities under the Act were very similar to or even broader than the ones under the Russian martial law.[49] Upon entry into force of the Act, the state of emergency extending to Tallinn and neighbouring municipalities and to the municipalities along the Russian border continued uninterrupted. The Interior Minister was given the power of the Commander of Internal Protection.[50]

Administrative expulsion from areas under state of emergency continued to be possible under the State of Emergency Act.[51] The new law was first tested by the Supreme Court in several liquor smugglers' cases. After giving a warning to the so-called liquor bosses a few months earlier, late in 1930 the Interior Minister ordered fourteen leading liquor smugglers to leave their homes within 48 hours

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47 Explanatory report to the amendment proposed by Jaan Soots. NAE, ERA.80.4.448, 81–81v. Minutes No. 65 of the IV session of the IV composition of the *Riigikogu*, 03.06.1930, pp. 1180–1181.

48 Minutes No. 76 of the IV session of the IV composition of the *Riigikogu*, 03.07.1930, pp. 1425–1427.

49 Lindmets J., Luts-Sootak M., Siimets-Gross H. Imperial Russian Rules on the State of Emergency in the Estonian Republic. In: New Legal Reality: Challenges and Perspectives: Collection of Research Papers in conjunction with the 8th International Scientific Conference of the Faculty of Law of the University of Latvia. Riga: University of Latvia Press, 2022, p. 40.

50 The 14/15 August 1930 Resolution by the Government. Riigi Teataja, 15 August 1930, No. 65, Art. 457.

51 Article 9, paragraph 9 of the State of Emergency Act reads: "The Commander-in-Chief of the Armed Forces has the right, in the territory declared under a state of emergency: [...] 9) to prohibit: a) the presence of individuals in places declared under a state of emergency, if the state of emergency has been imposed only in a part of the Republic, b) the presence and residence in certain places, if the state of emergency has been imposed over the whole territory of the Republic." The same right was granted to the Commander of Internal Protection (Art 7, para. 2 therein).

and settle outside the territory declared in a state of emergency.[52] Several of the expellees filed complaints against the expulsion orders. The Supreme Court rejected all the complaints, but three decisions indicate a possible change in the Supreme Court's approach.

Shipowners Eduard Kronstrom, Juri Silberberg and Elias Sandbank stated in their complaints that no allegations against them of smuggling contraband to the territory declared under a state of emergency or inciting armed resistance to the police forces had been proven. They stressed that emergency measures could be used only to protect state order and public security and not to fight alleged customs violations.[53]

In three almost identical decisions, the Administrative Chamber first recalled that a state of emergency may be declared not just during the war but also when "criminal activity aimed at state order and public security acquired a threatening character" (Article 1 of the State of Emergency Act).[54] In the court's view, expulsion was not a punishment, but a general measure to maintain state order and public security.[55] Consequently, the application of emergency measures was not limited to persons who had committed or had been sentenced for any political crimes. The measures could be applied to anyone whose activity "paralysed" state order or public security.

The court further noted that on several occasions, the transporters of illegal liquor to the coast have publicly resisted border guards and even caused the use of firearms by the authorities. Such resistance undermined public security.[56] Thereafter, the court stated: "Whether the use of the powers granted by the State of Emergency Act in a certain case is indispensable, expedient, and just is a matter

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52 Piiritusekuningate voistlus riigi viinamonopoliga [Liquor Bosses Competing with Government's Vodka Monopoly]. Paevaleht, No 243, 07.09.1930, 3. Piiritusekuningad valja [Liquor Bosses Out]! Postimees, No. 316, 20.11.1930, p. 3. Kitsendusi salapiiritusevedajate kohta [Restrictions on Liquor Smugglers]. Maaleht, No. 134, 22.11.1930, p. 4

53 Sandbank's lawyer Jaan Teemant to the Supreme Court, 27.11.1930. NAE, ERA.1356.2.329, 2–2v. Kronstrom's lawyers Ilmar Tannebaum and Alfred Maurer to the Supreme Court (not dated). NAE, ERA.1356.2.313, pp. 3–4. Silberberg's lawyer Alfred Maurer to the Supreme Court (not dated). NAE, ERA.1356.2.333, 2–2v.

54 Judgement of the Administrative Chamber of the Supreme Court of Estonia of 17 March 1931 in the Elias Sandbank Case No. 401-II. NAE, ERA.1356.2.329, pp. 20–21. Judgement of the Administrative Chamber of the Supreme Court of Estonia of 17 March 1931 in the Eduard Kronstrom Case No. 511-II. NAE, ERA.1356.2.313, 18–19v. Judgement of the Administrative Chamber of the Supreme Court of Estonia of 17 March 1931 in the Juri Silberberg Case No. 502-II. NAE, ERA.1356.2.333, pp. 15–17.

55 The Administrative Chamber had implicitly agreed with the same approach in the Boris Agapov and Vladimir Chumikov cases in 1923 (see above) and expressed a similar view for instance in the Judgements of 14 October 1927 in the Vasili Orekhov Case No. 731-II. NAE, ERA.1356.2.323, 19–19v; 13 November 1928 in the Liisa Liivak Case No. 593-II. NAE, ERA.1356.2.321, 14–14v; and 20 January 1931 in the Helene Karner Case No. 417-II. NAE, ERA.1356.2.319, 11–11v.

56 The Administrative Chamber had made similar arguments in two other smuggling cases, in the Judgement of 20 January 1931 in the Siegfried Reindorf Case No. 447-II. NAE, ERA.1356.2.327, 11–11v; and in the Judgement of 3 March 1931 in the Otto Kont Case No. 439-II. NAE, ERA.1356.2.310, 18–18v.

for the Commander of Internal Protection, but not for the Supreme Court. The Supreme Court can only decide whether, under the circumstances and conditions, the Commander of Internal Protection was at all justified by law to use his extraordinary powers." The court concluded that by shipping large quantities of liquor to Estonian waters, the complainants had made possible the transportation of illegal liquor to the territory declared in a state of emergency and therefore the authorities had not exceeded their powers with the expulsion.

In some later cases, the Supreme Court found that the Interior Minister had acted within the limits of its powers by expelling a sewing machine sales agent for the incitement of hatred between ethnic groups in Petseri,[57] an egg exporter for endangering public finance with the breach of foreign exchange controls,[58] and leaders of National Socialist organisations of local German minority for non-recognition of the democratic republic of Estonia.[59] In the latter, the court was not convinced by the argument of the complainants' lawyer Siegfried Bremen that "a negative attitude towards the democratic order and a positive attitude towards the leader principle [*Fuehrerprinzip* – H.V.] by itself should not be a reason to expel citizens".[60]

From the correspondence preserved in the court files, it appears that usually the Interior Ministry attached police investigation materials or the ministry's case file to its submission to the Supreme Court. These materials were returned after completion of the court proceedings and have not been preserved in the court's case files. The Minister's uncompromising refusal to produce any evidence supporting the allegations in Vilibergs and Ernst Turmann and perhaps some other earlier cases seems to be exceptional. Therefore, in most of the examined cases, the Supreme Court could and did check the facts supporting allegations against expellees.

Conclusions

1. The legal basis for the administrative expulsion of citizens and foreigners differed. Since the entry into force of the Constitution in December 1920, citizens could only be expelled under emergency legislation (Hermann Kromel I case). Foreigners could be exiled or, if that was impossible, interned

[57] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 20 November 1931 in the Sergei Filatov Case No. 1089-II. NAE, ERA.1356.2.302, 13–13v.

[58] Judgement of the Administrative Chamber of the Supreme Court of Estonia of 10 March 1933 in the Eduard Kink Case No. 463-II. NAE, ERA.1356.2.309, p. 15.

[59] Judgements of the Administrative Chamber of the Supreme Court of Estonia of 6 March 1934 in the Otto Haller and Emil Musso Case No. 345-II. NAE, ERA.1356.2.304, 15–15v; and of 13 April 1934 in the Ernst Maydell, Georg Lehbert and Heinrich Jucum Case No. 393-II. NAE, ERA.1356.2.306, 16–16v.

[60] Maydell's, Lehbert's and Jucum's lawyer Siegfried Bremen to the Supreme Court, 02.01.1934. ERA.1356.2.306, p. 3.

under both emergency and ordinary legislation. All expulsion laws were inherited from Russia and in the early 1920s, some additional regulations were adopted, aiming to solve complex demographic and economic issues resulting from the War of Independence (1918–1920). Like in Russia and despite strong criticism by left-wing political parties in the *Riigikogu,* expulsion became an ordinary governing measure in the Republic of Estonia. The reason for this was political movements that questioned the sovereignty and democratic governance of the Republic of Estonia (Communists, but also Russian Monarchists and Baltic German National Socialists). The utilisation of expulsion did not change when the Russian laws were replaced with Estonia's own State of Emergency Act in 1930.

2. However, unlike in Russia, expulsion decisions could be challenged in the Administrative Chamber of the Supreme Court. The Supreme Court enforced several principles of the rule of law in those cases. Firstly, it affirmed that expulsion decisions must have a legal ground or else the decisions were void (Emma Kuusk, Aron Rogovski, and Simon Meier Goldmann cases). Secondly, starting from 1925, the court required that expulsion decisions either contained reasoning or the reasons for the decisions had to be provided to the expellees and the court (Vilibergs, Semen Bushin II, and Ernst Turmann cases). When reviewing the cases, the Administrative Chamber satisfied itself that the allegations against the complainants had at least some factual ground. Otherwise, the court revoked expulsion (in addition to the Vilibergs and other cases, Marie Kuus and Analie Kuus I cases).
3. Towards the end of the 1920s, the Supreme Court became more careful in judging the reasons for expulsion. The court declared that it did not decide whether the administrative measures were indispensable, expedient, or just (Sandbank, Kronstrom and Silberberg cases). In fact, throughout the examined period, the Supreme Court left the Interior Minister almost unlimited discretion to expel foreigners (Michael Schmidt, Haim Sametschik, and Adolf Pilar von Pilchau cases), and very wide discretion to expel citizens. Even though the original aim of expulsion was the protection of state order and public safety justifying perhaps expulsion for political reasons (suppression of sedition), the Supreme Court accepted expulsion as a measure to fight organised crime (large-scale liquor smuggling on the Baltic Sea), support the economy (speculators) and deter petty breachers (brothel-keepers and bootleggers).

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SECTION 2

PRIVATE LAW

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ARGUMENTS AGAINST DAMAGES AS A LEGAL REMEDY IN PUBLIC PROCUREMENT PROCEEDINGS

Key words: public procurement, lost profits, lost chance, damages

Summary
The purpose of the article is to facilitate discussion regarding the lost profits as a legal remedy in public procurement cases. Although the issue regarding damages in public procurement procedure has been thoroughly researched before,[1] this article is intended to outline some robust arguments that have not been discussed before, as far as it is known to the author. The article outlines two main arguments against the usage of the lost chance doctrine in public procurement cases: 1) although the lost profit is a widely recognized type of damages in civil law, it is misused in public procurement procedure; 2) awarding lost profits in public procurement cases leads to unfair and even immoral results. The article presents several examples from the Latvian administrative court practice and therefore yields an insight into the existing situation on this matter in Latvia. Whereas the article produces arguments against the use of the lost profit as a type of damage, it is neither disputed nor elaborated that the search for other effective legal remedies should be considered instead of lost profits.

Introduction: Summary of the existing legal framework and practices regarding damages in public procurement proceedings

Damages as a form of legal remedy in public procurement proceedings are relevant in cases when a contract has been concluded, but afterwards, as a result of review proceedings, it has been established that another tenderer has been illegally disqualified, or that other provisions have been breached and thus the contract has been awarded to the "wrong" tenderer. Since for practical reasons the concluded contract usually remains in force and is being performed, a question naturally arises: what should be an efficient legal remedy for the aggrieved tenderer, who, probably, would have been awarded the procurement.

[1] Shebesta H. Damages in EU Public Procurement Law. Springer: 2016.

Since 1989, the EU directives have provided that damages should be included in the available legal remedies. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts provided that among other legal remedies, the Member States should provide for an opportunity to "award damages to persons harmed by an infringement" (Article 2, Paragraph 1). The same provision has been continued in the Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. However, the directive gives no further instructions regarding the concept of damages and preconditions of satisfying the claim for damages. The present situation has been summarized in the Judgment of the European Court of Justice in Case No. C568/08:

> *Article 2(1)(c) of Directive 89/665 clearly indicates that Member States must make provision for the possibility of awarding damages in the case of infringement of EU law on the award of public contracts, but contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay. […] Therefore, [...] as regards State liability for damage caused to individuals by infringements of EU law for which the State may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provisions of EU law in that area, it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.*[2]

Before adoption of the Directive 2007/66/EC, the European Commission concluded that damages are a particularly problematic remedy: regarding the satisfied claims for damages "the figures collected, supported by the feedback from stakeholders during the consultation process, are so low as to be almost non-existent".[3] Three main problems of damages as a legal remedy were identified: they have no real corrective effect, claims of damages are hampered by practical

[2] CJEU judgement of 9 December 2010 in Case No. C-568/08 Combinatie Spijker Infrabouw/De Jonge Konstruktie, Van Spijker Infrabouw BV, De Jonge Konstruktie BV v. Provincie Drenthe, para. 86; 92.

[3] Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts {COM(2006) 195}. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006SC0557 [viewed 16.04.2024.].

difficulties, the process is lengthy and costly.[4] However, several publications regarding practices of the EU Member States regarding regulation of damages in public procurement proceedings show that during the last 15 years there have been a shift towards accepting the theoretical possibility to bring claims for damages in the form of lost profits. As has been concluded in a major contribution by Hanna Schebesta, "one may conclude that the specific public procurement factual constellations have forced all jurisdictions to accept the lost chance theory in the field of public procurement in order to make damages available."[5] Somewhat similar conclusions can be drawn by responses to a questionnaire published in the book "Tort Liability of Public Authorities in European Laws".[6]

To sum up the consequences of the doctrine of the lost chance and therefore existing practices in several EU Member States, a use of a simple example is in order. A local municipality has announced a procurement on building a local school. Three bidders (B, C and D) submit their bids. Bidder B is awarded the right to conclude the contract with the total amount of 10 million euros. Although C and D contests the results, the Public Procurement Bureau allows the contract to be concluded with B. The contract is concluded and the building has been built. However, later administrative court concludes that C was illegally excluded from the competition and given all the facts would certainly had been awarded with the contract instead of B. According to the doctrine of the lost chance C could claim damages in the amount of the actual profits from the contract, i.e., the total cost of the contract minus actual costs of performance of the contract. Let us assume that the total profit from the contract, if the C would have performed it, would be 1 million euros.

1. Damages even in the form of lost profits (lost chance) is a fiction

The existing legal reasoning allowing damages claims in public procurement is mainly based upon such civil law concepts as lost profits (*lucrum cessans*)[7] and the doctrine of lost chance.[8] However, this transplantation of civil law concepts in public procurement law and other tenders regulated by public law is evidently ill grounded.

[4] Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts {COM(2006) 195}. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006SC0557 [viewed 16.04.2024.].

[5] Shebesta H., 2016, p. 216.

[6] Della Cananea G., Caranta R. (eds). Tort Liability of Public Authorities in European Laws. Oxford University Press: 2020, pp. 164–186.

[7] On the origins of the term "lost profits", see: Zimmerman R. The Law of Obligations. Roman Foundations of the Civilian Tradition. Oxford University Press: 1996, p. 827.

[8] See comparative examples regarding the lost chance in: Van Dam C. European Tort Law. Oxford University Press: 2007, pp. 294–297.

Lost profit as a type of damages is relevant when due to illegal activity of another person there has been an active breach of already existing rights (status). Typical examples are failure to deliver parts needed to timely perform another already concluded contract, an illegal injury of a person losing his ability to continue work, etc. In the sphere of state liability the prospect of lost chance is also possible. For instance, Article 7 of the Latvian Law on Compensation for Losses Caused by State Administration Institutions[9] prescribes that "within the meaning of this Law, a material loss is a deprivation which can be materially assessed and which has been caused to a victim due to an unlawful administrative act or an unlawful actual action of the institution" (Paragraph 1). "When calculating a material loss, the unearned profit shall also be taken into account if a victim can prove that the profit would have been earned in the course of normal course of events" (Paragraph 2). For instance, if an authority unlawfully closes the only road leading to a country hotel, then the owner of the hotel is theoretically entitled to receive damages in the form of lost profits (however difficult it is to prove those). The reason to reimburse lost profit is because the illegal active interference in the person's rights (status) has caused a person such a harm that has caused a loss of an income, which was promised (expected) before the illegal activity occurred.

However, in case of various competitions, including public procurement procedures, no person has the right to expect that he/she will win the competition. Even if a person has been illegally disqualified from the competition, his/her status after the competition is identical to the status before that. This is the main difference between the classical examples mentioned in the previous paragraph – in the case of a competition the illegalities of the competition itself does not cause any lost profits that would have been guaranteed before it. This simple observation can be generalized towards all competitions regulated by public law – whether they are competitions to public official positions, scientific grants or public procurements. It is rather clear that in those situations the contestants has no rights to claim lost profits, because there have been no active right that has been breached.

In Latvia the administrative courts were first confronted with the issue of lost profits in public procurement cases in 2014. In a case where a tenderer had been illegally disqualified and therefore claimed damages, the Supreme Court rejected the argument that the tenderer has no claim to damages. The Supreme Court ruled that it agrees "that legal provisions do not prescribe a person with whom a contract should be concluded and that the claimant had no legitimate expectations that the contract will be concluded with him. However, this could not be an unsurmountable obstacle in determining the causal link between the actions of the institution and the eventual damages. Otherwise the institute of damages in public procurement cases would be illusory, for in no instance the legal provisions provide for previously determinable winner and no one could have

[9] Law on Compensation for Losses Caused by State Administration Institutions. Available: https://likumi.lv/ta/en/en/id/110746-law-on-compensation-for-losses-caused-by-state-administration-institutions [viewed 02.12.2023.].

expectations that other contestants will not win."[10] However, as can be seen from this reasoning, the damages should be available not because they have occurred, but because otherwise they would not be available.

Therefore the concept of lost profits originally stemming from the civil law has been used in public procurement proceedings not because there is an active breach of already existing rights and thus a previously expected income is lost, but because otherwise there would be no other worthy legal remedies. However, as will be examined further, the existence of lost profits in public procurement procedure is not only fictional, but their reimbursement creates immoral results.

2. Unjustified enrichment and immorality of the use of lost profits in public procurement

Lost profits in public procurement proceedings are usually awarded in a situation, where the contract has already been concluded with the "wrong" person. Since it would be impractical to cancel the concluded contract, lost profits are awarded to the person who, in retrospect, would have been entitled to receive the contract. The lost profit usually is calculated as the eventual profit from the contract, i.e., total amount of the contract minus calculated costs. However, such a solution creates unfair and even immoral situation. Again an example with building contracts illuminates this situation most vividly. If a local municipality has concluded a building contract worth 10 million euros, then the contractor, although wrongfully chosen, does indeed perform the contract and thus quite rightly receives the money for his efforts. His profit from the contract, for instance 1 million euros, is indeed earned for the added value he has created using his resources. Then, in turn, if lost profits in amount of 1 million euros are also awarded to the person, who has been wrongfully excluded from the competition but would have won it, it is apparent that this sum of money is given for no efforts at all.

If one compares the earned profit of the person who performed the contract and the lost profit of the person who receives it as a damage, then it is obvious that the latter receives it for doing virtually nothing – no counter-performance at all. If the earned profit has been received for actually performed contract and therefore created value, then the lost profit as a damages is paid merely because of an error in oftentimes complex public procurement regulations. The outcome is such that the unfairly treated person receives profit for doing nothing, but the person, who performed the contract has put all the effort and resources and managed all the risks. However unwelcome is the fact that a person has been treated unfairly in the public procurement procedure, the legal remedy cannot treat this person as if she had actually performed the contract. Such a generous award for doing

[10] Judgment of the Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 22 October 2014 in Case No. SKA-807/2014, para. 8. Available: https://www.at.gov.lv/downloadlawfile/7447 [viewed 03.12.2023.].

nothing puts this market participant in an economically better position than his competitors and leads to another extreme – unjustified enrichment on the expense of public funds.

It should also be noted that the existing practice in awarding lost profit takes for granted that the person, who receives the damage, actually would have performed the contract. However, it is well known that contractors not always perform the contract according with the agreed standards or in a timely manner. Therefore the whole concept of the lost profit is based upon premise that the contract would have been performed faultlessly, but this assumption is a mere speculation.

Therefore awarding damages for the lost profit in public procurement procedure creates a result that is contrary to a simple moral standard – the person who has done nothing should not be granted the same profits that the person who has earned them.

Another disturbing issue in the theme of damages in public procurement procedure are the costs of the bid. If a person has been unlawfully excluded from the competition and would have been awarded with the contract, then costs of preparation of the bid are considered as damages. Such approach has been accepted in countries like Austria,[11] Germany,[12] Italy,[13] Poland,[14] Romania.[15] In turn, the Netherlands seem particularly averse to granting bid cost claims due to strong economic rationale: economic risk of participating in a tender procedure rests with the tenderer.[16] Indeed, the costs of the bid are expenses which are suffered by all participants of the public procurement procedure. Therefore there is no logic in paying damages in the amount of costs of the bid, because such costs would occur irrespective of the result of the public procurement procedure. The very logic is expressed in the Latvian law on Compensation for Losses Caused by State Administration Institutions: "causal link shall not exist in cases where the same loss would have arisen also if the action of the institution would have been lawful" (Article 6, Paragraph 2).

3. Intolerable speculation regarding the amount of the lost profit

Notwithstanding the infamous troubles for the judiciary to evaluate the person with whom the contract should have been concluded, it has been well known that proving the amount of the lost profit is also an exceptionally difficult task. Although in Latvia administrative courts have dealt with claims regarding lost profits in public procurement cases since 2014, most of the cases dealt with

[11] Della Cananea G., Caranta R. 2020, p. 165.

[12] Ibid., p. 173.

[13] Ibid., p. 178.

[14] Ibid., p.180

[15] Ibid., p.183

[16] Shebesta H. Damages in EU Public Procurement Law. Springer: 2016, p. 93.

theoretical issues regarding the preconditions of liability rather than calculating exact amount of the lost profit. However, quite recently first judgments in which an actual amount of damages have been judged upon, have been adopted and therefore give an insight into the speculative character of the lost profit.

The Supreme Court has ruled that "sufficient confidence on what the exact costs of the tenderer would have been if the contract had been performed is an essential element in determining the amount of the lost profit. Therefore it is expected that the court [...] explains its considerations [...] that with high probability the costs calculated in the estimate reflect the actual costs in the case of performing the contract. [...] It should be taken into account that there may be various circumstances related with the industry (for instance, rise of prices of building materials) that may lead to conclusion that the costs, which were estimated originally, actually would have been larger and therefore the profit would have been lesser."[17] "[...] the fact that other participants in the case have not doubted the algorithm of calculating the lost profit submitted by the claimant and that all changes in the contract cannot be foreseen does not mean that the conclusions regarding profit and its amount can be based on assumptions. It should be noted that the burden of proof lies on the claimant [...]."[18]

From one hand, these thesis quite rightly point that the amount of the lost profit should not be based upon unproven speculation and therefore tends to limit the possibilities of proving the lost profit. On the other hand, the task of evaluating various factors that could affect the costs is speculative in itself. As can be seen from the first judgments in Latvia actually awarding the lost profit, the courts are either base their merits on the unproven estimates of claimants or are faced with an enormously difficult task to determine the exact costs of performing a contract that has never been nor will be concluded.

One of the few judgments which have awarded the lost profit and have actually come into force is judgment of the Administrative District Court. The court concluded that all preconditions have been met in order to determine that the claimant was illegally disqualified from the procurement procedure (construction supervision services) and should have won the procedure. The court based it merit solely upon the estimate presented by the claimant, which represented the total sum of the bid, estimated costs and estimated profit. The position of "costs" included such position as "administrative expenses" which were calculated as overall administrative costs of the company and evenly distributed between all objects/contracts.[19] To prove the correctness of this position alone would be an

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[17] Judgment of the Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 10 May 2022 in Case No. SKA-471/2022, para. 48. Available: https://www.at.gov.lv/downloadlawfile/8525 [viewed 03.12.2023.].

[18] Judgment of the Department of Administrative Cases of the Supreme Court of the Republic of Latvia of 22 September 2017 in Case No. SKA-558/2017, para. 15. Available: https://www.at.gov.lv/downloadlawfile/5587 [viewed 03.12.2023.].

[19] Judgment of the Administrative District Court of 11 March, 2022 in Case No. A420121421, para. 14. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/472955.pdf [viewed 03.12.2023.].

insurmountable task. However, the main problem posed by such estimates is that regarding the lost profits the claimants naturally tend to minimize the estimated costs in order to prove that the profits from the contract would have been greater. Thus, the administrative district court has ruled that the estimate cannot be the only document proving the actual (estimated) costs: "Profits specified in the estimate is an eventual calculation based upon the total amount of the direct costs. However, it should be taken into account that the purpose of the claimant, as with any other bidder, is to conclude a contract, therefore, to try to bid the lowest price. Undeniably, the claimant hopes to receive profit, however, it is not proven whether the actual profit gained by the claimant would correspond to the calculated profit specified in the estimate. The claimant has not proven that the costs of performing the contract would have been exactly the same as specified in the financial offer, in other words, the financial offer has been drafted with the purpose of concluding the contract, but it does not prove the exact costs during the performance of the contract."[20]

Conclusions

1. Damages in the form of the lost profits are widely recognized as a legal remedy to compensate the rightful winner of the public procurement procedure for the fact that the contract has been illegally awarded to another person. However, the lost profit as a legal remedy in public procurement cases is ungrounded, unfair (immoral) and impractical legal remedy.
2. The transplantation of its use from the civil law in public procurement procedure has failed to pay sufficient attention to a significant difference – the public procurement procedure does not actively infringe already existing rights, therefore the legal status of the aggrieved person after the public procurement procedure is the same as before it. Therefore there has never been a previously expected income and hence the lost profit in public procurement cases is a mere fiction with the sole purpose of granting a legal remedy.
3. Awarding lost profits to the person in recompense for no effort at all in comparison to the person, who has actually performed the contract, is an unfair solution creating unjustified enrichment at the expense of public funds.
4. Lastly, the determination of the amount of the lost profit is based on nothing more than a speculation that the contract would have been performed precisely, and that all calculations regarding the costs would be identical to imaginary "actual" costs.

[20] Judgment of the Administrative District Court of 31 May, 2022 in Case No. A420283421, para. 12. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/479654.pdf [viewed 03.12.2023.].

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REVISITING THE ARBITRATION LAW OF LATVIA: AN END OF THE BLACK SHEEP ERA IN ARBITRATION WORLD?

Key words: no set aside procedure, court's assistance in arbitration proceedings, fair arbitration procedure

Summary
A state can learn from internationally unified or other countries' best practices in a particular area of law, or it can go its own way – follow the so-called Westphalian model. Historically, Latvia has departed from internationally recognized principles of arbitration, it is the only Member State in the Council of Europe that does not have full access to court's support during arbitration process and has not introduced a procedure for setting-aside arbitral awards. This has not only had a negative impact on Latvia's reputation in the field of arbitration but has also been the basis for proceedings before the Constitutional Court. However, it is hoped that on 2024 much will be changed, new amendments to law introduced and Latvia will no longer be the black sheep in the arbitration world.

Introduction: Why is Latvia the black sheep of arbitration family?

Since 1998, when Latvia introduced the provisions on arbitration in the Civil Procedure Law[1] for the first time, and later, when adopted Arbitration Law,[2] it has not followed the international arbitration standard – the UNCITRAL Model Law on International Commercial Arbitration[3] as it is done by 88 States in 121 jurisdictions in the world. The aim of the Model Law is to assist states in reforming

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1 1998 version of the Civil Procedure Law. Available: https://likumi.lv/ta/id/50500-civilprocesa-likums [viewed 03.01.2024.].

2 New Arbitration Law of Latvia was adopted on 11 September 2014, and entered into force on 1 January 2015. Available: https://likumi.lv/ta/id/269189-skirejtiesu-likums [viewed 03.01.2024.].

3 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. See: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [viewed 03.01.2024.].

and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.[4]

Theoretically, the so-called Westphalian model allows each state to have its own views prevail, without regard to what other state will do.[5] A state can, for example, consider that a domestic *ad hoc* arbitral awards are not enforceable, as did Latvia, even though most other states readily accept the idea of arbitration taking place outside of an institutional framework.[6] Or state, like Latvia, can introduce mandatory lists of arbitrators and provide no court assistance in arbitration proceedings, including no setting-aside procedure for arbitral awards. Latvia can still tolerate existence of 63 permanent arbitral institutions. However, all those specifics accepted by Latvia is far from the widely recognized principles and practices.[7]

The aim of this article, specifically focusing on the total lack of setting-aside procedure in Latvia, is to show that in case of arbitration the Westphalian model is unsatisfactory, and by not following the UNCITRAL Model Law, the arbitration process becomes unpredictable and departs from the international legal standards.

1. Absence of setting-aside procedure

Provisions on the court's role, including the setting-aside procedure, were not incorporated either into the Civil Procedure Law, or Arbitration Law of Latvia.

At least in theory, the setting-aside procedure must be available in Latvia for arbitration awards that fall within the scope of the European Convention on International Commercial Arbitration (Article IX), as Latvia is part of this convention, which provides for setting-aside procedure.[8] However, the law does not contain a procedure for that. This is an obstacle to an actual exercise of the setting-aside procedure even in those few cases when it is mandated by international law.

Scholars have insisted for years that "[regarding] total exclusion of setting-aside proceedings, the hypothesis is rather straightforward – a legislative approach failing to provide for the annulment mechanism arguably violates arbitrating parties' right of access to a court under Article 6(1) of the European Convention on Human Rights.[9]"[10]

[4] Binder P. International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions, Kluwer Law International, 2019, p. 13.

[5] Gaillard E. Legal Theory of International Arbitration. Martins Nijhoff Publishers, 2010, p. 29.

[6] Ibid., p. 68.

[7] See more on those particularities: Kacevska I., Fillers A. There Is Ordinary Situation and There is Latvia's Situation. Stockholm Arbitration Yearbook, Wolters Kluwer, 2023.

[8] European Convention on International Commercial Arbitration. Signed in Geneva on 21 April 1961.

[9] European Convention on Human Rights. Signed in Rome on 04.11.1950.

[10] Krumins T. Arbitration and Human Rights. Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR. Springer, 2020, p. 316. See also: Kacevska I., Fillers A. 2023, p. 323.

Likewise, the Constitutional Court has repeatedly indicated that Latvia should follow the UNCITRAL Model Law and introduce the institution of annulment of an arbitral award. Already in 2005, the Court pointed out:

> *Taking into consideration the frequently expressed criticism on the performance of the arbitration courts and prima facie noticeable faults in the regulation of the issuance of a writ of execution, the accepted in the world institute for challenging the arbitration award in Latvia, would be of especially great importance.*[11]

However, the legislator felt that the court could sufficiently exercise its supervisory function over arbitrations only at the stage of issuing the writ of enforcement. However, a refusal to issue the writ for the compulsory execution of arbitral award and challenging an arbitral award are two different legal instruments. A refusal to issue the writ of execution does not affect the validity of the arbitral award. The writ of execution is not required if the arbitral award needs no enforcement at all (e.g. in cases when arbitral tribunal made a declaratory award or an award dismissing all claims), or if it is to be recognized and enforced in another country. Moreover, in Latvia, only arbitral awards made by a permanent arbitral institution can be enforced, not *ad hoc* awards. So, if an arbitral tribunal has not respected, for example, due process, there is no legal remedy for an interested party to set aside such an unlawful award.

In 2014, the Constitutional Court again drew the attention of legislator to the need to define the grounds and procedure for setting-aside an award:

> *Taking into consideration,* inter alia*, the problems in the functioning of arbitration courts, [...] an internationally accepted institute for challenging an award by an arbitration court would be of particular importance in Latvia.*[12]

No action followed, so it is not surprising that this issue once more ended up on the table of the Constitutional Court. This time, in 2022, the Constitutional Court had to decide specifically and directly on the question of the constitutionality of the non-existence of the institute of setting-aside.[13] Although the wording of

[11] Judgment of the Constitutional Court of the Republic of Latvia of 17 January 2005 in Case No. 2004-10-01. Available in English: https://www.satv.tiesa.gov.lv/en/cases/?case-filter-years=&case-filter-status=&case-filter-types=&case-filter-result=&searchtext=2004-10-01 [viewed 03.01.2024.].

[12] Judgment of the Constitutional Court of the Republic of Latvia of 28 November 2014 in Case No. 2014-09-01. Available in English: https://www.satv.tiesa.gov.lv/en/cases/?case-filter-years=&case-filter-status=&case-filter-types=&case-filter-result=&searchtext=2014-09-01 [viewed 03.01.2024.].

[13] Judgment of the Constitutional Court of the Republic of Latvia of 23 February 2023 in Case No. 2022-03-01. Available in English: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-03-01_Judgement.pdf#search=2022-03-01 [viewed 03.01.2024.].

the substantive part is peculiar,[14] the Constitutional Court has recognized that the setting-aside procedure should have a place in the Latvian system.

However, not all judges of the Constitutional Court have considered this outcome to be justified, as there are two dissenting opinions.[15] It is surprising that these judges did not doubt why at least among the Member States of the Council of Europe, Latvia remains the only state where it is simply impossible to challenge arbitral awards before the state courts and that Latvia is a Member State of the European Convention on International Commercial Arbitration providing for such procedure.[16]

Most importantly, however, these separate opinions essentially stated that an action for annulment of an arbitration agreement is an effective remedy. Thus, there is no need for a mechanism to challenge the arbitral award.

Firstly, challenging the validity of an arbitration agreement is not an adequate substitute for a setting-aside procedure. The challenge concerns only the legal basis of arbitration – the validity of the arbitration agreement – and cannot be aimed at irregularities of the arbitration procedure that have affected the arbitration award. For example, currently, if during arbitral proceedings the arbitrator was biased, or due process was not foreseen, arbitral award rendered by the tribunal cannot be invalidated.

Secondly, in 2014 judgment the Constitutional Court ruled that an arbitration agreement can also be challenged before a court of general jurisdiction (previously, the courts did not accept such claims, only arbitral tribunals were competent to decide on the validity of the arbitration agreement), but no amendments were

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[14] The Constitutional Court decided:
To declare Sections 534, 5341, 535, 536 and 537 of the Civil Procedure Law, insofar as they do not provide for supervision of arbitral proceedings in cases where the interested party does not apply to a court of general jurisdiction for enforcement of the arbitral award for a prolonged period of time, where the arbitral award is to be recognized and enforceable abroad or where it is not necessary to apply to a court of general jurisdiction for the issue of a writ of execution for the enforcement of the arbitral award, incompatible with Article 92 of the Constitution of the Republic of Latvia as of 1 March 2024.
The scholars have questioned this part:
For instance, when is it possible to say that the award creditor has not requested the writ of execution for a long time? How long is too long? And what is the point of postponing the setting aside procedure? Likewise, it is hard to codify the difference between awards that are to be enforced abroad and those to be enforced domestically. When the award is rendered, it might be unknown whether the award debtor has any foreign assets.
See: Kacevska I., Fillers A. 2023, p. 323.

[15] Judge of Constitutional Court Janis Neimanis Separate Opinion in Case No. 2022-03-01, 06.03.2023. Available in English: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-03-01_Separate-opinion_Neimanis.pdf#search=2022-03-01 [viewed 03.01.2024.]. Judge of Constitutional Court Gunars Kusins Separate Opinion in Case No. 2022-03-01, 09.03.2023. Available in English: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-03-01_Separate-opinion_Kusins.pdf#search=2022-03-01 [viewed 03.01.2024.].

[16] Krumins T. 2020, p. 235.

made in addition, such as those in the UNCITRAL Model Law.[17] As a result, the arbitration agreement can be challenged without time limit, including once an arbitral award has been made, or even once a writ of execution has been issued. As stated in the separate opinion of Judge Kusins, on 6 April 2021 the applicant brought an action for annulment of the arbitration agreement before the District Court, but as at the date of the separate opinions, the court still has not reviewed the claim. It is scheduled on 25 January 2024. If we imagine that, in the best-case scenario, the first instance's judgement is handed down in 2024, the question is still open – what will happen with the arbitral award of 26 November 2019?

2. End of black sheep era?

The Constitutional Court ruled that the setting-aside procedure shall be introduced until 1 March 2024, otherwise all provisions of part 66 "Enforcement of Arbitral Awards" of the Civil Procedure Law will cease to exist. Thus, on 24 April 2023, the Working Group for the implementation of the Constitutional Court's judgment in the Case No. 2022-03-01 was established under the Ministry of Justice. It has worked diligently and proposed more than the changes in the Civil Procedure Law concerning the setting-aside procedure and grounds for challenging the arbitral award.

Currently, as concerns the setting-aside procedure, the draft amendments in Article 533^4 of the Civil Procedure Law provide identical grounds for the setting-aside of arbitral award as the UNCITRAL Model Law. Draft Article 533^1 determines that if the arbitral award has been rendered in Latvia, a party may, within one month from the date of the arbitral award or supplementary award, file an application for challenging the arbitral award, if any of the grounds for setting-aside the arbitral award set forth in Article 533^4 of this Law exists and the writ of execution has not been issued [...]. The court shall decide on application in the written process within 20 days of the date on which the notices were sent to the parties and the court is entitled to request from the arbitral institution or from a party the arbitration file or other information, if it is necessary to decide on the case. However, this draft Article 533^3 also stipulates that no appeal shall be allowed if the court makes a decision on setting-aside an arbitral award, but an ancillary appeal may be lodged against the decision rejecting the application for setting-aside of the arbitral award within 10 days from the date of receipt of the decision. Hopefully, the legislator will allow equal appeal for both decisions.

[17] Article 16(3) of UNICTRAL Model Law:
The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Members of the Working Group following the modern trends of arbitration urged the Ministry to make also other amendments to the law complying with UNCITRAL Model law by introducing other ways of the state court assistance in the arbitral proceedings (appointment and challenge of arbitrators, etc.) and compulsory execution of *ad hoc* awards. Furthermore, it was suggested that mandatory lists of arbitrators should be waived and stricter rules for disclosing the facts that may influence the impartiality of arbitrators introduced.

The new amendments are submitted to the Cabinet of Ministers for review and further approval of the Parliament.[18] I t can only be wished that these amendments are adopted as proposed and hopefully in 2024 Latvia will cease to follow the Westphalian model and will integrate in the modern world of arbitration.

And there will be an end of black sheep era…

Conclusions

1. Latvia should not continue to follow its own particular approach to arbitration (the Westphalia model) but adopt and follow the best practice – the UNCITRAL Model Law, as it reflects the international efforts towards harmonization of arbitration laws, thus making arbitration more predictable, in line with the modern human rights and due process.
2. Some members of the legislator and judiciary consider that the setting-aside process of the arbitral awards can be replaced either by the possibility of challenging the validity of the arbitration agreement or by judicial review in the process of issuing a writ of execution. However, those are separate legal procedures and all of them are necessary for fair arbitral proceedings.
3. The Constitutional Court of the Republic of Latvia repeatedly has pointed out that the arbitration legal framework is incomplete, raising concerns about the quality of arbitration proceedings and awards. Following the 2023 Constitutional Court judgment in Case No. 2022-03-01, the Ministry of Justice has prepared an amendment to the Arbitration Law and the Civil Procedure Law, which will introduce the institute of setting-aside of arbitral awards in Latvia and other court assistance during the arbitral procedure.

[18] Amendments to the Civil Procedure Law. Available: https://tapportals.mk.gov.lv/legal_acts/36caf92f-aec4-4041-a7b7-5f3580a16545 [viewed 03.01.2023.]. Amendments to Arbitration Law. Available: https://tapportals.mk.gov.lv/legal_acts/8cde4ee8-17a0-43e8-b2b1-d8315f7d1b05 [viewed 03.01.2024.].

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PERFORMANCE OF DEBT ON BEHALF OF DEBTOR

Key words: performance of debtor's debt, performance of debt, payment of the debt on behalf of the debtor, enforcement of debt on behalf of another, enforcement of obligation on behalf of another, enforcement of third-party debt, subrogation, legal cession, forced cession, *cesio legis*

Summary

This paper analyses the general Latvian private law framework and the legal consequences in cases where a third party performs the debt on behalf of the debtor. Historically, the Latvian Civil Law has taken a conservative position on this issue, not recognizing legal subrogation in the event of a debt termination. Although legal subrogation is considered foreign in the Latvian Civil Law (with certain exceptions in the case of recourse by a guarantor), it is recognized in certain Latvian laws. An assessment of Latvian case law reveals a number of judgments, which have addressed this issue, and historically the courts have not recognized legal subrogation. However, recent case law also contains judgments, which may lead to the conclusion that in certain cases there is legal subrogation where a person performs an obligation on behalf of the debtor. Given that there is some uncertainty on this issue, including the legal consequences of a third party performing a debt on the debtor's behalf without the debtor's knowledge and against his will, the paper sets out proposals and solutions to be taken to harmonize the approach in similar cases not only in case law but also in legal doctrine.

Introduction

Article 1815 of the Civil Law[1] (hereinafter – CL) states:

If the subject-matter of an obligation pertains only to the personal affairs of the obligor, then the obligor must perform the obligation personally. In all other cases, the obligation may be performed by a third person in place of the debtor, even without his or her knowledge and contrary to his or her intent.

[1] Civil Law. Available: https://likumi.lv/ta/en/en/id/225418-civil-law [viewed 08.01.2024.].

The purpose of this paper is to analyse the second sentence of Article 1815 CL, which applies to obligations that may also be performed by a third party who is not in a legal relationship with the creditor. Although the second sentence of the said Article allows the performance of an obligation in the place of another and even against the will of the creditor or the debtor[2], the Article does not regulate whether and what legal relationship exists between the former debtor and the third party in whose place the obligation was performed, after the obligation has been performed. It is clear that the lengthy content of the Article does not imply that the law would provide for legal subrogation in this case. A solution is provided by Article 1797 of the CL, which states:

> *A person who in lieu of a debtor satisfies a creditor shall provide by contract that the creditor cedes the claim to him or her, either before the satisfaction or during the time of satisfaction, and if this has been done, then the claim per se shall be considered to have been ceded to him or her at the moment of satisfaction.*

This Article makes it clear that, in order to acquire a claim against a former debtor, a third party must first contract a cession with the debtor's creditor. However, recent case law raises the question whether an assignment is indeed always necessary or whether there are certain cases where, even in the absence of such an agreement, a third party who performed the debt in the debtor's place has a claim against the former debtor for reimbursement of the performance made.

1. Concept of subrogation

Subrogation under the "Draft Common Frame of Reference"[3] (DCFR) is a process of transfer of rights in which a person who has made a payment or performance to another person acquires that person's rights against a third party on the basis of law. Subrogation is therefore the transfer of a claim from a creditor to a third party by operation of law in situations where a third party performs an obligation in place of another person. In other words, subrogation is the performance of an obligation in place of another person (the debtor), acquiring a claim against the debtor to the extent of that performance. It may arise by operation of law or by contract, e.g. an insurer, by paying an insurance claim, acquires a claim against the wrongdoer who caused the insured event.[4]

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[2] Cakste K. Civiltiesibas. Lekcijas. Raksti [Civil law. Lectures. Articles]. Riga: Zvaigzne ABC, 2011, pp. 146, 147.

[3] Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR), p. 1601. Available: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__DCFR_.pdf [viewed 07.01.2024.].

[4] Rozenbergs J. Subrogacija. Juridisko terminu vardnica [Subrogation. Dictionary of legal terms]. Riga: Nordik, 1998, pp. 247, 248.

Subrogation is the act of a third party who has paid a debt to a creditor entering in the creditor's place and receiving a claim from the creditor[5], thus, it is a special type of change of the subject of the active part of the obligation. The following view in the earlier Latvian legal doctrine is misleading and inaccurate –

> *If only the right of claim is transferred under the cession agreement (Art. 1800 CL), then in case of subrogation not only the right of claim is transferred, but also the contractual relationship from which this right arises. [...]Complete legalization of subrogation would be highly detrimental to the personal nature of the obligation and would be contrary to the provisions of the CL. Like the transfer and delegation of a debt, subrogation is possible by means of contract of novation to which the debtor is a contracting party[6].*

In the case of subrogation, there is no contractual relationship, nor does the finding of subrogation require a novation, it is based on a unilateral legal fact, i.e. the giving of performance. This also follows from the only legal definition of the term "subrogation" found in the Latvian legal system, which is contained in Point 23 of Article 1(1) of the Insurance Contract Law – the right of subrogation – the right of the insurer who has disbursed the insurance benefit to take over the right to claim of the insured person against the person responsible for losses in the amount of the disbursed sum. As can be seen from the definition, subrogation does not require a separate novation agreement and is based on the law. Subrogation is most often relevant in monetary obligations, where the identity of the debtor is indifferent to the creditor[7], but it is also possible in other types of obligations. Although the term "subrogation" is more commonly used, in Latvian legal literature this concept is sometimes also referred to as legal cession, forced cession or cesio legis.

2. The institute of subrogation in Civil Law from a historical perspective

The question of whether the Civil Law recognizes legal subrogation when another person performs the debt on behalf of the debtor has also been analysed in the interwar period. As the legal scholar N. Vinzarajs has pointed out,

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5 Sinaiskis V. Civiltiesibas [Civil law]. 1938, p. 207. Available: http://gramatas.lndb.lv/periodika2-viewer/?lang=fr#panel:pp|issue:693919|article:DIVL2045|page:407 [viewed 07.01.2024.].
See also: Civiltiesibu pamati. Sakara ar vietejo civillikumu III. dalu. Pec prof. V. Sinaiska lekcijam [Fundamentals of civil law. Due to Part III of local civil law. After "Prof. V. Sinaiski's lectures]. 1934, pp. 252, 253. Available: http://gramatas.lndb.lv/periodika2-viewer/?lang=fr#panel:pp|issue:663992|article:DIVL12|page:73 [viewed 18.08.2023.].

6 Torgans K., Grutups A., Balodis K., Visnakova G., Petrovics S., Kalnins E., Bitans A. Civillikuma komentari. Prof. K. Torgana zinatniskaja redakcija [Commentaries on the Civil Law. Under the scientific editorship of Prof. Torgans K.]. Mans Ipasums. Riga, 1998, p. 282.

7 Sinaiskis V. Latvijas civiltiesibu apskats. Lietu tiesibas. Saistibu tiesibas [Latvian Civil Law Overview. Law of Things. Liability Law]. Riga: Latvijas Juristu biedriba, 1996, pp. 137, 202.

> *from the beginning (see D.46, 3, 76), lawyers required the payer to conclude a contract of sale with the creditor before the act of payment, thus buying the creditor's claim against the debtor. Later (see D.46, 1, 36), the deed of payment was treated (by fiction) as a contract of sale. However, our civil law has not reciprocated the later – progressive – view, since our civil law requires the payer to agree on a cession of the claim before payment* [Art. 3466 BCL, analogous to Art. 1797 CL – author's note]. *The conclusion of the paper summarizes the insight gained, i.e. that forced assignment and its progressive form, cession ipso iure, are peculiarly constructive techniques, necessary in Justinian's statute (corpus iuris), but not in modern civil law. Erdmann is quite right to say that such a construction is a negation of forced cession.*[8]

With regard to subrogation, the legal scholar V. Sinaiskis[9], referring to Article 1797 CL, has pointed out that our CL recognizes cession, but subrogation is unknown to it, while mentioning that subrogation exists in other European countries, for example in France – in particular with regard to the law of obligations whose object of performance is money. With regard to the provision in the second sentence of Article 1815 CL that any third party may perform an obligation on behalf of the debtor if the obligation is not connected with the personality of the debtor, the legal scholar points out that this thesis is inconsistent with the principle of autonomy, and that such performance can be explained only as a gift by the third party.[10] In his paper "The Legal Nature of Liability Law", when discussing subrogation, V. Sinaiskis states:

> *But there may be cases when it is desirable to store a monetary obligation, despite the payment of the debt, in such a way as to put a third party who has paid the debt in the place of the creditor. In such a case, there is an exchange of creditors, with the obligation on the active side being reversed in relation to the subject. Cases of transformation of monetary obligations which are provided for by law (legal subrogation) or which arise in connection with a contract (contractual subrogation) constitute the institute of subrogation. Contractual subrogation is generally based on the creditor's will (i.e. an agreement between the creditor and a third party), which is expressed in the contract at the same time as making the payment. Such subrogation is obviously very close to a cession, because here too the debtor's consent is not required. But contractual subrogation on the basis of the debtor's will (on the basis of a contract between the debtor and a third party) is also possible, where not only is the creditor's consent not required, but subrogation is also possible against the creditor's will. [...] As regards to contractual subrogation,*

[8] Vinzarajs N. Jautajuma par piespiestu cesiju [On the question of forced cession]. Jurists, December 1932, No. 9 (43).

[9] Sinaiskis V. 1996, pp. 137, 202.

[10] Ibid., p. 134.

there is no reason to not recognize it in the law of the present (but the CL sticks to Roman law in this respect).[11]

As can be seen from an analysis of the interwar legal literature, Latvian general civil law did not recognize legal subrogation in the past.

Subrogation has also been addressed in more recent legal literature. For example, the legal scholar A. Fillers has pointed out to Article 1797 CL (corresponding to Article 3466 BCL), Roman law sources indicate that it dealt specifically with the impossibility of automatic subrogation, which was justified by technical considerations. In particular, the Roman jurist Modestinus argued: if one pays the debt of another, this extinguishes the debt, and if it is not previously ceded (effectively purchased), then the payer has no right of recourse, since it has been extinguished. However, the sources for this Article do not indicate that these purely technical considerations have any effect on third-party claims arising from an authorization contract or an unauthorized management.[12]

Despite the discussion of Latvian legal scholars of the interwar period that the CL does not recognize legal subrogation, but other countries do, the Latvian legislator of the time, when adopting the Civil Law of 1937, did not provide for the institute of subrogation in Article 1815, which means that there is no legal deficiency in this matter, but rather a deliberate will of the legislator.

3. The institute of legal subrogation in recent Latvian case law

When assessing the application and interpretation of Article 1815 CL in Latvian case law, contradictory approaches can be found. For example, the Supreme Court in Case No. SKC-267/2015[13] has indicated that there is a dispute in case, whether the actions of one joint debtor, whereby he pays the purchase price debt instead of all the debtors, in itself creates legal effects of cession [legal subrogation – author's note]. In this case, the Supreme Court analysed Article 1797 of the CL, stating that this provision applies to the cases where the third party who has satisfied the creditor in the debtor's place has also agreed for the cession of the right to claim, that is to say, has concluded a cession agreement with the creditor, either before or at the time of satisfaction. The Supreme Court also stated that it agreed with the view expressed in legal doctrine that if such acts [payment of the debt in place of the debtor without first concluding a contract of cession – author's note]

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[11] Sinaiskis V. Saistibu tiesibu juridiskais raksturs [The legal nature of contract law]. Jurists, 1936, No. 01-02. Available: http://www.periodika.lv/periodika2-viewer/?lang=fr#panel:pa|issue:209079|article:DIVL31 [viewed 24.08.2023.].

[12] Fillers A. Galvinieka un kilas deveja regresa tiesibu regulejums Latvijas civiltiesibas [Regulation of the right of recourse of the guarantor and the pledgor in Latvian civil law]. In: 78th International Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2020, pp. 259, 260.

[13] Judgment of the Supreme Court, Department of Civil Cases of 10 December 2015 in Case No. SKC-267/2015, p. 10.2. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [viewed 08.01.2024.].

in themselves had the legal effect of a cession, then it would be a de facto transfer of the debt, which would go against the personal nature of the right of obligation. However, under the CL, a transfer of the debt is possible only by concluding a novation contract, in which the creditor must be present. Such a thesis is, however, unfounded, since the transfer of debts is also possible on the basis of law and the existence of a contract of novation is not always necessary.

On the other hand, in Case No. SKC-27/2022[14], the Supreme Court formulated its position on the question whether a third party who has paid the purchase price to the seller instead of the buyer for immovable property is entitled to recover it from the latter. The Supreme Court analysed Article 1815 and Article 2014 of the CL in the context of this question. Commenting on Article 3487 of the Compendium of Baltic Local Civil Laws, which is analogous to Article 1815 of the Civil Law, the Court referred to legal scholar Vladimir Bukovsky[15], who has stated that when a third party fulfils an obligation in place of the debtor, an obligation relationship arises between them, and if the debtor does not prove that the third party paid the debt for the purpose of gifting him (making him richer), then the latter is obliged to reimburse the third party for the costs of fulfilling the obligation. In that case, the Supreme Court held that the use of the creditor's money, rather than the buyer's own, to pay the purchase price created a legal relationship of obligation between the parties and gave the creditor the right to recover from the buyer the purchase price paid on his behalf. The Supreme Court therefore concluded that the second sentence of Article 1815 CL contains a legal subrogation. Although the Supreme Court concluded that legal subrogation follows from Article 1815 CL in this case, the judgment did not at all analyse Article 1797 CL, which imperatively requires a cession, nor did it analyse the conclusions of legal scholars of the inter-war period that there is no legal subrogation in Article 1815 CL.

A similar judgment in which the Supreme Court pointed to the existence of the institute of legal subrogation in Article 1815 CL was later adopted in case No. SKC-263/2022.[16] The Court held that it had no reason to doubt the interpretation of the above-mentioned legal provisions, i.e. that by using not the buyer's own money for the purchase price but the money of his creditor, a legal relationship of obligation is created between the parties and the creditor acquires the right to recover the purchase price paid by the creditor on buyer's behalf from the buyer. Although the court did not refer to judgment No. SKC-27/2022 in its reasoning part of judgement, the reasoning of the judgment was identical.

[14] Judgment of the Supreme Court, Department of Civil Cases of 22 February 2022 in Case No. SKC-27/2022 (C29542517), p. 74. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [viewed 08.01.2024.].

[15] Bukovsky V. The Compendium of Civil Laws of the Baltic Provinces with the Continuation of 1912–1914. yr. and with explanations in 2 volumes. Volume II, containing the Law of Requirements. Riga, G. Gempel & Co, 1914, p. 1449.

[16] Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 14 December 2022 in Case No. SKC-263/2022 (C73294318). Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [viewed 08.01.2024.].

Similarly, in Case No. SKC-255/2022, the court assessed a situation in which the purchase contract indicated that a third party was the payer of the purchase price, and this third party transferred the entire purchase price to the seller one month before the conclusion of the purchase contract. The third party subsequently brought an action against the buyer named in the contract, seeking a declaration that the payment of the purchase price by the claimant had been made without lawful basis, fraudulently, while also asking for order that the defendant pays the claimant the amount of the purchase price. The Supreme Court held that in the present case it was not important to address the validity of the contract of sale, which was at issue, but whether the defendant was obliged to reimburse the plaintiff for the money used to purchase the immovable property belonging to the defendant. In its reasoning, the Supreme Court referred to the judgment in Case No. SKC-27/2022, reaching the identical conclusion that there is no reason to doubt the interpretation of Articles 3487, 3847 of the Compendium of Baltic Local Civil Laws, that is to say, that the use of the creditors money for the purchase price, rather than the purchaser's own, creates a legal relationship of obligation between the parties and entitles the creditor to recover from the purchaser the purchase price paid in his place.[17]

In assessing these Supreme Court judgments, it must be concluded that, from the point of view of legal theory, the Court's approach is feasible and modern, albeit different from the earlier approach as to whether there is legal subrogation in Article 1815 CL. From a theoretical point of view and abstracting from the outdated approach of the CL and the earlier legal literature, this position of the court is justified, as the majority of European Union countries, including Lithuania, Estonia and the German legal framework on obligations, which is similar to the Latvian legal system, recognizes statutory subrogation.

4. Legal subrogation in the civil codes of Lithuania, Estonia and Germany

The right of a third party to perform an obligation in place of the debtor is provided for in Article 6.50 of the Lithuanian Civil Code.[18] The first part of this Article provides that the third party may perform the obligation either partially or fully, except in cases where the obligation is related to the personal activity of the debtor. The second part of the Article states that the creditor may not accept the performance offered by the third party if the debtor has notified the creditor of his objections to the third party performing the obligation in his place, except in the case referred to in the first part of Article 6.51 of the Civil Code.

[17] Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 21 July 2022 in Case No. SKC-255/2022 (C73429419), p. 8. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi [viewed 15.06.2023.].

[18] Civil Code of the Republic of Lithuania. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.245495 [viewed 19.12.2024.].

The exception described above provides that, where the creditor seeks money recovery proceedings against an object belonging to the debtor, anyone who risks losing the right to the object as a result of the recovery proceedings is entitled to satisfy the creditor's claim. The same right also applies to the possessor of the thing if he risks losing possession as a result of the performance. On the other hand, Article 6.50(3) of the Lithuanian Civil Code provides that a third party who has performed an obligation acquires the rights of a creditor against the debtor, thus recognizing the existence of the institution of legal subrogation in the Lithuanian legal system.

Article 78(1) of the Estonian Act on Obligations[19] states that if the debtor is not obliged to perform the obligation personally by law, the transaction or the nature of the obligation, the obligation may be performed in whole or in part by a third party. If a third party fulfils the obligation, the debtor is discharged from the obligation. The second part of the article states that the creditor is entitled not to accept performance by a third party if the debtor objects. The third part of the Article states that if the debtor has objected to the performance of the obligation by a third party in his place, the creditor may not refuse such fulfilment in two situations. First, where the third party performs the obligation in order to avoid performance in respect of an object which belongs to the debtor but which is in the third party's lawful possession or to which the third party is otherwise entitled and which would lose such possession or rights if enforced. Secondly, where the third party has another legitimate interest in the performance of the obligation and the debtor has failed to perform the obligation when due or it is obvious that the debtor will fail to perform the obligation when due, or where the right from which the obligation arises is mortgaged or arrested and the failure to perform the obligation may jeopardize the enjoyment of the right. Finally, the fourth paragraph of the Article states that the third party who has performed the obligation may bring an action for recovery or claim reimbursement of the costs incurred in performance only if this arises from the law or from the relationship between the debtor and the third party, inter alia, as a result of unjust enrichment or unauthorized management.

Article 267 of the German Civil Code[20] states that if the debtor is not personally bound to perform the obligation, a third party may perform the obligation even without the debtor's consent, adding that the creditor may refuse to accept performance if the debtor objects. Article 268(1) of the Civil Code provides that if a creditor seeks money recovery against an object belonging to the debtor, anyone who risks losing his right to the object as a result of the recovery is entitled to satisfy the creditor's claim. The same right also applies to the possessor of the thing if he risks losing possession as a result of the performance. The third paragraph of that

[19] Law of Obligations Act. Available: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/524032023004/consolide [viewed 22.12.2023.].

[20] German Civil Code. Available: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0807 [viewed 19.07.2023.].

article provides that, to the extent that a third party satisfies the creditor's claim, he acquires a right of claim against the debtor, thus recognizing the existence of the institution of legal subrogation in Germany. In addition, however, it is pointed out that the transfer of the claim cannot be used to the detriment of the creditor.

5. Proposals to improve the legal framework

There is no doubt that the various and sometimes contradictory judgments of the Supreme Court in Latvian case law do not strengthen the principle of legal certainty. Therefore, in order to eliminate possible contradictions in the various judgments and to modernize the CL rules on legal subrogation, it is necessary to amend Article 1815 of the CL to provide for the following provisions regarding the right of a third party to perform an obligation in place of the debtor.

In order to avoid conflicting views on the existence of legal subordination in the CL and the legal consequences of a third party fulfilling a debt in place of the debtor, it is necessary to improve the CL by stating:

If a person performs an obligation in place of the debtor, he by law acquires a right of claim against the debtor to the extent of the performed obligation (legal subrogation),

- unless it can be established that such performance was not intended to gift the debtor, or
- unless it can be established that the debtor has objected to the third party's performance of the obligation in his stead (at the same time, this regime should provide for an exception that such objections should not be taken into account if the third party has a legitimate interest in the performance of the obligation).

The introduction of the abovementioned regulation would create and consolidate a clear idea of the legal consequences in Latvia in cases when a third party performs an obligation in place of the debtor, bring the content of the CL in line with modern private law theory, as well as put an end to almost 100 years of discussion in Latvian legal doctrine whether the second sentence of Article 1815 of the CL provides for legal subrogation or not.

Conclusions

The existence of a legal subrogation regime in Latvian private law does not follow grammatically from the second sentence of Article 1815 CL, and is also denied by the content of Article 1797 CL, which imperatively requires the conclusion of a cession agreement in order for the person who has performed the obligation in place of the debtor to be able to claim for recovery.

Latvian case law contains various and sometimes contradictory judgments on the interpretation of the second sentence of Article 1815 CL and whether

the Latvian CL contains an institution of legal subrogation, which does not contribute to the observance of the principle of legal certainty.

It is necessary to improve the CL rules on legal subrogation by amending Article 1815 of the CL, providing for the institute of legal subrogation, and specifying precise legal consequences in cases where a third party performs an obligation in place of the debtor.

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THE RIGHT TO DIVORCE – A SAFEGUARD OR A RESTRICTION ON THE SPOUSES' FREEDOM?

Key words: marriage, divorce, grounds for divorce

Summary
The article is dedicated to the analyses of the right to divorce provided by Law on Marriage of 1 February 1921 with the aim of finding the answer to the question of whether, after the dissolution of marriage, the law granted to the former spouses genuine freedom from each other. The basic principles of Law on Marriage are also identified in the article, assessment of case law and statistical materials is provided. The author concludes that divorce did not always give the former spouses genuine freedom, because the spouse who was not at fault in the divorce, in case of being needy, could claim maintenance from the spouse at fault. Such legal procedure did not have a major impact on the number of dissolved marriages. This is proven by the fact that, in the 1930s, Latvia, according to the number of divorces per 1000 marriages entered into, ranked second in Europe, immediately after the communist USSR.

Introduction

The right to dissolve marriage is one of the safeguards for human liberty. In written legal sources, the first records on the dissolvement of marriage in the lands inhabited by Latvians (Balts and Livonians) are found in the land (peasants') law recorded in the 13th c. in the Archbishopric of Riga: "If the husband divorces (by running away) his wife, he shall lose his fields and all property, which shall be governed by sons and daughters."[1] It follows from this provision that the property of the party at fault in the dissolution of marriage remained in the possession of family members to ensure means of subsistence to the family. In the same 13th c.,

[1] Rigas arhibiskapijas zemnieku tiesibas [Peasants' Law of the Archbishopric of Riga], Art. 10.b, 10.c. In: Latvijas tiesibu avoti. Tekstu un komentari. Seno parazu un Livonijas tiesibu avoti 10. gs.–16. gs. [Sources of Latvian Law. Texts and Commentaries. Sources of Ancient Customary and Livonian Law 10th–16th c.] Riga: [Publisher] LU zurnala "Latvijas vesture" fonds, 1998, Vol. I, p. 26.

local inhabitants accepted the Roman Catholic faith. According to the Catholic canon law, marriage is a sacrament and could be terminated only by the death of one spouse.[2] However, for the majority of Latvians as for persons belonging to the peasant class, marriage in church was not mandatory until the collapse of the Confederation of Livonia (1561).

At the beginning of the 16th century, estates in the Confederation of Livonia joined the Evangelic Lutheran Church. Lutherans, contrary to Catholics, were dissolving a marriage on certain conditions.[3] During the Polish-Swedish governance during the 16th–18th c., the Evangelic Lutheran Church became consolidated in the Dutchy of Courland and the province of Swedish Livonia, whereas the Catholic faith was restituted in the Polish Inflanty[4] (present-day Latgale/eastern Latvia). Thus, the Catholic Latgalians lost their right to dissolve a marriage.

In the 18th c., the lands inhabited by Latvians were annexed to the Russian Empire.[5] Similarly to the Catholics, for the Orthodox Church marriage is a sacrament. However, contrary to Catholics, it allowed the dissolution of a marriage on certain conditions[6], e.g., adultery, complete inability to practice spousal cohabitation, as well as in other cases strictly defined in law.[7] On 28 December 1832, the Statute of the Russian Evangelic Lutheran Church was adopted.[8] Apart from the grounds for dissolving a marriage referred to above, the Statute envisaged several other grounds for dissolving a marriage, e.g., malicious abandonment of the other spouse, cruel treatment of the other spouse, debauchery, etc. Thus, before the Republic of Latvia was proclaimed (1918), the majority of Latvians had the formal right to divorce, in accordance with the ecclesiastical law. In reality, as can be deduced from the discussions about the draft Law on Marriage among the members of the Constitutional Assembly of the Republic of Latvia,

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2 Bunge Fr. G. von. Geschichte des Liv-, Est- und Curlandischen Privatrechts [History of Liv-, Est- and Curlandian Private Law]. St. Peterburg: [Publisher] In der Buchdruckerei der Zweiten Abtheilung Sr. Kaisel. Majestat Eigener Canzlei, 1862, p. 12.

3 Baznicu likums un kartiba [Church law and order], Art. XVI §§ I.–XII. In: Latvijas tiesibu avoti. Teksti un komentari. Polu un zviedru laika tiesibu avoti (1561–1795) [Sources of Latvian Law. Texts and Commentaries. Sources of Law of the Polish and Swedish Times (1561–1795)]. Riga: [Publisher] Juridiska koledza, 2006, Vol. 2, pp. 356–359; Bunge Fr. G. von 1862, p. 176.

4 Kalnins V. Latvijas PSR valsts un tiesibu vesture. I. Feodalisma un toposa kapitalisma laikmets XI – XIX gs. [History of the State and Law of the Latvian SSR. Age of Feudalism and Emerging Capitalism XI – XIX c.]. Riga: [Publisher] Zvaigzne, 1972, pp. 116–118.

5 Dunsdorfs E. Latvijas vesture [History of Latvia], 1710–1800. Sundbyberg: [Publisher] Daugava, 1973, pp. 13–35.

6 Ducmanis K. Iz Baltijas provincu tiesibam [From the Baltic Provincial Rights]. Riga: [Publisher] P. Verdiņa gramatu pardotavas apgada, 1913, pp. 222–225.

7 Svod" Zakonov" Grazhdanskikh [Code of Civil Laws] (consolidated texts), Art. 45. In: Polnyy svod" zakonov" Rossiyskoy imperii. Kniga 2. Tomy IX–XVI. S.-Peterburg: [Publisher] izdaniye Yuridicheskago knizhnago magazina, 1911.

8 Ustav Yevangelicheski-Lyuteranskoy Tserkvi v Rossii [Statutes of the Evangelical Lutheran Church in Russia] (28.12.1832). Polnoe sobranie zakonov" Rossijskoj imperii [hereafter – PSZ], Vol. 7, Art. 113–135. Available: https://nlr.ru/e-res/law_r/descript.html [viewed 05.11.2023.].

churches dissolved marriages rarely or did not dissolve them at all.[9] Therefore, a law that would transfer the right to dissolve a marriage to a state institution was needed. Law on Marriage[10] was adopted on 1 February 1921.

The law changed the previous understanding of marriage law; however, until now Law on Marriage has not been analysed in the literature of legal science. However, all legal aspects related to Law on Marriage cannot be examined within the framework of a single article. Therefore, the author will limit the scope of the article to analysing the right to divorce with the aim of finding an answer to the question of whether Law on Marriage gave to the former spouses, in the case of a divorce, genuine freedom from each other. To achieve fully the aim of the article, the author will identify also the basic principles of the law, examine the most noteworthy clashes of opinions in the course of discussing the draft Law on Marriage at the Constitutional Assembly of the Republic of Latvia (hereafter – the Constitutional Assembly), and will also review case law and statistical materials.

1. Basic principles of Law on Marriage

At the Constitutional Assembly, Alberts Kviesis[11] from the Famers' Union party, who later became the President of the Republic of Latvia, reported on Law on Marriage. According to A. Kviesis' statements, two principles had to be recognised as "the corner-stones" of the law:

1) transition from church marriage to civil or secular marriage;
2) to the greatest extent possible, make the dissolution of marriage easier.

To make the dissolution of marriage as easy as possible, churches lost the right to dissolve marriage [12]. Henceforth, marriage was dissolved by a court as a state institution:

> *All inhabitants of Latvia, irrespective of their faith, shall be subject to this law. [...] a court may recognise marriage as having been dissolved only in cases provided for in this law.*[13]

A court's right to dissolve a marriage was the greatest innovation of this law. At the Constitutional Assembly, Latvian poetess, playwright, prose-writer,

[9] Latvijas Satversmes Sapulces stenogrammas, 13. burtnica, II. sesijas 7. sede, 1920. gada 10. decembri [Transcripts of the Latvian Constitutional Assembly, 13th Notebook, 7th sitting of II session on 10 December 1920] (hereafter – LCA, 13th Notebook), p. 1560.

[10] Likums par laulibu [Law on Marriage] (01.02.1921). Likumu un valdibas rikojumu krajums [Collection of laws and government orders], 1921, 6. burtnica [6th Notebook], Art. 1, 41.

[11] A. Kviesis was the President of the Republic of Latvia from 1930 until 1936.

[12] Namely: the courts of religious oganisation.

[13] Law on Marriage, Art. 1, 41.

translator, active on the cultural and social-political scene, (hereafter – poetess) Aspazija[14] commented passionately on the importance of this right:

> *Let us remind ourselves of the holy of holies that the church marriage has been until now. It forged the fates of two persons together for life, no matter, even if they through this sinned against the very law of life; it was not important, the only important thing was that two persons were branded by the church for their entire lives.*[15]

The largest Christian denominations, except Catholics, as described above, permitted divorce on certain conditions also before Law on Marriage entered into force.[16] During the debates of the members of the Constitutional Assembly, it was admitted also by poetess Aspazija. However, not all churches were dissolving marriages, and those religious organisations, which were dissolving marriage, did it rarely or reluctantly. Thus, granting to courts the right to dissolve marriage, in accordance with grounds defined in the law, was significant progress in human rights to freedom.

2. Grounds for divorce

Presenting the right to divorce to the Members of the Constitutional Assembly, A. Kviesis explained that all existing grounds for divorce had been retained. This means that the drafting of the section on divorce in this law was based on canon law. It needs to be added, however, that the grounds for divorce, taken from canon law, had been amended in accordance with the spirit of the times, and also new grounds for divorce were introduced. For example, "[s]pecial novelty is that marriage can be dissolved also without any reason at all if both spouses wish so".[17] A. Kviesis, however, did not refer to the canon law of any particular church. Comparing the legal regulation of "Marriage Law" with the right to dissolve the marriage, included in the statutes of major religious organisations, the author concludes that the legislator, in drafting the law, had used the canon law of the Evangelic Lutheran Church as the basis. Such actions by the working group that drafted the law can be easily explained. The majority of inhabitants in interwar Latvia belonged to the Evangelic Lutheran Church[18], likewise, the most extensive enumeration of grounds for divorce could be found in the Lutheran law.

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[14] Aspazija – real name Elza Rozenberga, born Johanna Emilija Lizete Rozenberga (following marriage to Janis Plieksans – Elza Plieksane). See Aspazija. Nacionala enciklopedija [National Encyclopaedia]. Available: https://enciklopedija.lv/skirklis/31832 [viewed 09.11.2023.].

[15] LCA, 13th Notebook, p. 1560.

[16] Ducmanis K. 1913, pp. 222–228.

[17] LCA, 13th Notebook, p. 1555; Law on Marriage, Art. 51.

[18] Silde A. Pirma republika. Esejas par Latvijas valsti [First Republic. Essays on the State of Latvia]. Riga: [Publisher] Elpa, 1993, p. 271.

Adultery[19], physical inability to consummate marriage[20] and disgust for the other spouse[21], for example, were retained as the traditional grounds for divorce. The right of underage spouses to demand divorce without the mediation of guardians also must be noted as a novelty, "since they have concluded a marriage they can also turn to a court with an independent claim"[22], moreover "[f]or married wives summoning an assistant [is no longer] mandatory"[23]. The legislator's aim to introduce the principle of gender equality in marriage law can be discerned here. The provision that, after divorce, not only the wife who was not at fault, as it was previously[24], but also the husband, in case of poverty, could demand maintenance from the former wife, upon the condition if "the wife has sufficient means"[25], also was subordinated to the gender equality principle.

Understandably, with such legal regulation, the number of cases of cohabitation without marriage increased. It is evident from discussions in the press, pointing to advantages of cohabitation without marriage, e.g.: "cohabitation without marriage is not subject to the consequences of a marriage agreement [but] the world of emotions is absolutely the same both in marriage and cohabitation without marriage. Sometimes it is even said that emotions are stronger in cohabitation without marriage, which can be explained by the fear that the other party might discontinue this cohabitation without any problems".[26]

The Latvian Senate has explained the duty to provide maintenance in accordance with the equality principle in several of its judgements. Thus, it is noted in the judgement of 26 May 1937 that "the court must take into account the social status and property of the spouses [...] concerning the divorced wife who is not at fault, first of all, the matter whether she is poor must be resolved, and who of the spouses has a better status in terms of property, and if the wife has a better status as regards property than the husband then the latter's duty to

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[19] Code of Civil Laws, Art. 45, Statutes of the Evangelical Lutheran Church in Russia, Art. 369 (1), Law on Marriage, Art. 42.

[20] Code of Civil Laws, Art. 45, Statutes of the Evangelical Lutheran Church in Russia, Art. 369 (4), Law on Marriage, Art. 44.

[21] Statutes of the Evangelical Lutheran Church in Russia, Art. 369 (4), Law on Marriage, Art. 46.

[22] LCA, 13th Notebook, p. 1555; Law on Marriage, Art. 65.

[23] Law on Marriage, Art. 65.

[24] "If by the judgement on dissolving the marriage the husband has been found at fault he must provide proper maintenance to his wife insofar as and until she needs it. However, upon entering a new marriage, the divorced wife loses the right to such maintenance." See Svod" mestny" uzakoneniy guberniy Ostzeyskikh" Chast' tretiya. Zakony grazhdanskiye [Code of Local Laws of the Baltic Provinces. Part three. Civil laws]. Sanktpeterburg: [Publisher] V" Tipografii otdeleniya sobstvennoy Ye. I. V. Kantselyarii, 1864, Art. 124; Statutes of the Evangelical Lutheran Church in Russia, Art. 324.

[25] LCA, 13th Notebook, p. 1573; Law on Marriage, Art. 60.

[26] Strelerts T. Bezlaulibas kopdzive no procesualo likuma viedokla [Cohabitation without Marriage from the Perspective of Procedural Law]. Tieslietu Ministrijas Vestnesis [Bulletin of the Ministry of Justice], 1939, pp. 707–710.

support the divorced wife ceases."[27] A conclusion of similar content is found also in a judgement of 27 October of the same year: if the former husband's status as regards property is poor his duty to support the former wife ceases.[28] Thus, the case law of the Latvian Senate, abiding by the purpose of the law, quite validly noted that, pursuant to the equality principle, only a spouse who was needy could demand maintenance and the obligation to provide maintenance ceased for that former spouse who was needy. Gender equality not only gives rights but also imposes obligations. Before the democratic Republic of Latvia was proclaimed, the claim for maintenance, compliant with the class and social status, could be brought only by the wife (former wife).[29] In a democratic republic[30], this right, in accordance with the equality principle, was granted also to a former husband in need.

Care for the existence (growth) of the Latvian nation was included in the provision that "[s]pouse shall have the right to request a divorce if the other spouse is infertile [...]"[31] and the husband's right to demand "[...] divorce if the wife is unable to bear a child"[32].

Incurable disease of a spouse was one of the grounds for divorce in the canon law of the Lutheran church.[33] The medical practice of the times showed that often it was difficult or even impossible to determine whether the disease was curable. Therefore the legislator introduced the concept of "a disease that is hard to cure, replacing "incurable disease": "The spouses shall have the right to demand divorce if the other spouse is sick with prolonged, hard-to-cure feebleness of mind or contagious disease of the same kind"[34].

On 11 July 1936, the Latvian Senate examined a case in which a guardian demanded divorce in the interests of a mentally ill person.[35] Contrary to the content

[27] 1937. gada 26. maija Senata spriedums lieta [The Senate's Judgement of 26 May 1937 in Case] No. 39. In: Latvijas Senata spriedumi (1918–1940). 14. sejums. Senata Civila kasacijas departamenta spriedumi [Judgements of the Latvian Senate (1918–1940). Volume 14. Judgements by the Civil Cassation Department of the Senate]. Riga: [Publisher] Faksimilizdevums, 1998, p. 5416.

[28] 1937. gada 27. oktobra Senata spriedums lieta [The Senate's Judgement of 27 October 1937 in Case] No. 57. In: Latvijas Senata spriedumi (1918–1940). 14. sejums. Senata Civila kasacijas spriedumi [Judgements of the Latvian Senate (1918–1940). Volume 14. Judgements by the Civil Cassation Department of the Senate]. Riga: [Publisher] Faksimilizdevums, 1998, p. 5437.

[29] Kalnins V. 1972, pp. 311–312.

[30] "1. Latvia is an independent democratic republic." See The Constitution of the Republic of Latvia (15.02.1922). Available: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [viewed 05.11.2023.].

[31] Law on Marriage, Art. 47 (a).

[32] LCA, 13th Notebook, p. 1557; Law on Marriage, (note to) Art. 47.

[33] See, for instance, Statutes of the Evangelical Lutheran Church in Russia.

[34] Law on Marriage, Art. 45.

[35] 1936. gada 11. junija Senata spriedums lieta Nr. 72 [The Senate's Judgement of 11 June 1936 in Case No. 72]. In: Latvijas Senata spriedumi (1918–1940). 13. sejums. Senata Civila kasacijas departamenta spriedumi (1934–1936) [Judgements of the Latvian Senate (1918–1940). Volume 13. Judgements by the Civil Cassation Department of the Senate (1934–1936)]. Riga: [Publisher] Faksimilizdevums, 1998, pp. 5292–5293.

of the legal provision, the divorce was not demanded by the mentally healthy spouse but, just the opposite, by the guardian of the mentally ill person in the interests of this person. The grounds for demanding the divorce was the fact that the mentally healthy spouse treated the mentally feeble spouse with unbearable contempt. Within the case law of interwar Latvia, the importance of this case lies in the fact that the reasoning of the judgement by the Court Chamber, in many ways based on the German law, clashed with the reasoning in the Senate's judgement, in many ways based on the case law of the former Ruling Senate of Russia [36] (hereafter – the Russian Senate).

In the Court Chamber's view, "the guardian of the mentally ill person should care for the personal wellbeing of the sick person and defend the rights, restricted by the disease, to the same extent the sick person himself would have done being in good health"[37]. This led to the Court Chamber's conclusion that the guardian had the right to demand divorce in the interests of the mentally feeble person. The Latvian Senate disagreed.

The Latvian Senate, on the basis of the Russian Senate's case law, noted that "[...] the protection of such rights of the ward that are so closely and inseparably linked to the subject of rights himself that they cannot be exercised in the procedure of legal representation does not fall within the guardian's competence".[38] To explain this thesis, the Latvian Senate referred mainly to "the letter of law". For example, pursuant to Article 1523 of the Statute of Civil Procedure, "submission of a request to register a child born out of wedlock through a representative is inadmissible; [a guardian] may not draw up a will in the name of the ward [Code of Local Laws, Article 1984, Article 1988]"[39], etc. The Latvian Senate deduced from this that there were several legal relations, in which the guardian did not have the right to represent his ward. Moreover, it follows from the verbatim text of Law on Marriage, which, being a special law, cannot be construed broadly, that, in the aforementioned case, only one of the spouses "[...]has the right to bring the claim regarding dissolvement of marriage, i.e., the one who is in good health".[40]

The Republic of Latvian, though, by Law on Leaving in Force Former Laws of Russia, adopted by the People's Council on 5 December 1919, had declared that "[a]ll former laws of Latvia, which existed within the borders of Latvia until 24 October 1917, temporarily shall be considered as being valid [...]".[41] Thus, also the case law of the Russian Senate could be used to substantiate the ruling. However, its use should have been reasonable and aimed at a fair resolution to

[36] On 1 September 1917, the Russian Empire was proclaimed a republic and, as such, existed until 24–25 October, O.S., when Bolsheviks came to power in former Russia.

[37] The Senate's Judgement of 11 June 1936 in Case No. 72, p. 5292.

[38] Ibid., p. 5293.

[39] Ibid., p. 5292.

[40] Ibid., p. 5293.

[41] Law on Leaving in Force Former Laws of Russia (05.12.1919). Likumu un valdibas rikojumu krajums [Collection of laws and government orders], 31.12.1919, No. 13, (document) No. 154.

the collision of interests, in which, in the author's opinion, the Latvian Senate did not succeed in this case.

3. Clashes of opinions in discussing the draft law

Law on Marriage defined 18 grounds for divorce.[42] Several deputies felt perplexed by this considerable number of grounds for dissolving marriage. For example, Francis Trasuns from Latgale Christian Farmers' Union noted that one or two grounds for divorce would suffice:

> *I cannot understand why this long list of reasons when marriage can be dissolved when one and only one paragraph would suffice – disgust felt by one or the other person towards the other. I simply [go to] the civil institution or a judge and tell that my wife or my husband is disgusting. [...] Then there is one more paragraph – they both agree that they do not want to live together anymore. It is enough with these two §§.*[43]

On the one hand, F. Trasuns' opinion that it would be sufficient to have one or two grounds for divorce could be upheld; however, dissolution of marriage in addition to civil law consequences can also bear penal consequences, as it was validly pointed out by Nikolajs Kalnins from the party of social democrats: "[j]udicial institutions are trying to establish, which party is at fault, which of the spouses has harmed the other party. In this sense, dissolution of marriage has also a criminal nature ."[44]

The party at fault in the divorce lost the right to demand, in case of need, maintenance from the divorced spouse; moreover, upon the husband's request, the wife could be prohibited from being called by the former husband's surname.[45] Adultery[46], malicious abandonment of the other spouse[47], commitment of a shameful crime[48], etc. were not only the grounds for dissolving marriage but also indicated clearly the party at fault in the divorce. The extensive enumeration of the grounds for divorce made the courts' work considerably easier in determining the party at fault in a divorce case.

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[42] Apart from the described grounds for divorce, the law provided for the right to demand divorce in the case where the life or health of the other spouse had been threatened or in the case of torture (Art. 43); malicious abandonment (longer than a year) of the other spouse (Art. 44); or if the spouses had been living separately for three years without interruption (Art. 50); if the other spouse had acted criminally or led so dishonest and debauched life that continuation of cohabitation in marriage could not be demanded (Art. 46); or if the married life was so broken that its continuation could not be demanded (Art. 49).

[43] LCA, 13th Notebook, p. 1567.

[44] LCA, 13th Notebook, p. 1569.

[45] Law on Marriage, Art. 60–61.

[46] Law on Marriage, Art. 42.

[47] Law on Marriage, Art. 44.

[48] Law on Marriage, Art. 46.

The content of Article 51 in the draft law also caused considerable clashes of opinions among the deputies of the Constitutional Assembly:

> *Marriage shall be dissolved also on the basis of a request from one of the spouses, without indicating any reasons for divorce. In such a case, as regards the consequences of the divorce, the claimant shall be equalled to the party at fault.*[49]

Judging by the transcripts of the Constitutional Assembly, mainly male deputies demanded the deletion of this provision in the interests of women[50]. For example, Reinhards Gustavs from the Christian National Union warned: "If we adopt this law we shall give the possibility to take a new wife every month and force out the old one."[51] Opposing the male majority, poetess Aspazija, already mentioned above, noted that women did not need male pity because a woman could find a job just like a man, and:

> *A woman might not like the man who leaves his wife, walks along boulevards, goes to cafes, gets drunk, who is a lecher, and she will not keep such a man. Do you think that a husband is such a precious thing for a woman when she should lose him? (Laughter). [...] Therefore, make way for the new woman arriving and step back in time, otherwise she will walk over you! (Applause).*[52]

At the Constitutional Assembly, not all female deputies upheld Aspazija's view. Thus, Zelma Cesniek-Freudenfeld from the non-party group was convinced that:

> *We should not view marriage only as personal pleasure but also as a certain duty to be fulfilled for the other loved persons and one's descendants, as well as for the state [...] If the married life turns out to be unbearable then the spouses will find an exit in our new marriage law, even without Article 51, but, by adopting Article 51, we would diminish the sanctity of marriage and recognition of its seriousness.*[53]

Although Aspazija's address was appreciated by many deputies, the grounds for divorce, defined in Article 51, was not included in Law on Marriage by a small majority of votes. The understanding of "the new woman arriving" or the future woman, who is independent in all situations in life, had not yet become consolidated

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[49] Latvijas Satversmes Sapulces stenogrammas. I. burtnica. Satversmes Sapulces izdevums. 1921. III. Sesijas 4. sede 1. februari 1921. gada [Transcripts of the Latvian Constitutional Assembly. Notebook I. Publication of the Constitutional Assembly. 1921. 4th sitting of III session on 1 February 1921 (hereafter – LCA, 14th Notebook], p. 58.

[50] Not all male deputies were against adoption of this provision. For example, N. Kalnins noted ironically that those deputies who wanted to delete this article feared that their wives would leave them. See LCA, 14th Notebook, p. 64.

[51] LCA, 14th Notebook, p. 60.

[52] Ibid., p. 59.

[53] Ibid., p. 62.

in the legal consciousness of the majority of deputies of the Constitutional Assembly. They still wanted to see the Latvian woman as being such that she, in fact, no longer was, as was later proven by the data on divorce.

4. Statistical data on dissolved marriages

In the first half of the 1930s, statistics on dissolved marriages and causes of divorce was collected (hereafter – the study). The study shows that, as regards the number of dissolved marriages, Latvia ranked as the second in Europe, immediately after the USSR. In Latvia, per 1000 of the marriages concluded 95.5 ended in divorce. In the USSR, these numbers were, respectively, 221.6 divorces per 1000 marriages concluded. To compare, Finland had only 49.3 divorces per 1000 marriages concluded. The Finns decided to break off the family ties almost twice as rarely, compared to the Latvians. The divorce rate of Estonians differed from that of the Finns but was similar to that of the Latvians. Estonia had 87.4 divorces per 1000 concluded marriages.[54] In the author's opinion, this can be explained by the shared history of both nations, spanning more than 700 years, and the similar legal consciousness that had evolved during these centuries.[55]

The courts had recognised as the grounds for divorce "adultery, torture, beating, malicious abandonment, feeble mindedness, dishonourable life, infertility, breakdown of cohabitation, etc."[56]. The study does not single out single dominant grounds for divorce. However, the study reveals certain consistencies:

1) childless marriages broke down most frequently – 55–60% of all dissolved marriages;
2) spouses divorced most often after five to nine years of cohabitation (approximately one-third of all dissolved marriages);
3) women aged from 25 to 29 years and men aged from 30 to 34 years divorced most frequently.

The fee for dissolving marriage was increased to decrease the number of divorces. However, as proven by the study, increasing the fee did not decrease the number of dissolved marriages.[57] The data of the study allow concluding that one of the purposes set for Law on Marriage, i.e., to make the dissolution of marriage as easy as possible, was achieved. The freedom from an undesirable

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54 Raibarts J. Piezimes par laulibas skirsanu [Notes on Divorce]. Tieslietu Ministrijas Vestnesis [Bulletin of the Ministry of Justice], 1939, pp. 707–708.

55 Svabe A. Zemes attiecibu un zemes reformu vesture Latvija [History of land relations and land reforms in Latvia]. Riga: atsevisks novilkums no "Latvijas agrara reforma" [a separate extract from "Agrarian reform of Latvia"], 1930, pp. 7–175; Osipova S. Establishing the University of Latvia. In: Legal Science: Functions, Significance and Future in Legal Systems II. Riga: University of Latvia Press, 2020, pp. 86–98. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Juridiskas-konferences/ISCFLUL-7-2019/Book-iscflul.7.2_.pdf [viewed 07.11.2023.].

56 Raibarts J. 1939, p. 709.

57 Ibid., pp. 707–710.

spouse was rated higher than the possible duty to provide life-long maintenance to a former spouse in need.

Conclusions

1. One of the purposes (basic principles) of Law on Marriage, i.e., "to make the dissolution of marriage as easy as possible", was achieved. At the beginning of the 1930s, as to the number of divorces, Latvia ranked second in Europe, immediately after the communist USSR.
2. The drafting of divorce law was mainly based on the canon law of the Evangelic Lutheran church, which, complying with the spirit of the times, was amended and supplemented by some new grounds for divorce, respecting the gender equality principle.
3. Law on Marriage granted the right to demand maintenance from the former spouse at fault in divorce not only to the former wife, as previously, but also to the husband, in case of need. Embodiment of the gender equality principle in the marriage law was considerable progress. However, the obligation to provide maintenance to the former spouse after the divorce went against the purpose of divorce – to give former spouses freedom from each other. Thus, Law on Marriage established significant restrictions on freedom for the party at fault in divorce.
4. Pursuant to the case law of the Latvian Senate, a spouse was released from the duty to provide maintenance to the former spouse if 1) the party at fault in divorce was needy; 2) the party who was not at fault in divorce, as regards property, was in a better situation than the party at fault in divorce.

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GRANTING DIRECT CLAIM RIGHTS IN VOLUNTARY LIABILITY INSURANCE TO THE AGGRIEVED PERSON[1] IN ESTONIAN INSURANCE PRACTICE: VIA INSURANCE CONTRACT VS CLAIM ASSIGNMENT

Key words: *actio directa*, obligatory and voluntary liability insurance, claim assignment

Summary
In the Estonian Law of Obligations Act (LOA), the right of direct claim (*actio directa*) is guaranteed only if there is any obligatory liability insurance. In the case of voluntary liability insurance, the injured party has no direct claim against the insurer. In Estonian legal practice, the absence of a direct claim has been solved in two main ways: a) the policyholder and the insurer grant a direct claim to the injured party on the basis of an agreement between them, and b) by assignment of the claim. Both ways involve problems. Therefore, the article examines, *inter alia*, the pros and cons of a direct claim under the law.

Introduction

The need for liability insurance derives from two main factors. Firstly, it helps to make the strict liability more tolerable (in the case of strict liability, a person is held liable regardless of their fault), and secondly, the small errors in the performance of certain professional duties may lead to significant losses. Without liability insurance, no one would be willing to hold these positions.[2]

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1 In the article, the authors use the terms “aggrieved party” and “injured party” as synonyms.
2 Lahe J. Kindlustusoigus [Insurance Law]. Tallinn: Juura, 2007, pp. 134.

Based on the above, liability insurance has two main purposes. The first is indemnification for damages caused to the injured party. The second purpose is to release the person who has caused the damage from liability. In the case of obligatory liability insurance, the primary purpose of the liability insurance – compensation for damages caused to the injured party – is of particular relevance.[3] In the case of voluntary liability insurance, the focus is on releasing the party causing the damage from their personal obligation to indemnify for damages.

In Estonian law, the injured party's right to file a direct claim (the so-called *actio directa*[4] principle) under liability insurance is guaranteed under the obligatory liability insurance.

In Estonian legal literature, it has been argued that the distinction between voluntary and obligatory liability insurance is important primarily due to two aspects: (a) in the case of voluntary liability insurance, the injured party has no direct claim against the insurer, while in the case of obligatory liability insurance, the injured party may also claim compensation from the insurer of the person who has caused the damage (LOA[5] § 521(1)[6] first sentence); (b) if the insurer is released from the duty to perform, then, in the case of voluntary liability insurance, this means full release, while in the case of obligatory liability insurance, the insurer may file a subsequent recourse action against the policyholder, because under obligatory liability insurance the injured party has to be compensated for the damage in any case (VÕS § 521(5))[7].

[3] Kull I., Kove V., Kaerdi M., Varul P. Volaoigusseadus II. Kommenteeritud valjaanne [Law of Obligations Act II. Commented edition]. Tallinn: Juura, 2007, p. 553.

[4] The principle of *actio directa* in insurance refers to the right of an injured party in insurance to make a claim directly against the insurer of the party responsible for the damage. This principle has emerged as a response to the understanding that a direct claim against the insurer of the party at fault is not allowed, as it would not be in accordance with the principles of contractual relationships. Some of the early introducers of the *actio directa* principle into insurance law were Sweden, with its 1927 insurance law, and Norway, with its 1930 insurance law, where, for the first time, certain cases allowed the victim to have a direct legal claim against the insurer of the party at fault. At present, the *actio directa* principle is considered natural in most Continental European countries, especially in the case of compulsory liability insurance (particularly in motor insurance). This change in insurance theory reflects a shift in society's understanding, where the concept of compensation for damages, once considered subjective and individualistic, is evolving towards an objective and collective approach. Wahlgren P. Tort liability and insurance. Stockholm University Law Faculty, 2001.

[5] Law of Obligations Act. Available: https://www.riigiteataja.ee/en/eli/524032023004/consolide [viewed 09.10.2023.].

[6] LOA § 521(1) states: An injured party may demand the compensation of damage caused thereto by the policyholder from both the policyholder and the insurer. Compensation for damage may be requested from the insurer only in monetary form.

[7] Lahe J., Luik O-J. 2018, pp. 160.

There are more than thirty obligatory liability insurances in force in Estonia[8] and, as a rule, there are no problems with the right of direct action for these types of insurance in practice.

On the other hand, there are many situations in Estonian insurance practice, where one party to a basic contract (e.g., a construction contract[9]) requires the other party to have a liability insurance contract. By their nature, such insurance contracts are voluntary liability insurance contracts and are not subject to the right of direct action provided by LOA. At the same time, however, business partners who expect a liability insurance contract in such basic contracts expect that such a liability insurance contract will protect them. This formally contradicts the primary purpose of voluntary liability insurance, which is to protect the policyholder. In practice, this problem can be solved in two ways:

a. The insurer extends the right of direct action under LOA to this voluntary liability insurance contract;
b. The policyholder assigns its right of action arising from the insurance contract to its business partner (e.g., the general contractor of the construction) in connection with the main contract.

Unfortunately, both solutions bring problems in practice. Additionally, some insurers have begun to refuse to extend the direct claim rights to voluntary liability insurance contracts.

As noted before, there are no problems in Estonia with the right of direct action for obligatory liability insurance in practice. At the same time, a dilemma has arisen in the business and insurance practice in Estonia, namely whether the principle of *actio directa* could and should be extended to voluntary liability insurance as well? Said practical problem arises, above all, from the fact that there are many situations in Estonian insurance practice where one party to a basic contract (e.g., a construction contract) requires the other party to have a liability insurance contract and at the same time, however, business partners who expect a liability insurance contract in such basic contracts expect that such a liability insurance contract will protect them.

The article aims to examine whether an aggrieved person in Estonia should be granted direct claim rights in voluntary liability insurance. The authors examine first direct claims in voluntary insurance in general, then possibilities of direct

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8 For example: bankruptcy trustees professional liability insurance, professional liability insurance of notaries, lawyers' professional liability insurance, professional liability insurance of bailiffs, insurance brokers professional liability insurance, professional liability insurance of patent attorneys, auditors' professional liability insurance, etc.

9 As an example, an extract from a construction contract between a contractor and a customer (original in the possession of the authors): "clause 14.3 [...] the contract shall identify the Customer, and the construction all-risk insurance contract shall also contain a provision under which the Customer has been assigned the right of submitting a direct claim against the insurer". The authors explain: since – in addition to the property insurance coverage – the construction all-risk insurance (CAR) policy also provides liability insurance coverage, the customer has requested the contractor to grant in the voluntary liability insurance contract the customer the right to submit a direct claim against the insurer.

claims in voluntary liability insurance under Estonian law and conclude the study with the pros and cons of a direct claim in voluntary insurance.

Analysis of the problem

1. Direct claim in voluntary insurance: general overview

From a legal philosophical point of view, one might also ask why is *legalis officium* (a legal obligation to enter into a liability insurance contract) given by virtue of law (LOA in the case of Estonia) *a priori* more/stronger protection in the context of the injured party than *contractum officium* (an obligation stemming from a contract to enter into a liability insurance contract)[10]? By their very nature, both contracts are binding on the obligor (the policyholder): the difference arises only from the basis of the obligation: either law or contract. It could be argued that in the case of an obligation arising from contract, the policyholder has voluntarily assumed such an obligation (obligation to enter into a liability insurance contract) – on the other hand, such an obligation often arises from, for example, public procurement[11] (the existence of a liability insurance contract is a prerequisite for the qualification of the bidder or their recognition as a successful bidder in a public procurement), which is essentially a "take-it-or-leave-it" situation. It could also be argued that in the case of both *legalis officium* and *contractum officium*, concluding a liability insurance contract is an interference with private autonomy[12], because the policyholder cannot (wholly) freely decide on the formation of their legal relationships. In a situation where interference with private autonomy is already taking place, it could also be in the interest of various participants involved in the legal relationships to find the legal balance through the harmonisation of the regulatory privileges of voluntary and obligatory liability insurance.

Considering the regulations of other European Union countries, the direct claim in voluntary insurance is not unusual. For instance, it has been pointed

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[10] For example, an extract from the insurance broker's order to the insurer in connection with the designer's liability insurance contract (the respective claim resulted from the contract for services concluded between the customer and the designer): clause 10 The insurance protection shall include the customer's right of direct claim (original in the possession of the authors).

[11] For example, clause 6.1.5.1 of the general terms and conditions of the design-build contract, presented in the procurement for the designing and construction of the Kaarepere platform and tunnel, provides for the submission of a liability insurance contract within 5 days of the entry into the construction contract. Available: https://riigihanked.riik.ee/rhr-web/#/procurement/6361744/documents/source-document?group=B&documentOldId=16525792 [viewed 09.10.2023.].

[12] From a traditional point of view, direct claims against the liability insurance company should not be allowed, since this would be contrary to the principle of privity of contract. Ulfbeck V. Modern Tort Law and Direct Claims Under the Scandinavian Insurance Acts. Scandinavian Studies in Law, 2001, No. 41, p. 524.

out in the legal literature[13] that it took some time until *actio directa* procedure became established in the Polish legislation, having been initially accepted only for compulsory insurances and introduced much later for the voluntary civil liability insurance[14]. A similar right of direct claim in voluntary liability insurance exists, for example, in Lithuania[15], Belgium[16] and Spain[17]. Moreover, such approach also exists outside the European Union: for instance, in the legal literature on the right of direct claim in Turkey[18] it is explained that this right is granted not only for compulsory liability insurance but also for optional liability insurance. As a result, under Turkish Commercial Code regime, it will now be possible for parties suffering loss to sue the liability insurer directly. A right of direct claim that is broader than what is afforded by obligatory liability insurance is also affirmed by the Principles of European Insurance Contract Law, Art. 15:101 1(d)[19], which always gives the right of direct claim to the injured party suffering personal injury[20].

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13 Serwach M. Civil liability insurance – evolution and directions of changes. Prawo Asekuracyjne, 2018, Vol. 1, No. 94, p. 31.

14 Kodeks cywilny [Polish Civil Code] Article 822(4) states: The party entitled to indemnity in connection with the event covered by the contract of civil liability insurance may pursue a claim directly against the insurer. Available: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf [viewed 11.10.2023.].

15 Republic of Lithuania Law amending the law on Insurance article 111 states: The injured third party shall have the right to request directly that the insurer, who has covered civil liability of the person liable for the damage, pays out the benefit. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a9f083803c7911e68f278e2f1841c088?jfwid=rivwzvpvg [viewed 11.11.2023.].

16 Loi relative aux assurances [Belgian Insurance Law], Art. 150. Available: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2014040423&table_name=loi [viewed 11.10.2023.]. Also: Fenyves A., Kissling C., Perner S., Rubin D. Compulsory liability insurance from a European Perspective. Tort and Insurance Law, Vol. 35, De Gruyter, 2016, pp. 66–67.

17 Ley 50/1980, de 8 de octubre, de Contrato de Seguro [Spain Law 50/1980, of 8 October 1980, on Insurance Contracts] Art. 76. Available: https://www.boe.es/buscar/act.php?id=BOE-A-1980-22501 [viewed 11.10.2023.]. Also: IBA Insurance Committee Substantive Project 2012. Direct Third-Pary Access To Liabilty Insurance, pp. 105.

18 Bilgin B. C. Right of Direct Action Against Liability Insurers under the New Turkish Commercial Code. Turkish Commercial Law Review, October 2015, Vol. I, No. 3, p. 266.

19 To the extent that the policyholder or the insured, as the case may be, is liable, the victim shall be entitled to a direct claim for compensation against the insurer under the insurance contract provided that the victim has suffered personal injury. Available: https://www.uibk.ac.at/zivilrecht/forschung/evip/restatement/sprachfassungen/peicl-en.pdf [viewed 11.10.2023.].

20 This is substantiated, as follows: This case is based on equitable considerations and provides for strong social dimension in liability insurance, The victim suffering personal injury should not be compelled to first bring a claim against the tortfeasor who might be unable to satisfy the victim. This aspect is of particular importance in the case of personal injuries. Basedow J. et al. (eds). Principles of European Contract Law (PEICL). 2nd expanded edition, 2016, p. 303.

2. Possibilities of direct claims in voluntary liability insurance under Estonian law

In liability insurance, the beneficiary cannot be designated. The purpose of liability insurance is to indemnify for loss caused to a third party, and generally, this third party cannot be identified in advance. However, in voluntary liability insurance, the injured party may be granted the right to file the claim directly against the insurer by a specific provision. Granting the right of direct claim to the injured party in voluntary liability insurance is reasonable in situations where the other party to the contract is required to have a liability insurance policy (for example, it is customary to require the construction contractor to have a liability insurance policy, however, without the right of submitting a direct claim this would not protect the customer's rights)[21].

From the legal point of view, there are two ways of granting such right of direct claim: since the LOA does not prohibit extending the provisions of obligatory liability insurance to voluntary liability insurance, the policyholder and the insurer may subject the voluntary liability insurance contract in part or fully to the legal regime of obligatory liability insurance, and thus the injured party would obtain the right of direct claim against the insurer on the basis of LOA § 521(1).

Another option is to stipulate in the voluntary liability insurance contract that it constitutes a contract for the benefit of a third party under LOA § 80(1) and that the obligation is to be performed for the benefit of a third party in lieu of the obligee[22].

The substantive difference between these two options is the release of the insurer from the performance obligation in an internal relationship in a situation where the policyholder causes the insured event intentionally or the policyholder violates other obligations, which release the insurer from the obligation to perform. Namely, the regulation of obligatory liability insurance (LOA § 521(5)) ensures that the insurer may not refuse to satisfy the claim of an injured party on the grounds that the insurer has been released from its liability to the policyholder in part or in full. Therefore: if the obligatory liability insurance regime is extended to a voluntary liability insurance contract, the insurer would not be released from the obligation to perform in the external relationship (injured party vs insurer); in a similar situation, where the contract is for the benefit of a third party under § 80(1) of LOA and the obligation is to be performed for the benefit of a third party in lieu of the obligee, the injured party would not have such a prerogative. It is specifically the privileged position of the injured party stemming from the regulation of obligatory liability insurance – (i) the right of direct claim of the injured party (who is not a party to the insurance legal relationship) against the insurer; and (ii) affirming the injured party's claim for performance in an external relationship

[21] Lahe J., Luik O-J. 2018, pp. 161.

[22] Namely, LOA § 80(4) stipulates that a third party for whose benefit a contract is entered into need not be personally identifiable at the time of entry into the contract.

(injured party vs insurer), in a situation where in an internal relationship (insurer vs policyholder) the insurer is released from the obligation to perform (due to a breach by the policyholder) – that ensures maximum protection for the injured party.

However, both these approaches require the consent of the insurer to subject itself to the corresponding regime in obligatory liability insurance. In practice, however, insurers might not be motivated to give such consent.

An alternative solution is that the policyholder assigns its right of action arising from the insurance contract to its business partner (e.g., the general contractor of the construction or designer) in connection with the main contract. Generally, in their standard terms and conditions, Estonian insurance companies do not restrict the assignment of claims arising from contract[23]. Such assignment of claim may be concluded (i) as assignment of a contingent and future claim (LOA § 165) immediately after concluding a voluntary liability insurance contract; or (ii) after the occurrence of an insured event (LOA § 164(1)). As an example of assignment of claims after the occurrence of an insured event, the authors point to a legal dispute HMK[24], No. 2-11-45374[25].

It is understandable that the assignment of a contingent and future claim is a safer solution for the party to the primary contract (e.g., the general contractor

[23] For instance, ERGO Insurance SE, General terms and conditions of ERGO Insurance services. Available: https://www.ergo.ee/fs-files/0000/0000/0002/files/ERGO_teenuse_uldtingimused_06.06.2022_ENG_.pdf [viewed 11.10.2023.], or If P&C Insurance AS, General insurance conditions TG-20131. Available: https://tingimused.if.ee/ViewPDF.aspx?ID=f66803b1-7d9b-4659-8a89-c5367bf004b8 [viewed 09.10.2023.].

[24] Harju County Court (HMK) decision No. 2-11-45374. Available in Estonian https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=110609097 [viewed 02.11.2023.].

[25] The insurer A and the policyholder B had entered into an architect's voluntary insurance contract and an engineer's professional liability insurance contract. Such insurance contract was entered into for the reason that in the public contract for the reconstruction of the quay of the port, concluded in the simple procurement procedure, the contracting authority C and the contractor B had agreed that the contractor B shall enter into a liability insurance contract. Due to faults in the design documentation, the port quay reconstruction work carried out with these designs did not comply with the requirements, and the contracting authority C submitted the contractor/policy holder B a compensation claim. The contractor/policyholder B was a small business whose damage was expected to exceed its assets. At the same time, the contracting authority C did not have the right of direct claim against the insurer A. In this case, the contractor/policyholder B transferred the right of claim arising from the voluntary liability insurance contract (against the insurer A) to the contracting authority C. Thereafter, the contracting authority C was able to file a claim for damages against insurer A in court. Had such an assignment of claim not taken place, the requirement of the contracting authority C relating to the liability insurance contract in the simple procurement procedure would have been devoid of economic substance, as the injured party would not have been able to realise its claim against the insurer (absence of the right of direct claim) while the policyholder B did not have sufficient financial resources to litigate the case with the insurer A in court. A similar dispute concerning the insurance obligation arising from the construction contract awarded under a public procurement and the loss caused by the contractor, as well as the subsequent assignment of the right of claim arising from the insurance contract by the contractor/policyholder to the contracting authority, was litigated in Harju County Court (HMK) decision No. 2-09-42553. Available in Estonian: https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=109223818 [viewed 02.11.2023.].

of the construction), as it reduces the risks that the policyholder's claim will not be assigned after the occurrence of the insured event, and the injured party will essentially have no "access" to the insurance contract concluded in a public procurement. On the other hand, such assignment of claims creates ambiguity for the insurer in insurance legal relations, and in the opinion of the authors, mass assignment of claims could lead to insurers starting to restrict the assignment of claims in their insurance contracts.

3. Pros and cons of a direct claim in voluntary insurance

On the one hand, it could be said that the conclusion of a voluntary liability insurance contract is a matter between the policyholder and the insurer, but in legal practice the need for an injured party's right of direct claim is also becoming increasingly apparent in the case of voluntary liability insurance. In particular, the parties to the basic contract who contract a service from the policyholder need protection. On the other hand, in the case of voluntary liability insurance, the granting of a direct claim to the injured party changes the purpose of the voluntary liability insurance contract: the protection of the injured party (and not the protection of the policyholder, as is the primary purpose of voluntary liability insurance) becomes paramount.

Understandably, from the perspective of the insurer, it would be possible to make a counter-argument to the direct claim that such an approach could render the respective insurance services more expensive (for example, due to the fact that the insurer has to take into account the risk that while it is released from the performance obligation in an internal relationship, in an external relationship, after having indemnified for the loss, it has to take recourse against the policyholder).

However, without a direct right of claim, such protection is incomplete, because the person requesting such voluntary liability insurance is not guaranteed with a direct right of claim against the insurer providing liability insurance. Neither the possibility of agreeing on the application of obligatory liability insurance provisions, nor the possibility of contracting for the benefit of a third party is an ideal solution. More so because, in principle, the parties may subsequently amend the contract without the consent of the third party. For the same reason, the possibility for the policyholder to assign its claim is not a complete solution either.

The authors find that a situation, where the public contract provides for the existence of a liability insurance contract, is primarily in the interests of a third party (the contracting authority), which leads to the conclusion that the contract is intended for the benefit of the third party. In this context, in the same way as in the case of the obligatory liability insurance, the voluntary liability insurance contract should therefore be treated in Estonia as a contract for the protection of a third party, and thus ensure the direct right of claim also under a voluntary liability insurance contract.

Based on the above, the authors find it reasonable to consider amending the LOA in such way that the right of direct claim (*actio directa*) would also be ensured in Estonia in the case of voluntary liability insurance. It is debatable whether this should be an imperative or dispositive principle. In the case of a dispositive provision, insurers might not have an incentive to provide such protection in voluntary liability insurance. It could be therefore assumed that the interests of the aggrieved parties would be better protected by an imperative provision. The said approach would, on the one hand, satisfy the purpose of protecting the aggrieved parties, and on the other hand, not harm the person causing the damage.

Moreover, granting the right of direct claim in voluntary liability insurance as well, is procedurally reasonable and economical[26]. In this case, the aggrieved party would not have to seek compensation from the policyholder, nor would the parties have to re-draft the voluntary liability insurance contract to include a direct claim or later assign the claim.

Conclusions

1. In light of the foregoing analysis, a question could be asked whether a legislative amendment, by which the voluntary liability insurance in Estonia as set forth in LOA is made subject to regulation similar to that applied to obligatory liability insurance, would be in the best interest of the policyholders, and in particular – the aggrieved parties? As the authors have noted above, such legal practice exists in some European countries.
2. It could be pointed out that in Estonian business practice it is customary in cases of public procurements, construction contracts, lease contracts, etc. that contracting authorities or entities /lessors often require the contracting partner to take out voluntary liability insurance. However, in a situation where the regulation of voluntary liability insurance in the LOA does not give the injured party the right of direct claim and does not oblige the insurer to indemnify for loss in an external relationship, where it is released from the performance obligation in the internal relationship, such voluntary liability insurance contract does not serve the purpose of protecting the aggrieved party.

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[26] It has been pointed out in legal literature that "Notwithstanding that the liability is that of the insured, if the insurer is the ultimate payor, it appears to be procedurally sensible, efficient, secure and cost effective to facilitate the recovery of compensation directly from the insurer. The alternative is cumbersome. It involves the third party suing the insured to establish liability, and thereafter the insured claiming an indemnity against the insurer under the policy, with the insurance monies or their equivalent value thereafter passing through the insured to the third party claimant". Rhidian T. Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions. In: Basu A. et al. Regulation of Risk. Transport, Trade and Environment in Perspective, 2023, p. 685.

3. Therefore, today the requirement for such a voluntary liability insurance contract (in public contracts or in contracts in general), without the right of direct claim and the performance obligation in external relationships (in the event that a party is also released from the performance obligation in the internal relationship), essentially constitutes a quasi-solution in terms of construction contracts, lease contracts, etc., where the customer (the potentially aggrieved party) is deceived into believing that the voluntary liability insurance contract that the customer has required its contracting party to have, provides it adequate protection. In essence, it could also be argued that the matter of granting the direct right of claim in voluntary liability insurance lies in whether the issue of liability and insurance should be considered together or separately.
4. Over the past 70 years, the boundaries between tort law and insurance law have become blurred, and the two have increasingly intertwined over time. The question of whether this might be the time to extend the direct claim rights at the legislative level to voluntary liability insurance, is a matter of legal policy, but is driven by real business practice.

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THE NON-SOCIAL PURPOSE OF PRIVATE LAW: A REPLY TO OTTO VON GIERKE

Key words: Gierke, legal history, private law theory, social law, system of law

Summary
The reasons presented by Otto von Gierke in his famous speech "The Social Purpose of Private Law" for a hybridisation of private law towards a social private law are not convincing anymore. Private law is not intrinsically social. Rather, the protection of the weaker party, for example through redistribution, is attributed to public law. Therefore, the present social private law must be broken down into its two original components: free and market-oriented private law and public social law. Only if both spheres of law are principally, conceptually and systematically separated from each other, they are capable of playing out their full capacity.

1. An often quoted but little read speech

In his famous speech on "The Social Purpose of Private Law" in Vienna in 1889, the German scholar Otto von Gierke called for a "drop of socialist oil" in private law when he criticised the first draft of the German Civil Code.[1] This drop has turned into a broad stream of norms that purport to protect the weaker contractual party against the stronger one. The whole of private law is permeated by norms which the legislature has codified to shield the weaker party in a contractual

[1] Gierke O. Die soziale Aufgabe des Privatrechts [The social task of private law]. Berlin/Heidelberg: Springer, 1889, p. 13; in detail: Repgen T. Die soziale Aufgabe des Privatrechts: Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts [The social task of private law: A fundamental question in science and codification at the end of the 19th century]. Tuebingen: Mohr Siebeck, 2001, pp. 25–49; Schaefer F. L. Juristische Germanistik: Eine Geschichte der Wissenschaft vom einheimischen Privatrecht [Legal German Studies: A History of Domestic Private Law]. Frankfurt am Main: Vittorio Klostermann, 2008, pp. 600–602.

relationship. These norms aim to create a social private law in accordance with the principle of the welfare state. This social private law is characterised by the fact that it merges public law and private law principles and thus cannot be called a liberal, free private law, a "pure" private law, but only a hybrid law. Since the turn of the millennium, numerous crises have been shaking social private law at ever closer intervals, from the dotcom crisis in 2000 to the collapse of numerous supply chains during the Corona pandemic in 2020/21 and the following Russian-European war since 2022. The public-law welfare state with its ever greater demands for redistribution and politically motivated regulation instead of market-optimising self-organisation is putting additional pressure on social private law. These two millstones, the pro-active welfare state and the deteriorating economic conditions threaten to tear social private law apart. The call for the state as the saviour of the private business sector is the last step before the state planned economy known from the former Soviet sphere of power.

Gierke certainly could not have foreseen all this. Nevertheless, his metaphor of socialist oil still serves as a legitimisation for deep interventions in private law. Hardly anyone has really read Gierke's speech from the beginning to the end, but everyone invokes Gierke for their desire for more social law instead of "pure" private law. In view of this wide-spread superficiality, the validity or falsity of Gierke's arguments cannot be used to conclusively judge social private law, but the outcome of this analysis indicates, to some extent, the following considerations on the present state of social private law. A profound critique of Gierke and his successors must use multidimensionally legal theory, legal history and law and economics. In a first step, the author will divide Gierke's arguments into two groups: firstly, into arguments that have proven to be wrong in the course of the last 135 years, and secondly, into arguments that are in principle correct, but formulated in a misleading way and need to be clarified. In a second step, the author will investigate, on the basis of Gierke's valid arguments and current state, whether social private law is capable of reform or whether the classic division into non-social private law and social public law is preferable in order to meet the demands of the present and the future.

2. History – back to the Middle Ages?

Gierke grounds his demand for a social private law in German legal history. He wants to strengthen domestic German law in the field of private law (hereafter referred to as domestic law), which he claims that jurists have wrongly replaced with common Roman law.[2] Here, he follows the tradition of German legal studies (German: *Germanistik*) and the historical school of law of the early 19th century.

[2] Gierke O. 1889, pp. 6–8.

Gierke argues, as follows: First, domestic law was the special property of the German people. Second, domestic law and Roman law were fundamentally different; domestic law was characterised by the common good, Roman law by boundless individualism. However, the historical literature of the earlier 19th century had already exposed such views as ahistorical and motivated purely by legal politics.[3] They no longer fitted the late 19th century. When Gierke gave his speech in 1889, the legal practice of the Industrial Age had long since ceased to ask about the origin of a legal norm, but about its usefulness. Legal history therefore does not provide a suitable argument for social private law, apart from the problem of drawing any conclusions at all from the past to the present.

Gierke deduces from his domestic law that the law of obligations and property law must be merged to socialise private law.[4] In terms of content, he refers to the domestic legal institution of the so-called *Gewere*. This hybrid legal institution united legal ownership and factual possession.[5] Leaving aside the fact that this legal institution, as such, is an invention of the 19th century, it is already unsuitable for Gierke's argumentation on general grounds. For the *Gewere* is about the relationship between right (property) and fact (possession), not about the law of obligations and property law.

If Gierke cannot rely on legal history for the fusion of said legal areas we should further ask how his thesis relates to private law theory as another benchmark. The contract is the central part of the law of obligations, allowing a person to shape his or her life in interaction with other persons and to exercise his or her private autonomy. The contractual parties are free to configure their relationship within the limits of their autonomy because they only define rights and obligations for themselves. In contrast, they cannot agree on obligations to the legal detriment of third parties. The situation is different in property law. Proprietary rights are also protected against infringements by third parties. The scope of protection under property law is not relative but absolute. Absolute protection is not based on a contract, but on the legal recognition of certain positions as particularly worthy of protection. This boundary between the two areas cannot be torn down without levelling the scope of protection of rights under the law of obligations and property law in one direction or the other. On the one hand, the absolute protection of contractual claims would severely compromise economic competition. On the other hand, the only relative protection of property rights would severely impair confidence in the durability of investments in economic goods. In both cases, the uniform protection of rights would lead to an economically suboptimal outcome compared to a differentiating solution. For good reasons, therefore, natural

[3] Overview with further references: Schaefer F. L. 2008, pp. 605–613, 617–627.

[4] Gierke O. 1889, pp. 26 sq.

[5] For all details: Schaefer F. L. 2008, pp. 494–496, 560–563.

law and pandectics (scholars of the so-called *Pandektenwissenschaft*) already opted for the differentiation of rights and of the according legal system.[6]

Gierke draws further conclusions from legal history that cannot withstand critical examination. He demands that the labour relation between the household staff and their manorial lord should be a part of family law.[7] Apparently, he had in mind the household community (German: *Hausgemeinschaft*) of the Germanic or Middle Ages, which, in addition to the head of the household, the wife and children, also included the household staff. It is obvious that this demand no longer fits the social reality of the 21st century. Feudal and patriarchal domination shaped this environment, the very opposite of social security for a weaker party.

Apart from that, Gierke obscures the boundaries between family law and the law of obligations (here: labour law as a sub-area of the law of obligations). The two areas of law are based on completely different principles: Family law is characterised by the solidarity of family members due to kinship, while the labour contract is an exchange relationship of service for remuneration or further benefits such as accommodation. Solidarity under family law is only mutual over a lifetime; it can initially be one-sided, as in the relationship between parents and child. In contractual exchange relationships, the principle applies that there is no counter-performance without performance.

To detach ourselves from history and inquire into the social content of labour law, two fundamental questions arise: First, whether the protection in labour law for employees is originally social at all, and second, whether the state as legislator is the appropriate actor to intervene in labour contracts using social private law. Indisputably, an individual worker is at a severe disadvantage *vis-à-vis* the employer. He has neither the knowledge nor the leverage to negotiate a contract on an equal footing with the employer. For this reason, workers have joined together in trade unions since the 19th century. They enforce the rights of their members through strikes and other actions. Trade unions pool the bargaining power of their members and multiply their private autonomy in negotiating the conditions of employment contracts. One can call this pooling of individual interests a social act, but it is not necessary. From the point of view of private autonomy, trade union members transform their single private autonomy into group autonomy in order to negotiate contracts that are advantageous to them. The social protection of trade union members is the consequence of the exercise of this autonomy, not its legal core.

This leads to the second question. Trade unions are able to regulate employment relationships with employers comprehensively, starting from salary as the price of labour, to safety at work and to protection against unfair contractual termination of employment. There is no need for an individual labour law made by the state. The state should not become a subsidiary contracting partner in place of

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6 See Schaefer F. L. 2008, pp. 400–402.

7 Gierke O. 1889, pp. 32, 40.

the unions because this discourages potential members from joining a union and because it undermines the unions' position *vis-à-vis* employers.

The statutory minimum wage is the most striking example of what happens when the legislator acts instead of trade unions in individual labour law. When the legislator raises the minimum wage for political reasons to improve electoral chances, for example to deal with high monetary inflation, he invokes two economic risks: first, even higher inflation because of higher labour costs, and second, a loss of competition if the wage increase is higher than productivity growth. Similarly, the specific risks for trade unions and employees should not be underestimated. The higher the minimum wage, the less trade unions and employers are able to differentiate wages according to the specific occupation. If the minimum wage is raised sharply over a very long period of time, there is a danger of a uniform wage for large sections of the workforce. With such standard wage, it is no longer reasonable for employees to undergo further training and to pursue higher-value work.

3. Theory – social law through conceptual confusion?

Let us now leave Gierke's ground of legal history and turn to his theoretical arguments. His thesis "no right without duty"[8] is equally inaccurate. With this thesis, Gierke does not repeat the truism that the right of one person corresponds with the duty of another. A right without the duty of one or more persons to respect that right would indeed be meaningless. Rather, Gierke means something else. He merges right and duty and wants to limit the right of one person by a corresponding duty in the *same* person. Private rights are therefore, according to Gierke, always immanently limited. Therefore, if we follow him, there is no absolute ownership; the owner is not allowed to do with his or her property as he pleases. Rather, his concept of ownership is intrinsically and socially bound, so that he must show consideration for the collective. According to Gierke's conception, this collective does not necessarily consist of the sum of other individuals and their rights. Rather, he has in mind constraining individual rights by the common good and other supra-individual values, all of which derive from the world of public law. In this way, he hybridises ownership into a right with private and public-law elements. Gierke's approach enables the conceptual formulation of limited ownership and thus a silent expropriation even without a formal legislative or administrative act. Gierke not only strips away ownership, but also the rule of law.

Leaving aside these fundamental concerns, Gierke's allegation that ownership under private law was some kind of selfish right that legalises behaviour to the detriment of other persons is unfounded.[9] The starting point is that society

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[8] Gierke O. 1889, pp. 17 sq.

[9] Gierke O. 1889, p. 18.

should tolerate the unreasonable exercise of ownership. There is no universal standard for determining when someone is behaving reasonably and when they are behaving unreasonably because interests differ from person to person. It is equally questionable to limit ownership by the concept of abuse of rights. For this creates a gateway for public-law norms into the concept of property. Ownership finds its limits solely in the rights of other persons. This barrier is not conceptually immanent to ownership. Rather, it follows from the collision of rights of different persons. Since ownership, like all other private rights, is an outflow of private autonomy, ownership has no priority whatsoever. This feature in itself prevents an owner from causing damage to other persons with his or her property.

Gierke's further support for a strong personality right[10] is certainly welcome, but a close look reveals that this is not social private law. When Gierke calls for the protection of the personality, he is not only referring to socially weaker persons, but in general to the right of personality as an outflow of private autonomy. This mixing of completely different principles continues to have a damaging effect in Germany to this day: As is well known, Gierke was one of the first advocates of the right of personality in the late 19th century. Nevertheless, the German legislature still shies away from codifying the right of personality. In contrast, the Swiss legislature already and universally protected the right of personality in Art. 28 Civil Code of 1911/1912.[11]

Similarly, Gierke's last demand for the incorporation of company law into the Civil Code[12] has nothing to do with a social private law. Here, Gierke merely addresses the fundamental systemic question of the unitary model and the separation model. Gierke obviously had the Swiss Code of Obligations of 1881/83 in mind, which codified commercial law together with the law of obligations. The merger of commercial law, which also includes the law of commercial companies, with the law of obligations is indeed a matter of debate. However, this is not a social question in the meaning of the traditional term. Instead, Gierke uses the attribute "social" because he sees all companies as a kind of social law.

4. Counter-theory – private law as a complement to public law

If one turns away from Gierke and looks at the question of whether private law should be social from today's perspective, one must first differentiate. The social content of a legal provision must be separated from its social effect. In principle, a social effect is immanent in every legal provision. However, it would be an overextension of

[10] Gierke O. 1889, pp. 34 sq.

[11] Details on Gierke and Switzerland: Schaefer F. L. Eugen Huber und das schweizerische ZGB: Vorbild fuer Deutschland [Eugen Huber and the Swiss Civil Code: A role model for Germany]? Zeitschrift des Bernischen Juristenvereins 159 (2023), p. 468 (480).

[12] Gierke O. 1889, pp. 41–44.

the social concept to classify all private law as social law *per se*. The advocates of social private law want something quite different. They want to merge private and public law norms to the detriment of private law. Private law is supposed to be less free and more state-bound.[13]

This approach should be rejected for several reasons. First, there is simply no practical need for such a hybrid law. Unlike in Gierke's age, the modern welfare state encompasses all areas of life and offers far more than subsidiary emergency assistance in challenging situations. It ranges from free attendance of schools and universities to subsidies for cultural institutions and a network of social insurances. Some European states are even discussing the introduction of an unconditional basic income as a money transfer without social need. Under these circumstances, it should be left to the welfare state to promote the material equality of its citizens. Private law, on the other hand, may limit itself to the complementary task of preserving the formal equality of citizens. The task of private law is therefore not substantive contractual justice, for example, through a "fair" price, but formal contractual justice at the time of entering into a contract and by safeguarding the principle of *pacta sunt servanda*.

Housing rents in particular show that this complementary division between private law and the welfare state governed by public law is the right way to go. Due to the housing shortage of the First World War, the German legislator created a complex set of rules to protect tenants. The following decades have seen many ups and downs of regulation and deregulation. Currently, the lawmaker restricts the landlord's freedom especially by limiting his right to terminate the lease (sections 573 sqq. German Civil Code) and setting price limits for new and current rental agreements (sections 555d, 557 sqq. German Civil Code).

State intervention in a system as dynamic and complex as millions of tenancy agreements with a very heterogeneous housing stock tends to misregulate such agreements. The rules protecting tenants are so complex that tenants regularly have to consult a tenants' association or a lawyer in order to exercise their rights adequately. The rules are not only difficult to understand, but also reduce the stock of available housing. In conjunction with high energy prices and with state regulations on thermal insulation, the market for new housing has collapsed.[14] It is simply no longer feasible for investors to build rental houses. Insofar as tenants are fortunate enough to rent

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[13] See for example: Dauner-Lieb B. Verbraucherschutz durch Ausbildung eines Sonderprivatrechts fuer Verbraucher: Systemkonforme Weiterentwicklung oder Schrittmacher der Systemveraenderung [Consumer protection through the development of a special private law for consumers: System-compliant further development or pacemaker of system change]? Berlin: Duncker & Humblot, 1983, pp. 108–150; Reichold H. Betriebsverfassung als Sozialprivatrecht: Historisch-dogmatische Grundlagen von 1848 bis zur Gegenwart [Working constitution as private social law: Historical-dogmatic foundations from 1848 to the present]. Munich: Beck, 1995, pp. 399–550.

[14] Hoefer C. & Ruehrmair C. Hohe Zinsen, Kosten und Auflagen: Dem Wohnungsbau droht der Kollaps – mit Folgen fuer alle, die eine Wohnung suchen [High interest rates, costs and requirements: Housing construction is threatened with collapse – with consequences for everyone who is looking for an apartment]. Business Insider, 13.09.2023. Available: https://www.businessinsider.de/ [viewed 20.11.2023.].

a home, they are also affected by the negative effects of this over-regulation. When the rent is no longer covering the expenses, some landlords might only carry out the most necessary repairs in the hope that tenants will move out again as quickly as possible due to the poor condition of their living space. Other landlords might try to circumvent tenant protection, for example by renting out a furnished flat to which some tenant protection regulations do not apply. In all cases, there is a long-term prospect that rental housing will be converted into ownership housing. Actually, at first glance, this is a desirable outcome from an economic point of view. However, in view of the current high interest rates for real estate loans, the majority of the population simply cannot afford such an expensive investment. In other words, social private law here worsens the social situation of the population instead of reducing the cost of living and easing the housing shortage.

Public-law measures, such as state subsidies for housing rents (or better: for home ownership), and public housing associations that build and rent out social housing, are preferable. The tenancy agreements should remain private contracts in the latter case. This enables a need-based adjustment of tenancy agreements, which can react much faster to the dynamics of the housing market than slow statutory regulation. Moreover, public housing competes with private investors, which in turn stimulates competition to the benefit of tenants.

Furthermore, social private law is incompatible with the foundations of private law theory because it is a hybrid matter. Legal rules concretise vague legal principles. The principles belonging to private law limit private law immanently, whereas those belonging to public law have a transcendent effect. The difference is enormous: transcendent limitations must be interpreted narrowly because they form an exception to the rule, whereas immanent ones do not. In a lawsuit, the defendant against a claim bears the burden of proof for transcendent limitations, the plaintiff for immanent ones (provided that a statute does not regulate this differently in individual cases). If private law and public law principles are mixed in social private law, it remains an open question which normative elements are to be interpreted narrowly or broadly and how the burden of proof relates. Since social private law precisely wants to mix private law and public law, it must also abandon the substantive difference between the two areas of law. Any continuation of a differentiation would be inconsistent with the premises of hybrid law.

After all, what remains as a sustainable solution is a private law that can do without social elements.[15] The individual person is the core of private law; the sum of

[15] In full detail: Schaefer F. L. Privatrechtstheorie des Libertarismus [Private law theory of libertarianism]. In: Rechtshistorische und andere Rundgaenge: Festschrift fuer Detlev Fischer [Legal history and other detours: Festschrift for Detlev Fischer]. Karlsruhe: Gesellschaft fuer Kulturhistorische Dokumentation, 2018, pp. 427–441.

the individuals constitutes the private-law society.[16] Private companies like joint-stock companies do not have a life of their own. They only exist because individuals want them to. The purpose of private autonomy – as the supreme principle of private law and equivalent of public-law human dignity – is not the unconditional responsibility for other individuals, but the self-responsibility of individuals. On the theoretical level, a person is responsible for every action attributable to him or her. Responsibility for others follows from self-responsibility alone. It is not socially third party-related, but non-socially related to the individual. In a specific legal environment, a person is only responsible for another person on the basis of a specific cause, that is contract, customary or statutory law, for example, on the basis of a tort.

In contrast, the common good, taxation, redistribution and regulation of private business are matters of public law. The attribute "social" is only appropriate for such a public law, which is focussed on the community. In view of this clear division of the legal system, the principle of the welfare state and the fundamental rights of a constitution do not command the legislator to create a social private law. Similarly, the primacy of the constitution does not dictate an interpretation of private law in the sense of social private law.

5. Sidestep – consumer protection as social private law?

In conclusion, one could come up with the idea of interpreting every consumer-protective norm as a social norm and therefore claim that consumer protection is proof of the need for social private law. However, such an equation would misjudge the meaning and purpose of consumer protection. It is only true that social protection and consumer law can coincide, but they do not have to. A consumer is not merely a person without sufficient bargaining power, financial resources and legal knowledge, but any person who is not an entrepreneur. Consumer protection therefore abstracts from the need for protection. A social private law, on the other hand, should consequently only protect socially vulnerable persons.

Correctly understood, consumer protection aims at something different in terms of content than social protection. Provisions for consumer protection seek to distribute information, not wealth, equitably. They do not change the material resources of consumers and typically do not regulate prices. In all cases, consumer protection law defines itself as a continuation of the law of persons and contract law, which already protects minors and other groups of persons whose private autonomy is endangered. By providing consumers with better information, consumer protection aims to strengthen their negotiating power and thus their freedom of contract as a facet

[16] Schaefer F. L. Die Privatrechtsgesellschaft des Libertarismus [The private law society of libertarianism]. In: Prozess als Wirklichkeit des Rechts: Festschrift fuer Stefan Smid zum 65. Geburtstag [Process as a reality of law: Festschrift for Stefan Smid on his 65th birthday]. Munich: Beck, 2022, pp. 755–766.

of private autonomy. The right to withdraw from a contract also serves the consumer's private autonomy. Consumers should be free to decide whether they want to stick to the contract they have concluded or not.

6. Examples – the merits of non-social private law

The thesis that private law does not have to be socialised in order to protect private autonomy, but on the contrary produces fairer and more efficient results than social private law, will be demonstrated using three selected areas of German law.

Let us start with tenancy law on housing. Gierke is famous for his call to reverse the rule in tenancy law that "purchase trumps rent" to "rent trumps purchase".[17] His paradigm shift followed from his basic strategy to merge the law of obligations (here: tenancy agreement) and property law (here: landlord's ownership). He wanted to ensure that tenancy agreements for housing endure when the owner changes. Gierke impressed the second commission on the German Civil Code so much that it adopted his demand into the final civil code (section 571 German Civil Code original version, section 566 German Civil Code reformed version). This rule orders the transfer of the tenancy agreement from the old landlord/owner to the new owner.

Gierke's proposal for statutory tenant protection is not only superfluous, it also harms tenants because they have no choices between different solutions with different risks and gains. Without a statutory provision, the new owner might sue the tenant out of his home because the tenant has no contract with the new owner and is in unlawful possession of the property. The tenant is limited to claiming damages from the landlord and former owner. Therefore, it is up to the parties of the original tenancy agreement to deal with this case. The parties are faced with the following choice: First, they could agree a discount on the rent for the risk of an action for eviction. This would be advantageous for the tenant in a housing market with sufficient housing, because the tenant pays a lower rent without running the risk of not being able to find a new home when the property changes hands. For the landlord, the value of his property would increase because a buyer would not be burdened by the existing tenancy. Second, the parties could agree a right of first refusal (pre-emption, German: *Vorkaufsrecht*) for the tenant in respect of the property and record this in the land registry (right of first refusal *in rem*). This solution would benefit the tenant; he could upgrade his rental possession to ownership. The tenant could finance the purchase price with a mortgage on his new property, provided, he has a certain amount of fiscal space. Third, the parties could agree that the landlord must negotiate a right of possession in favour of the tenant in a purchase agreement with the buyer. Unlike the right of first refusal *in rem*, this agreement would not have a direct effect on the buyer. However, the tenant could secure this right with a guarantee from a third party.

[17] Gierke O. 1889, pp. 26 sq.; in detail: Schaefer F. L. 2008, pp. 559 sq.

The second example is related to the first. According to the almost general doctrine in present day German private law, possession should enjoy protection in tort under certain conditions.[18] If one follows this view, at least rightful possession, for example possession under a tenancy agreement, is a protected right within the meaning of section 823(1) German Civil Code. This means that the tenant's protection extends beyond the tenancy agreement to infringements of his tenancy by third parties. The German Federal Constitutional Court confirms this broad interpretation of tort law; the court recognises the rightful possession of a dwelling as a property right protected by Art. 14 German Constitutional Law.[19] The purpose of this is to improve the protection of tenants under private law. Here, too, the law of obligations and property law are merged.

The protection of the tenant in tort must be rejected for every reason.[20] The inclusion of authorised possession under tort law combines possession with the tenancy agreement. However, possession on its own, as actual control of an object, is only a fact and not a juridical right worthy of protection. The tenancy agreement is no different. Although the tenant's claim to possession of the rented property is a right, it is only of a relative nature and is only effective against the landlord. According to the prevailing doctrine such a claim is not worthy of protection because, unlike life, health and property, it is not universal and therefore has no effect *vis-à-vis* third parties outside the rental agreement. If neither possession itself nor the right to possession are covered by tort law, this must apply *a fortiori* to the addition of the two positions. Logically, the addition of two negative values does not result in a positive value.

Constitutional law does not dictate otherwise. Even if one recognises in principle the dubious interpretation of the Federal Constitutional Court, this does not result in tortious protection for the tenant. In relation to the landlord, the tenant is not dependent on such protection. He can sue against the landlord for breach of contract under the tenancy agreement. There is also no need for protection against third parties. For the tenant, as the possessor of the rented property, has already extensive rights arising from the specific protection of possession in property law (sections 858 ff. German Civil Code) to self-help, restitution of the rented property and injunctive relief. That the legislator has not codified a claim for damages here is compliant with Article 14 German Constitution since the legislature has a degree of discretion when implementing constitutional law.

The third example stems from private insurance law. As is well known, German health insurance law is divided into statutory (social) and private health insurance. Section 193(6) of the private Insurance Contract Act (German:

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[18] German Federal Court of Justice (BGH) Neue Juristische Wochenschrift, Rechtsprechungs-Report Zivilrecht (NJW-RR) 37, 2022, p. 1386 margin 7.

[19] German Federal Constitutional Court (BVerfG) Neue Juristische Wochenschrift (NJW) 46, 1993, p. 2035.

[20] Schaefer F. L. Schuldrecht Besonderer Teil [Law of Obligations, Special Part]. Baden-Baden: Nomos, 2021, § 35 margin 46.

Versicherungsvertragsgesetz) orders that an insured person who does not pay premiums can still claim basic cover from the insurer in case of illness or accident. It is all too obvious that this regulation eliminates the justice of exchange in the contractual relationship because the insured person is entitled to a benefit without any counter-performance of his or her own. This *prima facie* creates the illusion that the legislator is aiming the social protection of a person in need at the expense of the insurer.

However, this is not the case for several reasons.[21] The legislator itself differentiates between persons in need of social assistance and persons not in need of social assistance. Anyone who needs social assistance has a social claim against the agency for social services for payment of the premiums. Section 193(6) Insurance Contract Act therefore only concerns persons who are not in need of social assistance, in other words those insured persons who could pay but do not want to. The legislator is not implementing social protection here, but debtor protection at the expense of the insurer and thus at the expense of the entire group of insured persons. The solution of non-social private law in complementary association with public social law would choose a different path: Those in need of social assistance would still be allowed to claim social assistance for the premium. Those not in need of social assistance do not deserve any insurance cover because they are responsible for not paying the premium themselves. This solution alone preserves the fairness of exchange in contract law, and it takes into account the self-responsibility of individuals.

Conclusions – the struggle against illiberalism

To sum up, the historical and theoretical reasons presented by Gierke for a social private law are not convincing. This is by no means a triumph over Gierke. Like many other jurists in the age of nationalism, Gierke believed in the power of German legal history. He wanted to reform the legal regime of his time and, in doing so, strengthen the rights of the economically weaker party to the contract. Since the impoverishment of the working class was the political, social and economic problem par excellence of his time, Gierke classified far too many problems and their solutions under the keyword "social", for example the whole realm of company law. From today's perspective, the part of Gierke's theses worthy of approval should be classified as personality right and equal bargaining power in contractual relationships. These concepts are far away from a social private law as it is understood today.

Therefore, the hybrid social private law should be broken down into its two original components: free and market-oriented private law and public social law.

[21] In Detail: Schaefer F. L. Notlage und Aequivalenz in der PKV [Emergency situation and equivalence in private health insurance]. Medizinrecht, 33, 2015, pp. 793–799.

Private law is not intrinsically social. Rather, the protection of the weaker party, for example through redistribution, is attributed to public law. Only if both spheres of law are principally, conceptually and systematically separated from each other, they are capable of playing out their full capacity. The paper therefore argues for the dismantling of so-called social elements in private law and for their transfer to public law. This demand may sound revolutionary. Nevertheless, it is no more revolutionary than Gierke's reverse plea for less liberty in private law. A non-social private law, purified of public law elements, could react extremely quickly to new challenges. For the supreme source of private norms is the contract, which the parties can flexibly adapt to changing environmental conditions at any time. In contrast, the hybrid social private law is no longer able to adapt quickly enough to the dynamic challenges of 21st century society and economy. Free private law strengthens the welfare state of public law through higher economic growth, new jobs and higher tax revenue. This, in turn, strengthens democracy and builds resilience against external threats. If Germany and the European Union want to survive in an environment hostile to democratic and liberal values, we should not put chains on freedom, but unleash it.

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ELDERLY PEOPLE IN SOCIETY – WHOSE DUTY IS IT TO CARE FOR THEM?

Keywords: elderly people, care facilities, right to state aid, duty of care

Summary
This article addresses the obligation to care for the elderly and the constitutionally guaranteed right to state assistance in case of old age and disability. According to the Constitution of Republic of Estonia, the duty to take care of family members in need rests with the family. At the same time, everyone has the right to state assistance in case of old age, which also includes the right to social welfare services. Although the Estonian Constitution provides for the right to state assistance, this assistance must be provided by legislation passed by the parliament. A care reform has been carried out in Estonia, and one of its goals is to reduce the burden on people in financing care facility places and to simplify the possibilities to family members in caring for persons in need. Although the state aspired to offer more support to people in the financing of care facility places, it sis not succeed because of the increasingly expensive prices of care facility places.

Introduction

The population in Europe as a whole is aging. This means that the proportion of older people is greater than that of younger people. As the proportion of the elderly increases, there is a growing need for corresponding care. If an elderly person can no longer manage on their own, the solution would be to place them in a care facility. The main question here is who has to guarantee the duty of care – is it the state or the family, who may rely on the assistance from the state, but it is not guaranteed.

Principle 18 of the European Pillar of Social Rights stresses that everyone has the right to affordable long-term care services of good quality, in particular homecare and community based services. The European Pillar of Social Rights action commits the EU-27 to further work on this.

Population ageing is expected to lead to a sharp increase in demand for long-term care. The number of people potentially in need of long-term care in the EU-27 is, therefore, projected to rise from 30.8 million in 2019 to 33.7 million in 2030 and 38.1 million in 2050.[1]

Long-term care has a pronounced gender dimension. Almost 90% of workers in the sector are female, and so are most informal carers. In addition, 33% of all women aged 65 or over need long-term care compared with only 19% of older men. Older women have lower incomes, including pensions, and thus are potentially less able to afford care. Adequate and affordable formal long-term care services, together with policies to improve working conditions in the sector and reconcile paid employment and caring responsibilities, could thus help support gender equality.

Ensuring adequate social protection for long-term care contributes to social fairness. Older people with lower levels of income are more likely to have long-term care needs, whereas they are potentially less able to afford it. Adequate social protection thus plays an important role in ensuring that long-term care needs can be met.

Informal carers, mostly women, carry out the bulk of care-giving in many Member States. The use of solely informal care varies from around 30% to around 85% across Member States. However, while informal care is sometimes a matter of preference, it may often be the only option due to a lack of accessible and affordable formal care. The availability of informal care is likely to decrease due to increased participation by women in the labour market, extended working lives, greater geographic mobility, and other demographic trends.[2]

It is also important to bear in mind that long-term care expenditure is projected to be one of the fastest rising social expenditure items, thus requiring sustainable financing mechanisms. The level of expenditure on long-term care is highly differentiated across the EU-27. In Member States with higher expenditure on long-term care relative to GDP, social protection coverage for long-term care is also higher, whereas a lower-than-average share of the residents of Member States with low current public expenditure use formal long-term homecare services.

Increasing the efficiency of long-term care expenditure can contribute to addressing the financing challenge. A key role in delivering high-quality care at lower cost can be played by the effective deployment of new technologies, investment in active and healthy ageing policies, as well as health promotion and disease prevention.

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1 European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Long-term care report – Trends, challenges and opportunities in an ageing society. Volume II, Country profiles, Publications Office, 2021. Available: https://data.europa.eu/doi/10.2767/183997 [viewed 03.12.2023.], pp. 12–14.

2 Ibid.

Despite differences, Member States generally face four common challenges in relation to long-term care:

1. providing affordable and adequate access to long-term care services for all in need;
2. providing long-term care services of good quality;
3. ensuring an adequate long-term care workforce with good working conditions, and of supporting informal carers; and
4. financing long-term care in times of rising demand for care.

The number of people in society who need assistance and long-term care in Estonia is also constantly growing. According to different scenarios, by 2050, the share of people over 65 in the Estonian population will increase to a third of the population. Already, a large number of people with severe disabilities live in Estonia. As the population is ageing, the proportion of these people increases.

According to statistics from 2020, the number of people who required additional services in the population was between 56 000 and 75 900 people. The older the age group, the greater the need for assistance and services. The need for state guaranteed assistance and services is growing rapidly for people aged 80 and older, more than a half of whom use assistance and 22% consider themselves as requiring additional services. About 18 000 people in Estonia estimated that they might need a permanent 24-hour general care service in the next 12 months.

Regardless of the need for care, a person's primary choice is to live in a familiar and safe environment – at home. However, for some people, 24-hour general care service, i.e. a care facility, is an unavoidable need. The availability of high-quality help that meets a person's real needs is very important.

Long-term care can be defined differently. Long-term care (LTC), also defined as long-term care services, and support (LTCSS), refers to the "help needed to cope, and sometimes to survive, when physical and cognitive disabilities impair the ability to perform activities of daily living (ADL), such as eating, bathing, dressing, using toilet and walking"[3]. That is, it refers to services and supports provided to people with a reduced degree of functional capacity who need support in a residential setting or at home with their activities of daily living.[4]

WHO and OECD (2021) define them as "a range of services and assistance for people who, as a result of mental and/or physical frailty and/or disability over an extended period of time, depend on help with daily living activities and/or are in need of some permanent nursing care". They involve a range of services including medical and nursing care, personal care services, assistance services and social

[3] Grabowski D. Encyclopedia of Health Economics – Long-Term Care, Volume II. Encyclopedia of Health Economics, Amsterdam, 2014, pp. 329–331.

[4] Global Report on Long-Term Care Financing. London School of Economics and Political Science, 2022. Available: https://www.lse.ac.uk/business/consulting/reports/global-report-on-long-term-care-financing, pp. 7–9 [viewed 08.01.2024.].

services that help people live independently or in residential settings when they can no longer carry out routine activities on their own.[5]

This article analyses the duties and responsibilities of the state, individual and local government in providing care services. The aspects of the Estonian care reform are also discussed.

1. Constitutional requirements

A number of rights and obligations connected to the care duties arise from the Constitution of the Republic of Estonia. According to § 27 of the Estonian Constitution, the family is obliged to take care of family members in need. Pursuant to Constitution's § 28, a citizen of the Republic of Estonia has the right to a state assistance in case of old age, disability and poverty. From the interaction of these two provisions, it is possible to conclude that the primary responsibility for taking care of family members rests with the family. The Constitution does not specify to what extent the family must bear responsibility for caring for family members in need.[6] Likewise, it does not define the amount of the assistance nor the conditions for its provision in terms of state assistance. Parliament must pass a law that determines the role of the state and the individual in meeting the need for care.[7]

Although family members are obliged to care for their relatives in need, many care facility services remain unused. The high price of the service is one of the reasons why families try to cope with care themselves. In 2021, the average service cost was 852 euro per month, and according to Statistics Estonia, the average old-age pension in the same year was 551 euro. Since 90% of people living in care facilities are 65 years old and older, it can be concluded that for a large part of the service recipients, their main source of income (old-age pension) does not cover the care facility accommodation fee. Therefore, family members of the service recipient often have to contribute financially as well, which negatively affects their livelihood. The people in need of care depend upon the people of working age who have the primary responsibility to ensure the maintenance of their minor children and grandchildren. By putting them in a situation compelling a choice between providing professional care for their parents at an unaffordable price or remaining as caregivers themselves, working people of various professions are taken out of the labour market.

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[5] Barber S. L., Van Gool K., Wise S., Wood M., Or Z., Penneau A., et al. Pricing long-term care for older persons. World Health Organization and the Organisation for Economic Co-operation and Development, 2021, pp. 1–3.

[6] Madise U. (ed.). Eesti Vabariigi pohiseadus. Kommenteeritud valjaanne [Constitution of Republic of Estonia. Commentary]. Tallinn, Juura, 2020, pp. 413–417.

[7] Ibid.

In addition to the above, a significant consideration must also be given to the local government. In the Social Welfare Act, the responsibility for social welfare services is imposed only upon the local government.

According to § 156 of the Constitution, all issues of local life are decided and organized by local governments, which act independently, pursuant to legislation.

Obligations may be imposed on the local government only on the basis of the law or an agreement with the local government. The costs related to the state obligations assigned to the local government by law are covered from the state budget.[8]

The Constitution does not specify whether welfare services can also be organized by local government. However, according to the aforementioned Social Welfare Act, the local government is responsible for organizing social welfare in its territory.[9]

Taking into account the provisions of the Constitution, three parties involved in the provision of welfare services are the family, the state and the local government.

When fulfilling the state's obligation, it is important to answer the question whether the state must provide the care service itself, or it is possible to delegate it to another agent.[10] While the state itself does not provide this service, the question arises as to what the state is responsible for. According to the Social Welfare Act, the state takes over the responsibility of paying for care facility services. The state does not provide the corresponding service itself, but only guarantees the availability of the service. Ensuring the availability of the service in this way is also in line with the constitutional requirement of the right to the state assistance in case of old age and in need.

In a situation where the state has transferred the provision of welfare services to another legal entity, the state is still not released from the obligation stipulated by the Constitution to provide assistance in case of need and old age. The individual still has a claim against the state. In order to receive assistance from the state, the law must provide for the conditions for the provision of this assistance.

The Supreme Court of Estonia has analysed what assistance in old age means.[11] In a court decision assessing the constitutionality of changes to the pension system, the court decreed that it was necessary to ensure decent assistance in old age. Decent assistance means that a person's income in case of an old-age pension does not decrease significantly compared to his working income. A similar

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[8] The Constitution of the Republic of Estonia. Available: https://www.riigiteataja.ee/en/eli/530122020003/consolide [viewed 03.12.2023.].

[9] Social Welfare Act. Available: https://www.riigiteataja.ee/en/eli/531072023003/consolide [viewed 03.12.2023.].

[10] Viirsalu M-L. Die Verantwortungsstruktur bei der Privatisierung der Rehabilitationsleistungen im estnischen Sozialrecht, Juridica International, No. 26, 2017, pp. 94–102.

[11] Judgement of the Estonian Supreme Court, of 20 October 2020 in Case No. 5-20-3. Available in Estonian: https://www.riigikohus.ee/et/lahendid/marksonastik?asjaNr=5-20-3/43 [viewed 03.12.2023.].

approach can be used for the care services. Every person has the right to decent living conditions. These conditions include the possibility of obtaining a place in a care facility.

According to the Constitution of Estonia, the state shall promote voluntary and municipal welfare services. Therefore, the task of the state is to provide support to the local governments in the provision of these services.[12]

In order to ensure the obligation stipulated in the Constitution, the Constitution itself has not determined how the corresponding services must be financed. According to the Social Welfare Act, local government must provide thirteen different social services, including welfare (care) services.[13] Although the state has stipulated obligations, the financial means necessary for the fulfilment of these obligations are not unambiguously regulated. According to § 156 of the Constitution, the obligations for local governments prescribed by the state are also guaranteed with financial means, but this has often not been the case. The Estonian Supreme Court in its case law has highlighted that the provision of services at the level of the local government must still be ensured, even if the local government does not have the required financial resources. If there are no financial means, the additional funds will be requested from the state.[14]

Regardless of how the state ensures the provision of care services, whether it provides it directly with the help of various state care facilities or takes over the responsibility of financing, the individual still has the individual right to turn to the state for assistance. If the state has not provided a separate legal regulation for this purpose, it is possible to oblige the state to establish the respective legal framework in order to ensure the realization of the constitutional rights of individuals.

2. Care reform in Estonia

However, in order to ensure appropriate assistance for individuals and to fulfil the requirement arising from the Constitution, in the summer of 2023, Estonia carried out a care reform with the aim to ensure the availability of a place in a care facility and the ability of people to pay for their place in a care facility. The main motivation behind the reform has been political promises, one of the messages – an average old-age pensioner can obtain a place in a care facility. One of the main pillars of the care reform was the increase of co-financing from the state and

[12] The Constitution of the Republic of Estonia. Available: https://www.riigiteataja.ee/en/eli/530122020003/consolide [viewed 03.12.2023.].

[13] Olle V. Valdade ja linnade korraldatavate kohustuslike kohalike sotsiaalteenuste probleeme [Problems of guaranteeing services in rural municipalities and towns]. Juridica, No. 1, 2019, pp. 30–42.

[14] Judgement of the Estonian Supreme Court, Constitutional Review Chamber of 9 December 2018 in Case No. 5-18-7. Available in Estonian: https://www.riigikohus.ee/et/lahendid/marksonastik?asjaNr=5-18-7/8 [viewed 03.12.2023.].

the increase in the share of the local government. Thus, the funds for a place in a care facility come from three sources: the person in need of help, the local government and the state. Based on such a financing scheme, the place in a care facility is guaranteed. At this point, it must be clarified that the state does not have care facilities. All care facilities either belong to the local government or constitute separate legal entities. In order to fulfil the obligation arising from the Constitution to ensure the provision of assistance in case of need and old age, the state can purchase the corresponding service from other legal entities. If a person is able to pay for a place in a care facility only by using their pension, then this would mean that the state has fulfilled its constitutional task.

The care reform that entered into force on 1 July 2023 means that the state will help pay for the care. If until now the person had cover 100% of the care facility accommodation fee, as of 1 July 2023, the accommodation fee is divided between the person requiring the service and the local government.[15]

Care reform does not only mean the funding for a place in care facilities. Municipalities can use the funds provided by the state to organize care facility services, as well as home care. According to the principle that applies in welfare, priority should be given to the kind of help that supports a person in their own home. Institution-based care is only necessary if living at home with assistance is not possible.

The state covers the part of the care costs, which are the costs of the care staff employed by the care facilities. The person's own contribution funds the rest – accommodation and meals in the care facility, as well as other expenses related to personal needs.

The costs and fees of care facilities differ, and the local government may define limits for the payment of care costs. The limits are not an obstacle to finding a place in a care facility, but the available funding may be insufficient to cover the costs of care in all care facilities and additional payment must be considered.

In order to receive the necessary care service, the social worker assesses the need for care and can offer services that support living at home instead of entering a care facility.

One of the important aspects of the care reform is the increase in financial support from the state. State support is distributed among local government units proportionally, based on the number of residents aged 65–84 and those aged 85 years and above. The purpose of such distribution is to give the municipality an opportunity to organize the entire spectrum of social services for the elderly in long-term care – from one need-based service to another, giving preference to the services that support living at home.

When financing the care reform, the local government's own contribution has been taken into account. Municipalities are left with the right to decide how to

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[15] Many municipalities hold care reform unconstitutional. Available: https://www.err.ee/1609154065/mitu-omavalitsust-peab-hooldereformi-puudulikku-rahastust-pohiseadusvastaseks [viewed 03.12.2023.].

carry out the task: they can establish a ceiling for care costs and assess whether a person's need for assistance can be better supported at home or in a care facility.

Although financial support to finance places in care facilities comes from the state, each municipality has the right to set a limit on care costs, which must ensure the availability of services to people in at least some care facilities. The threshold cannot be so low that it is not possible to receive a service with such care costs in any care facility. However, the limit does not have to cover care costs in every care facility. When choosing a care facility, a person must proceed from this and make a choice considering the ability to pay for themselves or their dependents.

People's participation in paying for a place in a care facility is expected to decrease. In the future, the state will cover part of the care costs, which are the care staff costs of the care facility. The person's own contribution funds the rest – accommodation and meals in the care facility and other expenses related to personal needs.

The local government will pay the care cost part of the care facility accommodation fee. Care costs include the labour costs of care workers and auxiliary care workers, as well as the costs of work clothes, health checks and training. The care facility must calculate and disclose these costs per service recipient.

The prerequisite for municipal financing is the assessed need for the service. The local government will establish, for each respective person, whether help can be better provided by guaranteed home services or entering a care facility.

An increase in state aid is certainly important. Different analyses show that the care burden on the Estonian families is heavy.

According to the data of the study completed in 2021, 22% of Estonian residents aged 16 and older, or an estimated 230 000 people, care for or help someone with a long-term health problem or activity limitation, most often an elderly relative who needs help to cope at home. Of these, nearly 30 000 people contribute more than 40 hours in a week.

More than 40 000 people help or care for their household members for more than 20 hours a week. Approximately 25 000 people assist or care for their relatives for forty hours or more, according to a survey of residents' activity restrictions and care needs.

It is estimated that 50 000 people need a service, which is not funded including 20 000 people who would need a home service, which they currently cannot obtain. Welfare statistics show that, while the number of people receiving general care services has been constantly increasing, the number of home service recipients has remained at the same level for years.

In 2020, approximately 70 000 people felt significantly restricted in their daily activities (age group 16 years and above). About 160 000 people of the same age group felt moderate restrictions. About 180 000 people aged 16 and over used the assistance of relatives or acquaintances due to a health problem or activity limitation.

Conclusions

1. An increase in the proportion of elderly people in Estonian society is inevitable.
2. The duty of care of family members, as it is written in the constitution, increases. It is inevitable that the need for help from the state will become even more important.
3. The Estonian welfare reform is a step in the right direction; the current situation shows that it serves the set goals.
4. The number of care facility places has not increased, services have become more expensive. Although local self-governments have been promised more state support, this has not materialized.

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